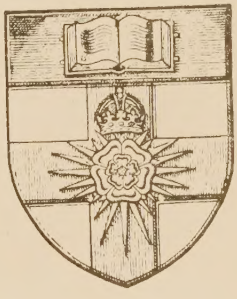
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

Mx North Gallery.



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/all-england-law-reports-reprint_1904-1907

THE

ALL ENGLAND

LAW REPORTS

REPRINT

1904-1907

ENGLAND: BUTTERWORTH & CO. (PUBLISHERS) LTD.
LONDON: 88 KINGSWAY, W.C.2

AFRICA: BUTTERWORTH & CO. (AFRICA) LTD.
DURBAN: 33/35 BEACH GROVE

AUSTRALIA: BUTTERWORTH & CO. (AUSTRALIA) LTD.
SYDNEY: 6/8 O'CONNELL STREET
MELBOURNE: 473 BOURKE STREET
BRISBANE: 240 QUEEN STREET

CANADA: BUTTERWORTH & CO. (CANADA) LTD.
TORONTO: 1367 DANFORTH AVENUE, 6

NEW ZEALAND: BUTTERWORTH & CO. (NEW ZEALAND) LTD.
WELLINGTON: 49/51 BALLANCE STREET
AUCKLAND: 35 HIGH STREET

U.S.A.: BUTTERWORTH INC.
WASHINGTON, D.C.: 7235 WISCONSIN AVENUE, 14

THE ALL ENGLAND LAW REPORTS REPRINT

Being a selection from the
LAW TIMES REPORTS
1843—1935

REVISED AND ANNOTATED

1904-1907

Editor
G. F. L. BRIDGMAN, ESQ.
of the Middle Temple, Barrister-at-Law

LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.
1962

BIBL. LONDIN UNIV.

These Reports are cited thus:

[1904-7] All E.R. Rep.

©
Butterworth & Co. (Publishers) Ltd.
1962

Made and printed in Great Britain by
William Clowes and Sons, Limited, London and Beccles

Assistant Editors

R. D. H. OSBORNE, ESQ.
of Gray's Inn, Barrister-at-Law

ALBERT H. BERMAN, ESQ.
of the Middle Temple, Barrister-at-Law

F. A. AMIES, ESQ.
of Gray's Inn, Barrister-at-Law

HENRY SUMMERFIELD, ESQ.
of Gray's Inn, Barrister-at-Law

MISS WENDY SHOCKETT
of Gray's Inn, Barrister-at-Law

N. D. BANKS, ESQ.
of Lincoln's Inn, Barrister-at-Law

G. A. KIDNER, ESQ.
of the Middle Temple, Barrister-at-Law

MISS M. R. PLUMMER
of Lincoln's Inn, Barrister-at-Law

ANTHONY SCRIVENER, ESQ.
of Gray's Inn, Barrister-at-Law

R. P. GROUND, ESQ.
of the Inner Temple, Barrister-at-Law

MRS. ELIZABETH IWI
of Gray's Inn, Barrister-at-Law

DAVID IWI, ESQ.
of Gray's Inn, Barrister-at-Law

CASES REPORTED IN THIS VOLUME

PAGE

AKROKERRI (ATLANTIC) MINES, LTD. *v.* ECONOMIC BANK (1904) [K.B.D.] 1054
ALDERSEY, *Re*, GIBSON *v.* HALL (1905) [CH.D.] 644
ALLEN (SAMUEL) & SONS, LTD., *Re* (1907) [CH.D.] 785
ALLISON *v.* CLAYHILLS (1907) [CH.D.] .. 500
ANDREWS *v.* MITCHELL (1904) [H.L.] .. 599
ANDREWS *v.* WAITE (1907) [CH.D.] 1023
ASHTON *v.* LANCASHIRE AND YORKSHIRE RAIL. CO. (1904) [K.B.D. DIVL. CT.] .. 901
ASHFORTH, *Re*, SIBLEY *v.* ASHFORTH (1904) [CH.D.] 275
ATTORNEY-GENERAL AND ANOTHER *v.* DORCHESTER CORPORATION (1906) [C.A.] .. 762
ATTORNEY-GENERAL FOR CANADA *v.* CAIN (1906) [P.C.] 582
ATTORNEY-GENERAL FOR CANADA *v.* GILHULA (1906) [P.C.] 582
BANNATYNE *v.* MACIVER AND ANOTHER (1905) [C.A.] 425
BATES, *Re*, HODGSON *v.* BATES (1906) [CH.D.] 450
BEALE AND OTHERS *v.* KYTE (1907) [CH.D.] .. 931
BEARN, THE (1905) [C.A.] 315
BLEW, *Re*, BLEW *v.* GUNNER (1906) [CH.D.] .. 264
BRANDT'S SON & CO. *v.* DUNLOP RUBBER CO. (1905) [H.L.] 345
BRINCKMAN *v.* MATLEY (1904) [C.A.] .. 941
BRINDLEY, *Re*, *Ex parte* TAYLOR, SONS & CO. (1905) [C.A.] 1027
BRITISH EQUITABLE ASSURANCE CO., LTD. *v.* BAILY (1905) [H.L.] 592
BULAWAYO MARKET AND OFFICES CO., LTD. (1907) [CH.D.] 759
BULLOCK *v.* LONDON GENERAL OMNIBUS CO. AND OTHERS (1906) [C.A.] 44
BUTTERKNOWLE COLLIERY CO. *v.* BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY (1906) [H.L.] 977
BUTTON, *Re*, *Ex parte* HAVISIDE (1907) [C.A.] 957
BUTTON, *Re*, *Ex parte* VOSS (1905) [C.A.] .. 418
CABLE *v.* BRYANT (1907) [CH.D.] 937
CASSWELL AND ANOTHER *v.* CHESHIRE LINES COMMITTEE (1907) [K.B.D. DIVL. CT.] .. 812
CHAYTOR, *Re*, CHAYTOR *v.* HORN (1904) [CH.D.] 230
CHEMISCHE FABRIK VORMALS SANDOZ *v.* BADISCHE ANILIN UND SODA FABRIKS (1904) [H.L.] 234
CHESHIRE *v.* BAILEY (1904) [C.A.] 882
CITIZENS' LIFE ASSURANCE CO. *v.* BROWN (1904) [P.C.] 925
CLARE *v.* JOSEPH (1907) [C.A.] 508
CLOUSTON & CO., LTD. *v.* CORRY (1905) [P.C.] 685
CLYDEBANK ENGINEERING AND SHIPBUILDING CO. *v.* CASTANEDA AND OTHERS (1904) [H.L.] 251
COHEN, *Re* (1905) [C.A.] 421
COLEMAN'S DEPOSITORIES, LTD. AND LIFE AND HEALTH ASSURANCE ASSOCIATION, *Re* (1907) [C.A.] 383
COLLS *v.* HOME AND COLONIAL STORES, LTD. (1904) [H.L.] 5
COPSEY *v.* COPSEY AND ERNEY (1904) [DIV.] 106
CRANE, *Re*, ADAMS *v.* CRANE (1907) [CH.D.] .. 577
CREDITON (BISHOP) *v.* EXETER (BISHOP) (1905) [CH.D.) 552
CRIGGLESTONE COAL CO., LTD., *Re* (1906) [C.A.] 894
CROSSLEY BROS., LTD. *v.* LEE (1907) [K.B.D. DIVL. CT.] 1042
DAVIS *v.* PETRIE (1906) [C.A.] 356

PAGE

DAWSON *v.* GREAT NORTHERN AND CITY RAIL. CO. (1904) [C.A.] 913
DE JAGER *v.* ATTORNEY-GENERAL OF NATAL (1907) [P.C.] 1008
DE LA BERE *v.* C. A. PEARSON, LTD. (1907) [C.A.] 755
DENABY AND CADEBY MAIN COLLIERIES, LTD. *v.* YORKSHIRE MINERS' ASSOCIATION (1906) [H.L.] 616
DEVONALD *v.* ROSSER & SONS (1906) [C.A.] .. 988
DOVER COALFIELD EXTENSION LTD., *Re* (1907) [C.A.] 161
EASTERN INVESTMENT CO., LTD., *Re* (1904) [CH.D.] 553
EASTGATE, *Re*, *Ex parte* WARD (1905) [K.B.D.] 890
EDEN *v.* NORTH EASTERN RAIL. CO. (1907) [H.L.] 513
EDMONDSON *v.* BIRCH & CO., LTD. (1907) [C.A.] 996
EDWARDS *v.* HOOD-BARRS (1904) [CH.D.] .. 483
EGMONT'S SETTLED ESTATES, *Re*, LEFROY *v.* EARL OF EGMONT (1906) [CH.D.] 1035
EUROPA, THE (1907) [ADM.] 394
EVANS *v.* EVANS AND BLYTH (1904) [DIV.] .. 110
EVANS *v.* EVANS AND BLYTH (1905) [DIV.] .. 1031
FIELD *v.* METROPOLITAN POLICE RECEIVER (1907) [K.B.D. DIVL. CT.] 435
FITZMAURICE *v.* HESKETH (1904) [P.C.] .. 716
FITZROY *v.* CAVE (1905) [C.A.] 194
FLETCHER *v.* BIRKENHEAD CORPORATION (1906) [C.A.] 324
FLEW, *Re*, *Ex parte* FLEW (1904) [C.A.] .. 548
FOSTER *v.* WARBLINGTON URBAN DISTRICT COUNCIL (1906) [C.A.] 366
FRANCIS, *Re*, BARRETT *v.* FISHER (1905) [CH.D.] 556
FRASER, *Re*, LOWTHER *v.* FRASER (1904) [C.A.] 177
FROST *v.* AYLESBURY DAIRY CO. (1905) [C.A.] 132
FROWD *v.* FROWD (1904) [DIV.] 104
GARNETT, *Re*, RICHARDSON *v.* GREENEP (1905) [CH.D.] 479
GARRARD, *Re*, GORDON *v.* CRAIGIE (1907) [CH.D.] 237
GETTY *v.* GETTY (1907) [DIV.] 741
GIBBON *v.* PEASE (1905) [C.A.] 454
GLENWOOD LUMBER CO., LTD. *v.* PHILLIPS (1904) [P.C.] 203
GOLDSMITHS' CO. *v.* WYATT (1906) [C.A.] .. 542
GOOD, *Re*, HARRINGTON *v.* WATTS (1905) [CH.D.) 476
GORDON *v.* GORDON (1904) [C.A.] 702
GOUGH AND ASPATRIA, SILLOTH AND DISTRICT JOINT WATER BOARD, *Re* (1904) [C.A.] .. 726
GRANT, BULCRAIG & CO., *Re* (1905) [CH.D.] .. 579
GRASSI, *Re*, STUBBERFIELD *v.* GRASSI (1905) [CH.D.] 845
GREAVES *v.* WHITMARSH, WATSON & CO., LTD. (1906) [K.B.D. DIVL. CT.] 1010
GRIFFITH *v.* OWEN (1906) [CH.D.] 718
GRIMOND *v.* GRIMOND (1905) [H.L.] 445
GUEDALLA, *Re*, LEE *v.* GUEDALLA'S TRUSTEE (1905) [CH.D.] 1012
GWENDOLEN FREEHOLD LAND SOCIETY *v.* WICKS (1904) [K.B.D. DIVL. CT.] 564
HADJI ALI AKBAR & SONS, LTD. *v.* ANGLO-ARABIAN AND PERSIAN STEAMSHIP CO., LTD. (1906) [K.B.D.] 572
HALKETT *v.* EARL OF DUDLEY (1907) [CH.D.] 465
HALL *v.* LEES (1904) [C.A.] 126

PAGE

HARSE *v.* PEARL LIFE ASSURANCE CO. (1904) [C.A.] 630
HENNAN & CO., LTD. *v.* DUCKWORTH (1904) [K.B.D. DIVL. CT.] 862
HOARE *v.* ROBERT GREEN, LTD. (1907) [K.B.D. DIVL. CT.] 858
HOARE & CO., LTD. AND REDUCED, *Re* (1904) [C.A.] 635
HOOPER *v.* HERTS AND ANOTHER (1906) [C.A.] 849
HOUGHTON, *Re*, HAWLEY *v.* BLAKE (1904) [CH.D.] 486
HOWE *v.* NEWINGTON LICENSING JUSTICES (1907) [K.B.D. DIVL. CT.] 1001
HUNTLY (MARCHIONESS OF) AND ANOTHER *v.* GASKELL AND OTHERS (1905) [C.A.] .. 625
HUNT'S SETTLED ESTATES, *Re*, BULTEEL *v.* LAWDESHAYNE (1905) [CH.D.] 736
JOHN HALL JUNIOR AND CO. *v.* RICKMAN (1905) [K.B.D.] 946
JOHNSON, *Re*, SANDY *v.* REILLY (1905) [CH.D.] 539
JOHNSON *v.* PICKERING, NORTON, CLAIMANT (1907) [C.A.] 1004
KAUFMAN *v.* GERSON (1904) [C.A.] 896
KAY *v.* KAY (1904) [DIV.] 429
KEENE *v.* THOMAS (1904) [K.B.D. DIVL. CT.] 590
KEET, *Re* (1905) [C.A.] 836
KEITH *v.* TWENTIETH CENTURY CLUB, LTD. (1904) [CH.D.] 164
KILGOUR *v.* GADDES (1904) [C.A.] 679
KIRBY *v.* HUNSLET ASSESSMENT COMMITTEE (1905) [H.L.] 710
LARNER *v.* LARNER (1905) [K.B.D. DIVL. CT.] 1022
LAW *v.* LAW (1904) [C.A.] 526
LAW *v.* LLEWELLYN (1906) [C.A.] 536
LEAD COMPANY'S WORKMEN'S FUND SOCIETY, *Re*, LOWES *v.* GOVERNOR AND COMPANY FOR SMELTING DOWN LEAD WITH PIT AND SEA COAL (1904) [CH.D.] 933
LEFROY *v.* EARL OF EGMONT, *Re* EGMONT'S SETTLED ESTATES (1906) [CH.D.] 1035
LEICESTER & CO. *v.* CHERRYMAN (1907) [K.B.D. DIVL. CT.] 794
LETHBRIDGE *v.* ATTORNEY-GENERAL (1906) [H.L.] 805
LIVERPOOL CORPORATION *v.* WEST DERBY UNION (1905) [K.B.D. DIVL. CT.] 296
LLOYDS BANK, LTD. *v.* MEDWAY UPPER NAVIGATION CO. (1905) [C.A.] 433
LODGE *v.* NATIONAL UNION INVESTMENT CO., LTD. (1906) [CH.D.] 333
LOGAN *v.* BANK OF SCOTLAND AND OTHERS (1905) [C.A.] 438
LONGBOTHAM & SONS, *Re* (1904) [C.A.] .. 488
LUMBY *v.* FAUPEL (1904) [C.A.] 905
LUMSDEN *v.* SHIPCOTE LAND CO. (1906) [C.A.] 1046
LYTTELTON TIMES CO., LTD. *v.* WARNERS, LTD. (1907) [P.C.] 200
MCMANUS *v.* FORTESCUE (1907) [C.A.] .. 707
MADDEN *v.* RHODES AND OTHERS (1906) [K.B.D. DIVL. CT.] 789
MALONE *v.* LASKEY AND ANOTHER (1907) [C.A.] 304
MARTIN *v.* NADEL. DRESDNER BANK GARNISHEES (1906) [C.A.] 827
MELLISON, *Re*, *Ex parte* DAY (1906) [K.B.D. DIVL. CT.] 822
MERCER AND OTHERS *v.* DENNE (1904) [CH.D.] [C.A.] 71
MERSEY DOCKS AND HARBOUR BOARD *v.* MARPESSA (OWNERS) (1907) [H.L.] .. 855
MIDLAND COUNTIES DISTRICT BANK, LTD. *v.* ATTWOOD (1904) [CH.D.] 648
MILLS, *Re*, *Ex parte* MILLS (1905) [C.A.] .. 407
MINNETONKA, THE (1905) [C.A.] 873
MITCHELL BROS. *v.* WORKSOP UNION ASSESSMENT COMMITTEE AND OTHERS (1904) [K.B.D. DIVL. CT.] 107
MOORE *v.* BISHOP OF OXFORD (1904) [P.C.] .. 588
MOORE, NETTLEFOLD & CO. *v.* SINGER MANUFACTURING CO. (1904) [C.A.] 810
MORGAN *v.* FEAR AND ANOTHER (1907) [H.L.] 928
MOSS, *Re*, *Ex parte* HALLETT (1905) [K.B.D. DIVL. CT.] 713
NASH *v.* CALTHORPE AND OTHERS (1905) [C.A.] 968
NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS *v.* SMITHIES (1906) [H.L.] .. 961
NATIONAL PHONOGRAPH CO., LTD. *v.* EDISON-BELL CONSOLIDATED PHONOGRAPH CO., LTD. (1907) [C.A.] 116
NELSON LINE (LIVERPOOL), LTD. *v.* NELSON & SONS, LTD. (1907) [H.L.] 244
NIBLETT *v.* MIDLAND RAIL. CO. (1907) [K.B.D. DIVL. CT.] 248
NISBET AND POTTS' CONTRACT, *Re* (1906) [C.A.] 865

NORTHAMPTON CORPORATION *v.* ELLEN (1904) [C.A.] 492
OGDEN *v.* OGDEN (1907) [C.A.] 86
OPPENHEIMER *v.* ATTENBOROUGH & SON (1907) [C.A.] 1016
OPPENHEIMER *v.* FRAZER AND WYATT (1907) [C.A.] 143
PADDINGTON CORPORATION *v.* ATTORNEY-GENERAL (1905) [H.L.] 362
PAQUIN, LTD. *v.* BEAUCLERK (1906) [H.L.] .. 729
PEARSON (S.) & SON, LTD. *v.* DUBLIN CORPORATION (1907) [H.L.] 255
PERKINS, *Re*, BROWN *v.* PERKINS (1907) [CH.D.] 273
PERRING & CO. *v.* EMERSON (1905) [K.B.D. DIVL. CT.] 641
POLLEY *v.* FORDHAM (1904) [K.B.D. DIVL. CT.] 651
POLSUE AND ALFIERI, LTD. *v.* RUSHMER (1907) [H.L.] 586
PONSFORD, BAKER & CO. *v.* UNION OF LONDON AND SMITH'S BANK, LTD. (1906) [C.A.] 829
POOLE *v.* NATIONAL BANK OF CHINA, LTD. (1907) [H.L.] 138
POWELL *v.* VICKERS, SONS AND MAXIM, LTD. (1906) [C.A.] 390
PRICE, *Re*, PRICE *v.* NEWTON (1905) [CH.D.] 448
PRICE & CO. *v.* UNION LIGHTERAGE CO. (1904) [C.A.] 227
PUBLIC WORKS COMMISSIONER *v.* HILLS (1906) [P.C.] 919
R. *v.* BOND (1906) [C.C.R.] 24
R. *v.* BRAILSFORD AND ANOTHER (1905) [K.B.D. DIVL. CT.] 240
R. *v.* CHANDRA DHARMA (1905) [C.C.R.] .. 570
R. *v.* DAVIES (1905) [K.B.D. DIVL. CT.] .. 60
R. *v.* DE MARNY (1906) [C.C.R.] 923
R. *v.* DODDS, *Ex parte* ROBERTS AND OTHERS (1905) [C.A.] 658
R. *v.* JOHNSON (1905) [K.B.D. DIVL. CT.] .. 688
R. *v.* LANCASHIRE JUSTICES (1906) [K.B.D. DIVL. CT.] 903
R. *v.* LINNEKER (1906) [C.C.R.] 797
R. *v.* MELLADEW (1906) [C.A.] 339
R. *v.* OSBORNE (1905) [C.C.R.] 54
R. *v.* PINCKNEY, *Ex parte* PINCKNEY (1904) [C.A.] 406
R. *v.* RUSSELL AND ANOTHER, *Ex parte* MORRIS AND OTHERS (1905) [K.B.D. DIVL. CT.] 292
R. *v.* TOLHURST AND OTHER JUSTICES, *Ex parte* FARRELL AND OTHER CASES (1905) [K.B.D. DIVL. CT.] 964
REYNOLDS *v.* ASHBY & SON (1904) [H.L.] .. 401
RICHARD AND GREAT WESTERN RAIL. CO., *Re* (1904) [C.A.] 521
RUBEN AND LADENBURG *v.* GREAT FINGALL CONSOLIDATED (1906) [H.L.] 460
SALVESEN & CO. *v.* REDERI AKTIEBOLAGET NORDSTJERNAN (1905) [H.L.] 886
SAMUEL *v.* NEWBOLD (1906) [H.L.] 693
SAMUEL ALLEN & SONS, LTD., *Re* (1907) [CH.D.] 785
SANDERSON *v.* COLLINS (1904) [C.A.] .. 561
SCARBOROUGH AND ANOTHER *v.* COSGROVE (1905) [C.A.] 48
SCARR AND GENERAL ACCIDENT ASSURANCE CORPORATION (1904) [K.B.D.] 566
SECRETARY OF STATE FOR WAR *v.* WYNNE AND OTHERS (1905) (K.B.D. DIVL. CT.] .. 352
SEDDON *v.* NORTH EASTERN SALT CO., LTD. (1904) [CH.D.] 817
SELLAR *v.* CHARLES BRIGHT & CO., LTD. (1904) [C.A.] 559
SEWELL *v.* NATIONAL TELEPHONE CO., LTD. (1907) [C.A.] 457
SHEFFIELD CORPORATION *v.* BARCLAY AND OTHERS (1905) [H.L.] 747
SHEPHARD, *Re*, GEORGE *v.* THYER (1904) [CH.D.] 186
SMITH *v.* GIDDY (1904) [K.B.D. DIVL. CT.] .. 289
SOLICITOR, *Re* A, *Ex parte* HALES (1907) [K.B.D. DIVL. CT.] 1050
SOUTH WALES MINERS' FEDERATION AND OTHERS *v.* GLAMORGAN COAL CO., LTD., AND OTHERS (1905) [H.L.] 211
STEVENS *v.* KING (1904) [CH.D.] 951
STOCKDALE *v.* ASCHERBERG (1904) [C.A.] .. 153
STRONG & CO., LTD. *v.* WOODIFIELD (1906) [H.L.] 953
STUCLEY, *Re*, STUCLEY *v.* KEKEWICH (1905) [C.A.] 281
SUMMERS, *Re*, *Ex parte* OFFICIAL RECEIVER (1907) [K.B.D.] 892
SUSSEX BRICK CO., *Re* (1904) [C.A.] .. 673

PAGE

TACTICIAN, THE (1907) [C.A.] 743
THOMAS *v.* BRADBURY, AGNEW & CO., LTD. AND ANOTHER (1906) [C.A.] 220
THOMPSON, *Re*, LANGHAM *v.* THOMPSON (1904) [CH.D.] 474
TORRENS AND ANOTHER *v.* WALKER (1906) [CH.D.] 800
TREDWAY *v.* MACHIN (1904) [C.A.] 155
TYLER, *Re*, *Ex parte* OFFICIAL RECEIVER (1907) [C.A.] 181
VAN LAUN, *Re*, *Ex parte* CHATTERTON (1907) [C.A.] 157
VILLAR *v.* GILBEY (1907) [H.L.] 779
WADDLE *v.* SUNDERLAND UNION (1907) [C.A.] 207
WALBRAN, *Re*, MILNER *v.* WALBRAN (1905) [CH.D.] 360
WATSON *v.* JONES (1905) [H.L.] 1
WATSON *v.* M'EWAN (1905) [H.L.] 1
WATT *v.* WATT (1905) [H.L.] 840
WEINER *v.* GILL AND OTHERS (1906) [C.A.] .. 773

PAGE

WEINER *v.* SMITH AND OTHERS (1906) [C.A.] 773
WEINGARTEN BROTHERS *v.* BAYER & CO. (1905) [H.L.] 877
WEST LEIGH COLLIERY CO., LTD. *v.* TUNNICLIFFE AND HAMPSON, LTD. (1907) [H.L.] 189
WESTON'S SETTLEMENT, *Re*, NEEVES *v.* WESTON (1906) [CH.D.] 174
WILLIAM BRANDT'S SONS & CO. *v.* DUNLOP RUBBER CO. (1905) [H.L.] 345
WILLIAMS AND OTHERS *v.* NORTH'S NAVIGATION COLLIERIES (1889), LTD. (1906) [H.L.] 907
WINANS *v.* ATTORNEY-GENERAL (1904) [H.L.] 410
WINGFIELD AND BLEW, *Re* (1904) [C.A.] .. 667
WOODALL *v.* CLIFTON (1905) [C.A.] 268
WORTHING CORPN. *v.* HEATHER (1906) [CH.D.] 530
WRIGHT, *Re*, MOTT *v.* ISSOTT (1906) [CH.D.] .. 169
YORKSHIRE MINERS' ASSOCIATION AND OTHERS *v.* HOWDEN (1905) [H.L.] .. 602
YOUNG *v.* HOFFMAN MANUFACTURING CO., LTD. (1907) [C.A.] 307

THE
ALL ENGLAND
LAW REPORTS
REPRINT

WATSON *v.* M'EWAN. WATSON *v.* JONES

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord James of Hereford and Lord Robertson), July 28, 1905]

[Reported [1905] A.C. 480; 74 L.J.P.C. 151; 93 L.T. 489]

Libel—Slander—Absolute privilege—Essential step in judicial proceeding—Statement by potential witness to solicitor regarding evidence to be given.

The privilege which protects a witness from legal proceedings in respect of evidence given by him in a court of justice necessarily extends to the information communicated by him to the solicitor engaged in the conduct of the proceedings who is concerned to ascertain what the witness can prove. If a witness were not protected when making his preliminary statement to a solicitor or to the parties engaged in the case the protection afforded to him in the witness-box would practically be no protection at all.

Notes. Followed: *Beresford* v. *White* (1914), 30 T.L.R. 591. Distinguished: *Gerhold* v. *Baker* (1918), 35 T.L.R. 102. Considered: *Hargreaves* v. *Bretherton*, [1958] 3 All E.R. 122; *Lincoln* v. *Daniels*, [1961] 3 All E.R. 740. Applied: *Marrinan* v. *Vibart*, [1962] 1 All E.R. 869. Referred to: *More* v. *Weaver*, [1928] All E.R.Rep. 160; *R.* v. *Wicks*, [1936] 1 All E.R. 384; *Szalatnay-Stachov* v. *Fink*, [1946] 2 All E.R. 231.

As to absolute privilege, see 24 HALSBURY'S LAWS (3rd Edn.) 48–54; and for cases see 32 DIGEST 102 et seq.

Cases referred to in argument:

Dawkins v. *Lord Rokeby* (1873), L.R. 8 Q.B. 255; 42 L.J.Q.B. 63; 28 L.T. 134; 21 W.R. 544, Ex.Ch.; affirmed (1875), L.R. 7 H.L. 744; 45 L.J.Q.B. 8; 33 L.T. 196; 23 W.R. 931; 32 Digest 102, *1339*.

R. v. *Skinner* (1772), Lofft. 54; 98 E.R. 529; 32 Digest 104, *1354*.

Munster v. *Lamb* (1883), 11 Q.B.D. 588; 52 L.J.Q.B. 726; 49 L.T. 252; 47 J.P. 805; 32 W.R. 243, C.A.; 32 Digest 105, *1368*.

Seaman v. *Netherclift* (1876), 2 C.P.D. 53; 46 L.J.Q.B. 128; 35 L.T. 784; 41 J.P. 389; 25 W.R. 159, C.A.; 32 Digest 106, *1374*.

Capital and Counties Bank v. *Henty* (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, *121*.

Anderson v. *Bank of British Columbia* (1876), 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 24 W.R. 624, 724; 3 Char. Pr. Cas. 212, C.A.; 18 Digest (Repl.) 102, *863*.

Friend v. *London, Chatham and Dover Rail. Co.* (1877), 2 Ex.D. 437; 46 L.J.Q.B. 696; 36 L.T. 729; 42 J.P. 70; 25 W.R. 735, C.A.; 18 Digest (Repl.) 112, *947*.

Rome v. *Watson* (1898), 25 R. 733.

Williamson v. *Umphray and Robertson* (1890), 17 R. 905.

Hassan v. *Paterson* (1885), 12 R. 1164.

Appeals by the defender in the action from decisions of the Second Division of the Court of Session in Scotland (the Lord Justice Clerk (Lord Kingsburgh), Lord Trayner, and Lord Moncreiff, Lord Young dissenting), varying a judgment of the Lord Ordinary (Lord Kincairney).

Mrs. M'Ewan, the respondent, was the pursuer in an action of separation and aliment brought by her against her husband on the ground of alleged cruelty, which was decided against her by Lord Low. The ground of the present action was that the appellant, Sir Patrick Heron Watson, while being examined as a witness in the action, made statements in the witness-box which respondent alleged were slanderous. The respondent alleged that the statements made in the witness-box had been, prior to the trial and with a view to giving evidence, communicated by the appellant to her husband and his agent and counsel. The Lord Ordinary (Lord Kincairney) and the Second Division were unanimously of opinion that no action would lie against the appellant for the statements made in the witness-box, but the Second Division, Lord Young dissenting, allowed an issue with reference to the information previously given. The question raised in the appeal, therefore, was whether the averment of the respondent that the statements made in the witness-box were previously communicated to her husband and his agent and counsel formed a ground of action against the appellant. A similar action for damages was raised by James Jones, the father of the respondent, against the appellant, arising out of the same subject-matter, and the judgment in this case also was appealed against.

The facts were as follows. The married life of the respondent and her husband was unhappy on account of the behaviour of her husband towards her, and her health was in consequence seriously affected. She became pregnant and fell into a very weak state of health. On this account, and for other reasons, her husband took a strong antipathy to her, and his conduct became unbearable and culminated in his requesting her to leave the house, which she did about Sept. 28, 1901. She then went to reside with her father. Shortly thereafter she consulted her agents, and instructed them to take the necessary steps with a view to the institution of an action of separation and aliment at her instance against her husband on the ground of cruelty. The conduct of her husband of which the respondent complained consisted of constant nagging, continuous and deliberate annoyance, and unkind treatment, which had resulted in seriously undermining her health; and it was deemed advisable to obtain a separate medical opinion as to her condition, and as to the effect of the course of conduct alleged upon her health. The appellant, who was an eminent medical man, was asked by her agent to visit her and make an examination; and on Oct. 24, 1901, he visited her at her father's house in order to examine her person, and ascertain from her the facts connected with the matters upon which she desired his medical opinion and advice. The appellant examined her accordingly. On his return to Edinburgh the same afternoon he had a meeting with her agents, at which he expressed views of a nature that rendered it evident that his opinion was adverse to the respondent in reference to the action proposed. On Dec. 13, 1902, she raised an action of separation and aliment against her husband, and concluding for custody of the child of the marriage, which had been born in the preceding February, and was then in her husband's custody. The action was defended by her husband. Proof was led before Lord Low. Several medical witnesses were examined and

A gave evidence on her behalf. The appellant was not asked to give evidence on her behalf. On Oct. 21, 1903, the appellant, along with other medical men, made an examination of the respondent on her husband's behalf. Shortly after making the examination, the appellant reported the result of his examination, his opinion of the case, and the nature of the evidence which he was prepared to give to her husband's agents. He also gave information to the parties as to certain matters B which he alleged that he had ascertained as the result of his prior examination of the respondent on Oct. 24, 1901. At the same time he showed to the husband, his solicitor, and the counsel engaged by the husband in the case, or communicated to these parties, the contents of private notes made by him at the time of his previous examination of the respondent. On Oct. 24, 1903, at a diet which had been fixed for hearing the remaining evidence in the case, he was examined as C a witness for the husband. In the course of his evidence he deponed to certain matters which he alleged that he had learned on the occasion of his professional visit to the respondent in October, 1901, and produced his private notebook containing the notes before referred to, alleged by him to have been made at the time. The respondent averred that in showing the notes and voluntarily giving evidence the appellant acted wrongfully and in violation of the duty of secrecy D which he owed to her, and that in consequence she had been wounded in her feelings and injured in her character, and suffered loss and damage which she estimated at the sum of £2,500, which was the sum first concluded for by her in the summons. She further averred that the notes contained a slander upon her; that the statement meant, and was intended to mean, that the respondent had indicated to the appellant her desire at the time of his visit in October, 1901, E criminally to procure abortion; that she had endeavoured to obtain his assistance and co-operation to attain this end; and that her sole motive in so doing was to free herself of any permanent reminder of her marriage with her husband. She averred that in consequence of these statements she had sustained serious loss and damage, and had suffered in her character and feelings, and estimated her loss at the sum of £2,500, which was the sum concluded for in the summons.

F

W. Campbell, K.C., and *R. T. Younger, K.C.* (both of the Scottish Bar), for the appellant.

Haldane, K.C., and *C. D. Murray* (of the Scottish Bar), for the respondents.

THE EARL OF HALSBURY, L.C.—In examining these appeals it is impossible G to say that any question of difficulty is raised in one rather than in the other. The same decision will be applicable to both. On examining the different allegations made in the condescendence and in the answers, I do not think that the question as to the confidential nature of the relations between a patient and a medical man is raised. I do not propose to express any opinion upon what would be the legal determination of that question if it was raised. I entertain no doubt H as to the broad proposition, which seems to me to be the only question which is properly raised here, as to the immunity of a witness from liability for evidence given in a court of justice. It is too late to argue upon that, for it has been decided by competent authority, including the authority of your Lordships' House. The immunity of a witness from responsibility in the nature of an action for evidence given in a court of justice has been too well established to be shaken. I The remedy against a witness who has given evidence which is false is to indict him for perjury, but, for very obvious reasons, the necessity for taking legal proceedings in courts of justice, and the necessity of compelling witnesses to attend, involves, as one of the necessities of the administration of justice, the immunity of witnesses from actions brought against them in respect of evidence given by them.

So far the matter is too plain to argue. Then comes the question, which, so far as I know, is raised for the first time in this case—the ingenious suggestion that, although it is true that the witness is protected in respect of evidence

actually given in a court of justice, yet that no such protection exists in respect of his attendance on a solicitor to make what is called in Scotland a "precognition" —that is, to reduce to writing the evidence which the witness is prepared to give. One very serious element of difficulty in insisting upon such a liability is manifest, that in the course of the diligent inquiry made by counsel no case has been found in which it was sought to establish such a liability before. So far as I know, no such question has ever been raised, and the learned judges who have allowed this issue have done it for the first time. In respect of this case it appears to me that the privilege which surrounds the evidence actually given in a court of justice necessarily extends to the information communicated to the solicitor engaged in the conduct of the proceedings. If it were otherwise, and a witness could be made liable for an action for what he communicated before going into the witness-box, the privilege would practically disappear, for he would say: "I will tell you nothing beforehand, as I am liable to have an action brought against me." It is evident that the privilege extended to a witness in the box must involve the preliminary examination to find out what it is that he can prove. It may be that to some extent that is a hardship, but, after all, the hardship is not to be compared with that which would arise if it were impossible to administer justice because people were afraid to give their testimony. If the evidence of a witness is false, then the party aggrieved is entitled to indict him for perjury. But it is necessary in the interests of justice to protect a witness who gives evidence to the best of his ability, and without any desire to falsify it. Unless a witness is protected in making his preliminary statement to a solicitor, or to the parties engaged in the case, the protection afforded to him in the witness-box would practically be no protection at all. That there is that protection in the witness-box is established beyond all possibility of doubt. In this case, the appellant being an eminent medical man, there was no communication to strangers, or to persons outside the litigation. The communication was made to the counsel and solicitor, and under those circumstances it was the duty of the person who was to become a witness to tell the truth, and the whole truth; otherwise the precognition would be worthless. I think that the privilege is the same whether the evidence is given in the box, or the statement is communicated to the solicitor in the case, because the same thing would be said in court as was stated in the precognition. For the reasons which I have given I move that the appeals be allowed, and the judgments below reversed with costs.

LORD JAMES OF HEREFORD and **LORD ROBERTSON** concurred.

Appeals allowed.

Solicitors: *A. & W. Beveridge*, for *J. P. Watson*, Edinburgh; *Neish, Howell & Haldane*, for *Drummond & Reid*, Edinburgh.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

COLLS *v.* HOME AND COLONIAL STORES, LTD.

[House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Davey, Lord Robertson and Lord Lindley), May 15, 18, 19, 22, December 8, 10, 11, 1903, May 2, 1904]

B

[Reported [1904] A.C. 179, 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475]

Easement—Light—Obstruction—Degree to be actionable—Interference amounting to nuisance—Extent of right—Amount of light needed by ordinary people in ordinary circumstances for ordinary purposes—Consideration of ordinary
C *purposes to which dominant tenement adaptable—No addition to right by alteration in premises or user—Loss or restriction of right—Non-user or restricted user of ancient lights—Interference—Damages awarded in lieu of injunction—Substantial question whether or not obstruction legal—Fair dealing by defendant—Court to guard against extortion—Injunction—Damages not fair compensation—High handed conduct by defendant—*
D *Attempted evasion of jurisdiction of court.*

To succeed in an action for interference with a right to light the owner of the right must prove an obstruction of light amounting to an actionable nuisance, i.e., an obstruction rendering the dominant tenement less comfortable and convenient.

The dominant tenement, however, is not necessarily entitled to the full
E amount of the light which it has enjoyed during the prescriptive period. It is entitled to the amount of light needed for the habits and requirements of ordinary persons in all ordinary circumstances for all the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind. In determining this question regard may be had, not only to the present use of the dominant tenement, but also to any ordinary uses to which the tenement is
F adapted, but the burden on the servient tenement cannot be increased or varied at the will of the owner of the dominant tenement by an alteration of the internal structure of the dominant tenement or as a result of its being put to some special or extraordinary purpose.

The owner of a dominant tenement does not lose or restrict his right to light by non-user of his ancient lights or by not using the full measure of light which
G the law permits.

Where there has been an infringement of the rights of the dominant tenement the question whether damages should be given in addition to or substitution for an injunction is a matter for the discretion of the court to be exercised judicially. An injunction is necessary to do justice to the plaintiff and as a warning to others where, e.g., the injury cannot fairly be compensated by money, or the
H defendant has acted in a high-handed manner, or has endeavoured to steal a march on the plaintiff or to evade the jurisdiction of the court. But if there is really a question whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit the court should incline to damages rather than to an injunction. The court must be very careful not to allow an action for the protection of ancient lights to be used as a means of
I extorting money: per Lord Macnaghten.

Notes. By the Rights of Light Act, 1959 (39 Halsbury's Statutes (2nd Edn.) 285), s. 1, the period of prescription for the acquisition of rights of light under s. 3 of the Prescription Act, 1832 (6 Halsbury's Statutes (2nd Edn.) 669), is temporarily extended from 20 to 27 years, and by s. 2 provision is made for the registration of a notice in the register of local land charges to prevent the access and use of light from being taken to be enjoyed without interruption.

Considered: *Ambler* v. *Gordon*, [1905] 1 K.B. 417; *Higgins* v. *Betts*, [1905] 2 Ch. 210. Applied: *Anderson* v. *Francis*, [1906] W.N. 160; *Polsue and Alfieri* v.

Rushmer, [1907] A.C. 121; *Ankerson* v. *Connelly*, [1907] 1 Ch. 678. Considered: *Jolly* v. *Kine*, [1907] A.C. 1. Followed: *Hyman* v. *Van Den Bergh*, [1908] 1 Ch. 167. Considered: *Davis* v. *Marrable*, [1913] 2 Ch. 421; *Griffith* v. *Richard Clay & Sons, Ltd.*, [1911–13] All E.R.Rep. 760. Considered and Followed: *Paul* v. *Robson* (1914), 83 L.J.P.C. 304. Applied: *Litchfield-Speer* v. *Queen Anne's Gate Syndicate (No. 2), Ltd.*, [1918–19] All E.R.Rep. 1075. Considered: *Slack* v. *Leeds Industrial Co-operative Society*, [1923] 1 Ch. 431; *Slack* v. *Leeds Industrial Co-operative Society*, [1924] 2 Ch. 475. Followed: *Price* v. *Hilditch*, [1930] 1 Ch. 500. Considered: *Sheffield Masonic Hall, Co.* v. *Sheffield Corpn.*, [1932] All E.R.Rep. 545; *Smith* v. *Evangelization Society Incorporated Trust* (1932), 48 T.L.R. 336; *Smith* v. *Evangelization Society Incorporated Trust*, [1933] All E.R.Rep. 527; *Fishenden* v. *Higgs and Hill, Ltd.*, [1935] All E.R.Rep. 435. Referred to: *Cowper* v. *Laidler*, [1903] 2 Ch. 337; *Morgan* v. *Fear*, [1907] A.C. 425; *Andrews* v. *Waite*, [1907] 2 Ch. 500; *Clark and Gorst* v. *Horrocks* (1908), 24 T.L.R. 486; *Heath* v. *Brighton Corpn.* (1908), 97 L.T. 718; *Cowper* v. *Milburn* (1908), 52 Sol. Jo. 316; *Bailey* v. *Holborn and Frascati*, [1914] 1 Ch. 598; *News of the World, Ltd.* v. *Allen Fairhead & Sons, Ltd.*, [1931] All E.R.Rep. 630.

As to the easement of light and remedies for interference, see 12 Halsbury's Laws (3rd Edn.) 582–594, 616–619; and for cases see 19 Digest (Repl.) 134 et seq., 199 et seq.

Cases referred to:

(1) *Fishmonger's Co.* v. *East India Co.* (1752), 1 Dick. 163; 21 E.R. 232, L.C.; 19 Digest (Repl.) 146, *953*.

(2) *Clarke* v. *Clark* (1865), 1 Ch. App. 16; 35 L.J.Ch. 151; 13 L.T. 482; 30 J.P. 20; 11 Jur.N.S. 914; 14 W.R. 115, L.C.; 19 Digest (Repl.) 149, *966*.

(3) *Warren* v. *Brown*, [1900] 2 Q.B. 722; 69 L.J.Q.B. 842; 83 L.T. 318; 49 W.R. 206; 16 T.L.R. 549; reversed [1902] 1 K.B. 15; 71 L.J.K.B. 12; 85 L.T. 444; 50 W.R. 97; 18 T.L.R. 55; 46 Sol. Jo. 50, C.A.; 19 Digest (Repl.) 150, *977*.

(4) *Baten's Case* (1610), 9 Co. Rep. 53b; 77 E.R. 810; 36 Digest (Repl.) 302, *482*.

(5) *Aldred's Case* (1610), 9 Co. Rep. 57b; 77 E.R. 816; 19 Digest (Repl.) 146, *952*.

(6) *Back* v. *Stacey* (1826), 2 C. & P. 465, N.P.; 19 Digest (Repl.) 147, *959*.

(7) *Parker* v. *Smith* (1832), 5 C. & P. 438, N.P.; 19 Digest (Repl.) 148, *960*.

(8) *Wells* v. *Ody* (1836), 1 M. & W. 452; 7 C. & P. 410; 5 Dowl. 95; 2 Gale, 12; Tyr. & Gr. 715; 5 L.J.Ex. 199; 150 E.R. 512; 19 Digest (Repl.) 148, *962*.

(9) *Calcraft* v. *Thompson* (1867), 31 J.P. 675; 15 W.R. 387, L.C.; 19 Digest (Repl.) 150, *971*.

(10) *Scott* v. *Pape* (1886), 31 Ch.D. 554; 55 L.J.Ch. 426; 54 L.T. 399; 50 J.P. 645; 34 W.R. 465; 2 T.L.R. 310, C.A.; 19 Digest (Repl.) 138, *892*.

(11) *Tapling* v. *Jones* (1865), 20 C.B.N.S. 166; 11 H.L.Cas. 290; 5 New Rep. 493; 34 L.J.C.P. 342; 12 L.T. 555; 29 J.P. 611; 11 Jur.N.S. 309; 13 W.R. 617; 144 E.R. 1067, H.L.; 19 Digest (Repl.) 137, *886*.

(12) *Wright* v. *Williams* (1836), 1 M. & W. 77; 1 Gale, 410; Tyr. & Gr. 375; 5 L.J.Ex. 107; 150 E.R. 353; 19 Digest (Repl.) 79, *453*.

(13) *Richards* v. *Fry* (1838), 7 Ad. & El. 698; 3 Nev. & P.K.B. 67; 1 Will. Woll. & H. 116; 7 L.J.Q.B. 68; 2 Jur. 641; 112 E.R. 632; 11 Digest (Repl.) 33, *431*.

(14) *Cooper* v. *Hubbuck* (1862), 12 C.B.N.S. 456; 31 L.J.C.P. 323; 6 L.T. 826; 9 Jur.N.S. 575; 142 E.R. 1220; 19 Digest (Repl.) 142, *924*.

(15) *Ecclesiastical Comrs. for England* v. *Kino* (1880), 14 Ch.D. 213; 49 L.J.Ch. 529; 42 L.T. 201; 28 W.R. 544, C.A.; 19 Digest (Repl.) 152, *992*.

(16) *Kelk* v. *Pearson* (1871), 6 Ch. App. 809; 24 L.T. 890; 36 J.P. 196; 19 W.R. 655, L.JJ.; 19 Digest (Repl.) 138, *887*.

(17) *City of London Brewery Co.* v. *Tennant* (1873), 9 Ch. App. 212; 43 L.J.Ch. 457; 29 L.T. 755; 38 J.P. 468; 22 W.R. 172, L.C.; 19 Digest (Repl.) 85, *502*.

A (18) *Yates* v. *Jack* (1866), 1 Ch. App. 295; 35 L.J.Ch. 539; 14 L.T. 151; 30 J.P. 324; 12 Jur.N.S. 305; 14 W.R. 618, L.C.; 19 Digest (Repl.) 149, *968.*

(19) *Robson* v. *Whittingham* (1866), 1 Ch. App. 442; 35 L.J.Ch. 227; 13 L.T. 730; 30 J.P. 179; 12 Jur.N.S. 40; 14 W.R. 291, L.JJ.; 19 Digest (Repl.) 149, *967.*

(20) *Mackey* v. *Scottish Widows' Fund Assurance Society* (1877), I.R. 11 Eq. 541; 19 Digest (Repl.) 152, **423.*

B (21) *Moore* v. *Hall* (1878), 3 Q.B.D. 178; 47 L.J.Q.B. 334; 38 L.T. 419; 42 J.P. 343; 26 W.R. 401, D.C.; 19 Digest (Repl.) 150, *975.*

(22) *Dent* v. *Auction Mart Co.*, *Pilgrim* v. *Same*, *Mercers' Co.* v. *Same* (1866), L.R. 2 Eq. 238; 35 L.J.Ch. 555; 14 L.T. 827; 30 J.P. 661; 12 Jur.N.S. 447; 14 W.R. 709; 19 Digest (Repl.) 153, *1005.*

(23) *Lanfranchi* v. *Mackenzie* (1867), L.R. 4 Eq. 421; 36 L.J.Ch. 518; 16 L.T. C 114; 31 J.P. 627; 15 W.R. 614; 19 Digest (Repl.) 153, *998.*

(24) *Luttrel's Case* (1601), 4 Co. Rep. 84b; 76 E.R. 1063; 19 Digest (Repl.) 96, *557.*

(25) *Martin* v. *Goble* (1808), 1 Camp. 320, N.P.; 19 Digest (Repl.) 159, *1047.*

(26) *Cooper* v. *Straker* (1888), 40 Ch.D. 21; 58 L.J.Ch. 26; 59 L.T. 849; 37 W.R. 137; 5 T.L.R. 53; 19 Digest (Repl.) 142, *921.*

(27) *Harris* v. *De Pinna* (1886), 33 Ch.D. 238; 56 L.J.Ch. 344; 54 L.T. 770; 50 D J.P. 486; 2 T.L.R. 529, C.A.; 19 Digest (Repl.) 139, *895.*

(28) *Truscott* v. *Merchant Tailors' Co.* (1856), 11 Exch. 855; 26 L.T.O.S. 283; 20 J.P. 132; 2 Jur.N.S. 356; 4 W.R. 295; 156 E.R. 1079; sub nom. *Merchant Taylors' Co.* v. *Truscott*, 25 L.J.Ex. 173, Ex. Ch.; 19 Digest (Repl.) 137, *885.*

(29) *Frewen* v. *Philipps* (1861), 11 C.B.N.S. 449; 30 L.J.C.P. 356; 25 J.P. 676; E 7 Jur.N.S. 1246; 9 W.R. 786; 142 E.R. 871, Ex. Ch.; 19 Digest (Repl.) 140, *902.*

(30) *Simper* v. *Foley* (1862), 2 John. & H. 555; 5 L.T. 669; 70 E.R. 1179; 19 Digest (Repl.) 98, *581.*

(31) *Harbidge* v. *Warwick* (1849), 3 Exch. 552; 18 L.J.Ex. 245; 154 E.R. 964; 19 Digest (Repl.) 143, *930.*

F (32) *Courtauld* v. *Legh* (1869), L.R. 4 Exch. 126; 38 L.J.Ex. 45; 19 L.T. 737; 17 W.R. 466; 19 Digest (Repl.) 142, *918.*

(33) *Collis* v. *Laugher*, [1894] 3 Ch. 659; 63 L.J.Ch. 851; 71 L.T. 226; 43 W.R. 202; 8 R. 760; 19 Digest (Repl.) 142, *919.*

(34) *Smith* v. *Baxter*, [1900] 2 Ch. 138; 69 L.J.Ch. 437; 82 L.T. 650; 48 W.R. 458; 44 Sol. Jo. 393; 19 Digest (Repl.) 84, *492.*

G (35) *Leech* v. *Schweder* (1874), 9 Ch. App. 463; 43 L.J.Ch. 487; 30 L.T. 586; 38 J.P. 612; 22 W.R. 633, L.JJ.; 19 Digest (Repl.) 136, *876.*

(36) *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315; 20 L.J.Ch. 433; 17 L.T.O.S. 103; 15 Jur. 416; 64 E.R. 849; affirmed (1852), 19 L.T.O.S. 308, L.C.; 19 Digest (Repl.) 191, *1332.*

(37) *Crump* v. *Lambert* (1867), L.R. 3 Eq. 409; 15 L.T. 600; 31 J.P. 485; 15 H W.R. 417; on appeal, 17 L.T. 133, L.C.; 19 Digest (Repl.) 194, *1352.*

(38) *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.*, [1902] A.C. 381; 71 L.J.P.C. 122; 88 L.T. 457; 50 W.R. 657; 18 T.L.R. 523, P.C.; 36 Digest (Repl.) 284, *336.*

(39) *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H.L.Cas. 642; 35 L.J.Q.B. 66; 12 L.T. 776; 29 J.P. 579; 11 Jur.N.S. 785; 13 W.R. 1083; 11 E.R. 1483, I H.L.; 36 Digest (Repl.) 263, *127.*

(40) *Theed* v. *Debenham* (1876), 2 Ch.D. 165; 24 W.R. 775; 19 Digest (Repl.) 152, *990.*

(41) *Parker* v. *First Avenue Hotel Co.* (1883), 24 Ch.D. 282; 49 L.T. 318; 32 W.R. 105, C.A.; 19 Digest (Repl.) 152, *994.*

(42) *Dyers' Co.* v. *King* (1870), L.R. 9 Eq. 438; 39 L.J.Ch. 339; 22 L.T. 120; 34 J.P. 373; 18 W.R. 404; 19 Digest (Repl.) 157, *1035.*

(43) *Aynsley* v. *Glover* (1874), L.R. 18 Eq. 544; 43 L.J.Ch. 777; 31 L.T. 219; 39 J.P. 36; 23 W.R. 147; subsequent proceedings (1875), 10 Ch. App. 283;

44 L.J.Ch. 523; 32 L.T. 345; 39 J.P. 484; 23 W.R. 457, L.JJ.; 19 Digest (Repl.) 207, *1479*.

(44) *Curriers' Co.* v. *Corbett* (1865), 4 De G.J. & Sm. 764; 13 L.T. 154; 29 J.P. 644; 11 Jur.N.S. 719; 13 W.R. 1056; 46 E.R. 1119, L.JJ.; 19 Digest (Repl.) 208, *1500*.

(45) *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (1877), 6 Ch.D. 757; 46 L.J.Ch. 871; 37 L.T. 91; 26 W.R. 26; 19 Digest (Repl.) 155, *1020*.

(46) *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34; 43 W.R. 238; 11 T.L.R. 137; 39 Sol. Jo. 132; 12 R. 112, C.A.; 19 Digest (Repl.) 202, *1425*.

Also referred to in argument:

Lewis v. *Price* (1761), 2 Wms. Saund. 175a; 85 E.R. 926; 19 Digest (Repl.) 71, *393*.

A.-G. v. *Nichol* (1809), 16 Ves. 338; 3 Mer. 687; 33 E.R. 1012, L.C.; 19 Digest (Repl.) 146, *954*.

Moore v. *Rawson* (1824), 3 B. & C. 332; 5 Dow. & Ry.K.B. 234; 3 L.T.O.S.K.B. 32; 107 E.R. 756; 19 Digest (Repl.) 93, *538*.

Adamson v. *Gatty*, [1870] W.N. 184.

Dickinson v. *Harbottle* (1873), 28 L.T. 186; 19 Digest (Repl.) 153, *999*.

A.-G. v. *Queen Anne Garden and Mansions Co.* (1889), 60 L.T. 759; 37 W.R. 572; 5 T.L.R. 430; 19 Digest (Repl.) 139, *896*.

Appeal from a decision of the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.), reported [1902] 1 Ch. 302, reversing a decision of Joyce, J.

The respondents brought the action against the appellant claiming an injunction to restrain him from erecting in Worship Street, in the city of London, any building which would darken, injure, or obstruct any ancient lights of the plaintiffs. The question in dispute related to the windows on the ground-floor of the plaintiffs' building, which was used as a clerk's office, and had, as was admitted, enjoyed light for more than twenty years. The room was an unusually long one, with no window at the back, and in ordinary weather it was usually necessary to use artificial light at the back part of the room. It was admitted that the erection of the defendant's building would diminish the amount of light previously enjoyed, but it was proved that it would leave sufficient light for all ordinary business purposes. Joyce, J., gave judgment for the defendant, but his judgment was reversed by the Court of Appeal, and the defendant appealed to the House of Lords.

R. Bray, *K.C.*, *O. L. Clare*, and *Nutter* for the appellant.

Haldane, *K.C.*, *T. R. Hughes*, *K.C.*, and *Vernon* for the respondents.

Their Lordships took time for consideration.

May 2, 1904. The following opinions were read.

THE EARL OF HALSBURY, L.C.—In this case, which was tried before Joyce, J., the learned judge gave judgment for the defendant, Colls, upon the ground that the plaintiffs, Home and Colonial Stores, Ltd., had failed to prove any actionable wrong, although he found that the erection of the buildings of which the plaintiffs complained had appreciably diminished the light which they had previously enjoyed. The Court of Appeal, as I understand their judgment, thought this wrong, and ordered a mandatory injunction to pull the premises down so as to restore all the light that had been previously enjoyed. If this principle should be sanctioned by your Lordships, it would be for the first time that, in this House at all events, such a principle had been determined. I do not deny that authorities may be found for it, some of which have been cited at the Bar; but I do not think that the exact question which is now in debate has ever been brought before this House until now.

A The question may be very simply stated thus. After an enjoyment of light for twenty years, or if the question arose before the Prescription Act, 1832, for such a period as would justify the presumption of a lost grant, would the owner of the tenement in respect of which such enjoyment had been possessed be entitled to all the light without any diminution whatsoever at the end of such a period? If that were the law it would be very far-reaching in its consequences, and the application B of it to its strict logical conclusion would render it almost impossible for towns to grow, and would formidably restrict the rights of people to utilise their own land. Strictly applied it would undoubtedly prevent many buildings which have hitherto been admitted to be too far removed from others to be actionable; but if the broad proposition which underlies the judgment of the Court of Appeal be true, it is not a question of 45 degrees, but any appreciable diminution of light which has been C enjoyed (that is to say, has existed uninterruptedly) for twenty years constitutes a right of action, and gives a right to the proprietor of a tenement that has had this enjoyment to prevent his neighbour from building on his own land. I do not think that this is the law. The argument seems to me to rest upon a false analogy, as though the access to and enjoyment of light constituted a sort of proprietary right in the light itself. Light, like air, is the common property of all, or, to speak more D accurately, it is the common right of all to enjoy it, but it is the exclusive property of none. If the same proposition against which I am protesting could be maintained in respect of air, the progressive building of any town would be impossible. The access of air is undoubtedly interfered with by the buildings which are being built every day round London. The difference between the town and country is very appreciable to the dweller in cities when he goes to the open country or to the E top of a mountain or even a small hill in the country, but would the possessor for twenty years of a house on the edge of a town be at liberty to restrain his neighbour from building near him because he had enjoyed the free access of air without buildings near him for twenty years? No doubt this is an extreme case, but it is one of the extreme cases which tries the principle. The truth is that, though there were objections to asking a jury whether the enjoyment talis qualis was such that F they might presume a lost grant when nobody supposed that such a grant was ever really made, yet it gave the opportunity of considering what was the extent of the supposed grant, and if anything so extreme as I have just supposed were claimed no jurymen in their senses would have affirmed such a grant.

The statute upon which reliance is placed in this case illustrates the danger of attempting to put a principle of law into the iron framework of a statute. The G statute literally construed by the use of the words "the light" would mean all the light which for twenty years has existed in the surroundings of the tenement which has enjoyed it; yet, singularly enough, there has been a complete uniformity of decision upon the construction of the statute that it has made no difference in the right conferred, but is only concerned with the mode of proof; but though I quite concur with this construction, which is supported by an overwhelming body of H authority, yet I cannot but think that the language of the statute has led to some of the decisions which your Lordships are now called upon to review. Certainly, in the older decisions which have been brought to your Lordships' notice the proposition which, as I have said, underlies the judgment now under appeal finds no place. Lord Hardwicke, long ago in 1752 (*Fishmongers' Co.* v. *East India Co.* (1)), dealing with this very question, the alleged obstruction to light, laid down I what I believe to be law to-day. He said (1 Dick. at p. 165):

> "It is not sufficient to say that it will alter the plaintiff's light, for then no vacant piece of ground could be built on in the city, and here there will be 17 ft. distance, and the law says it must be so near as to be a nuisance."

Lord Cranworth, in *Clarke* v. *Clarke* (2), adopted the same test, and his observation, though a subsequent decision of his seemed to throw doubt upon it, has received the assent of some of the most learned judges who ever sat upon the English Bench.

I think that the whole subject has been confused by certain decisions which were dependent on the facts proved, and were incautiously reported as laying down principles of law, when they were, in my view, only intended to be findings of fact in that particular case. At all events, I am prepared to hold that the test given by LORD HARDWICKE is the true one, and I do not think that a better example could be found than the present case to show to what extravagant results the other theory leads. The owner of a tenement on one side of a street 40 ft. wide seeks to restrain his opposite neighbour from erecting a house which, when erected, will not then be of the same height as the house belonging to the complaining neighbour, and the only plausible ground on which the complaint rests is that on the ground-floor he has a room not built in the ordinary way of rooms in an ordinary dwelling-house, but built so that one long room goes through the whole width of the house to a back wall and has no window at the back or sides, and was, therefore, at the back of it, too dark for some purposes without the use of artificial light even before the building on the other side of the street was erected. I think that no tribunal ought to find as a fact that the building is a nuisance; and altogether apart from the inappropriateness of the remedy by injunction, I am of opinion that the plaintiff has no cause of action against the defendant. The test of the right is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the building complained of. What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and whether in each case it amounts to a nuisance which will give a right of action.

I have not thought it necessary to enter into a discussion of the authorities, because I think that it has been most carefully and accurately done by WRIGHT, J., in *Warren* v. *Brown* (3). Of course, it must be taken that the foundation of this judgment rests upon the finding of fact by JOYCE, J., that the buildings of the defendant had not so materially interfered with the light previously enjoyed by the plaintiff as to amount to a nuisance. It follows that, in my judgment, *Warren* v. *Brown* (3) was rightly decided by WRIGHT, J., and ought to have been affirmed by the Court of Appeal. It was, however, reversed in accordance with the same views which guided that court in the case now under review. For the reasons which I have given I have to move your Lordships that the judgment of the Court of Appeal be reversed, and the judgment of JOYCE, J., restored, and that the respondents do pay to the appellant the costs both here and below.

LORD MACNAGHTEN.—The right of a person who is owner or occupier of a building with windows in it, privileged as ancient lights, in regard to the protection of the light coming to those windows is a purely legal right. It is an easement belonging to the class known as negative easements. It is nothing more or less than the right to prevent the owner or occupier of an adjoining tenement from building or placing on his own land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement. This right in early times was vindicated by an action on the case for nuisance, in which damages might be recovered and judgment had for removal or abatement of the nuisance: *Baten's Case* (4). In *Aldred's Case* (5) LORD COKE says that an action lies for nuisance done to light as one of the three essential requisites of habitation. He says:

> "An action lies for hindrance of the light, for the ancient form of the action was significant, sc.—quod messuagium horridâ tenebritate obscuravit."

It was not every diminution of light that would support such an action. The form of the action itself shows that. In later times when an action for the protection of

A ancient lights came to be regarded rather as an action for disturbance of an easement than an action grounded on nuisance—as an action to prevent the infringement of a right rather than an action to redress a wrong—the necessity of showing the gravity of the injury complained of was not so obviously apparent. Still the principle was the same, and it must always be the same. As LORD HARDWICKE observed in *Fishmongers' Co.* v. *East India Co.* (1) (1 Dick. at p. 165):

B

> "It is not sufficient to say it will alter the plaintiff's lights. . . . The law says it must be so near as to be a nuisance."

Probably the most satisfactory statement of the rule to be applied in all cases of ancient lights is to be found in *Back* v. *Stacey* (6) and *Parker* v. *Smith* (7). *Back* v. *Stacey* (6) was an issue directed by the LORD CHANCELLOR to try two questions—
C (i) Whether the ancient lights of the plaintiff in his dwelling-house in Norwich had been "illegally" obstructed by a building of the defendant; and (ii) if so, what damage the plaintiff had sustained in respect of the injury. So that if the jury had found that the obstruction complained of was an illegal obstruction the damages would have gone to the whole of the injury and not merely to the loss sustained up to the date of the writ. It was contended there that as it was evident that the
D quantity of light previously enjoyed had been diminished the plaintiff was at any rate entitled to a verdict on the first issue, any obstruction of ancient lights being illegal. But according to the report (2 C. & P. at p. 466):

> "BEST, C.J., told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's
E ancient lights had undergone. It was not sufficient, to constitute an illegal obstruction, that the plaintiff had in fact less light than before, nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action and sustain the issue there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to
F prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done. HIS LORDSHIP added that it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises."

G *Back* v. *Stacey* (6) was determined in 1826. *Parker* v. *Smith* (7) was heard during the sittings after Michaelmas Term, 1832. It is, I think, the earliest reported case dealing with the question of light after the passing of the Prescription Act, which came into operation on the first day of Michaelmas Term, 1832. It was tried before TINDAL, C.J. The marginal note states, accurately, I think, the effect of the decision in these words (5 C. & P. 438):

H

> "That diminution of light and air which the law recognises as the ground of an action against a party who builds near another's premises is such as really makes them to a sensible degree less fit for the purposes of business or occupation."

It does not seem to have been suggested either by the counsel or by the judge that the Prescription Act had made the slightest alteration in the nature of the right to
I light or the principle on which the question of an alleged infringement of that right ought to be determined. To these two cases I would only add *Wells* v. *Ody* (8), before PARKE, B., in 1836. In his charge to the jury the learned judge said that he entirely adopted the law as laid down by TINDAL, C.J., in *Parker* v. *Smith* (7). After reading a passage from *Parker* v. *Smith* (7), he concluded his address to the jury by saying (7 C. & P. at p. 412):

> "The question, therefore, which I shall leave to you is whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect

the occupation of the plaintiff's premises and make them less fit for occupation." A

So much for the right at law. Courts of equity had no original jurisdiction in the matter. Their province was simply to grant an injunction in aid of the legal right where there was danger of irreparable mischief or where an injunction was required to prevent multiplicity of actions. Under Lord Cairns' Act [Chancery Amendment Act, 1858] the court was empowered, in all cases in which it had B jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, to award damages to the party injured, either in addition to or in substitution for such injunction. The Chancery Regulation Act, 1862, commonly known as Sir John Rolt's Act, provided that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery was sought, whether the title to such relief or remedy was or was not incident to or dependent C upon a legal right, every question of law or fact cognisable in a court of common law on the determination of which the title to such relief or remedy depended, should be determined by or before the same court. These Acts are superseded by the Judicature Acts, and now the High Court has all the jurisdiction of the Court of Chancery and of the several courts of law. But still, so far as the right in question is a legal right, the court, in the exercise of its jurisdiction, must be D guided by the principles established at law. And those principles, in my opinion, are still to be found most clearly and most concisely exhibited in the cases before Best, C.J., and Tindal, C.J., to which I have already referred.

Although the question thus stated appears tolerably simple, it cannot be disputed that the reported cases on questions of light in recent times are not altogether consistent. There seem to be two divergent views, neither of which, I think, is E absolutely accurate. The extreme view on one side is that the right which is acquired by so-called statutory prescription is a right to a continuance of the whole or substantially the whole quantity of light which has come to the windows during a period of twenty years. This view is conspicuous in *Calcraft* v. *Thompson* (9), before Lord Chelmsford, L.C., and in *Scott* v. *Pape* (10), where Cotton, L.J., speaks of a "cone of light" and Bowen, L.J., of "a specific quantity of light" as F the measure of the plaintiff's right. The extreme view on the other side is that the right is limited to a sufficient quantity of light for ordinary purposes. I think that this divergence of view comes from a difference of opinion, consciously or unconsciously entertained, as to the meaning and effect of the provisions of the Prescription Act, 1832, and if I am not mistaken it may be traced to certain expressions, not perhaps sufficiently guarded, which are to be found in judgments G delivered in this House in *Tapling* v. *Jones* (11). In that case Lord Westbury, Lord Cranworth, and Lord Chelmsford all assume that a period of twenty years' enjoyment of the access and use of light to a building creates an absolute and indefeasible right immediately on the expiration of the period of twenty years. No doubt s. 3 says so in terms, but s. 4 must be read in connection with s. 3, and if H the two sections are read together it will be seen that the period is not a period in gross, but a period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question. Unless and until the claim or matter is thus brought into question no absolute or indefeasible right can arise under the Act. There is what has been described as an inchoate right. The owner of the dominant tenement after twenty years' un- I interrupted enjoyment is in a position to avail himself of the Act if his claim is brought into question. But in the meantime, however long the enjoyment may have been, his right is just the same, and the origin of his right is just the same as if the Act had never been passed. No title is as yet acquired under the Act.

This point seems to have been much discussed shortly after the Act was passed. It was finally settled in a series of cases at common law, beginning, I think, with *Wright* v. *Williams* (12), and including *Richards* v. *Fry* (13) and *Cooper* v. *Hubbuck* (14), in which there is an interesting controversy between Willes and

A WILLIAMS, JJ., on the question whether the twenty years' uninterrupted enjoyment under s. 3 is the period of twenty years before any suit or action or twenty years before each suit or action in which the point may from time to time arise. The former construction, in which ERLE, C.J., and BYLES, J., concurred with WILLES, J., eventually prevailed. The question is of little or no practical importance. But the construction established by the series of decisions to which I have referred, in B accordance with the express language of the statute, goes, I think, a long way to show that the view taken by JAMES and MELLISH, L.JJ., and LORD SELBORNE as to the effect of the Act is absolutely correct, and that the qualification suggested by BOWEN, L.J., in *Scott* v. *Pape* (10) is not well founded. It certainly would be strange if the court had been compelled to hold that the Prescription Act confers upon a person whose right is questionable, at least to the extent that it has been C actually brought into question, a higher and a larger right than that possessed by a person whose prescriptive claim to the enjoyment of light is so clear as to be beyond all question. I have, therefore, no doubt that the Prescription Act has not in the slightest degree altered the pre-existing law as to the nature and extent of the right of access of light or the principle on which it is to be determined in any particular case whether the right has been infringed. If this be so, it seems to me, in D accordance with the opinion expressed by JAMES and BRETT, L.JJ., in *Ecclesiastical Comrs. for England* v. *Kino* (15), and by many other judges, that the direction given by BEST, C.J., in *Back* v. *Stacey* (6) is the direction which a court exercising the functions of both judge and jury ought to keep steadily in view.

Having come to this conclusion, I do not propose to trouble your Lordships with any comments upon the mass of cases by which in comparatively modern times the E question has been elucidated or obscured. It is enough, I think, to refer to what was said in *Kelk* v. *Pearson* (16), *City of London Brewery Co.* v. *Tennant* (17), and *Ecclesiastical Comrs. for England* v. *Kino* (15). Speaking for myself I doubt very much whether it is a profitable task to re-try actions which depend simply on questions of fact or to review and endeavour to reconcile or distinguish a number of cases that naturally enough contain some statements which, taken by themselves F and apart from the context, may seem to be contradictory, but must all proceed upon the same principle. It would only be another link in the embarrassing chain of authority, or, if I may venture to say so, only another handful of dust to be cast into one scale or the other when the claims of opposing litigants come to be weighed in the balance. I think there is much good sense in the observations of BRETT, L.J., in *Ecclesiastical Comrs. for England* v. *Kino* (15), where he said (14 Ch.D. at G p. 225):

> "to my mind, the taking some expression of a judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion as laying down a rule of conduct for other judges in considering a similar state of facts in another case is a false mode of treating authority. It H appears to me that the view of a learned judge in a particular case as to the value of a particular piece of evidence is of no use to other judges who have to determine a similar question of fact in other cases where there may be many different circumstances to be taken into consideration."

If I may trespass for a few minutes longer on your Lordships' attention, I would rather spend the time in making one or two practical suggestions. I do not put I them forward as carrying any authority. But they may possibly be of use to those who have to try such questions as this, if and so far as they appear to be consistent with good sense. It will be observed that in *Back* v. *Stacey* (6) the learned judge told the jury who had viewed the buildings that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient light had undergone. Now, a judge who exercises the functions of both judge and jury cannot be expected to view the buildings himself, even if he considers himself an expert in such matters. But I have often wondered why the court does not more frequently avail

itself of the power of calling in a competent adviser to report to the court upon the question. There are plenty of experienced surveyors accustomed to deal with large properties in London who might be trusted to make a perfectly fair and impartial report, subject, of course, to examination in court if required. I am not in the least surprised that the plaintiffs in the present case objected to a report from a disinterested surveyor; but, in my opinion, the court ought to have obtained such a report for its own guidance.

Then, with regard to giving damages in addition to or substitution for an injunction—that, no doubt, is a delicate matter. It is a matter for the discretion of the court, and the discretion is a judicial discretion. It has been said that an injunction ought to be granted when substantial damages would be given at law. I have some difficulty in following out this rule. I observe that in some cases juries have been directed to give 1s. damages as a notice to the defendant to remove the obstruction complained of. Then, if the obstruction was not removed, in a subsequent action the damages were largely increased. In others a substantial sum has been awarded to be reduced to nominal damages on removal of the obstruction. But the recovery of damages, whatever the amount may be, indicates a violation of right, and in former times, unless there were something special in the case, would have entitled the plaintiff as of course to an injunction in equity. I rather doubt whether the amount of the damages which may be supposed to be recoverable at law affords a satisfactory test. In some cases, of course, an injunction is necessary —if, for instance, the injury cannot fairly be compensated by money; if the defendant has acted in a high-handed manner; if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money. Often a person who is engaged in a large building scheme has to pay money right and left in order to avoid litigation, which will put him to even greater expense by delaying his proceedings. As far as my own experience goes, there is quite as much oppression on the part of those who invoke the assistance of the court to protect some ancient lights which they have never before considered of any great value as there is on the part of those who are improving the neighbourhood by the erection of buildings that must necessarily to some extent interfere with the light of adjoining premises. The common form of injunction which has been in use since *Yates* v. *Jack* (18) is not, I think, altogether free from objection. I think it would be better that the order, when expressed in general terms, should restrain the defendant from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows, as the same existed previously to the taking down of the house which formerly stood on the site of the defendant's new buildings. If the action is brought to a hearing before the defendant's new buildings are completed, and there seems to be good ground for the plaintiff's apprehensions, an order, I think, might be conveniently made in that form, with costs up to the hearing, and liberty to the plaintiff within a fixed time after completion to apply for further relief by way of mandatory injunction or damages as he might be advised.

With the present case I may deal very briefly. It cannot be disputed that some diminution of light is caused by the defendant's buildings, but such as it is I think it is exactly what Best, C.J., described as partial inconvenience rather than serious injury. I am satisfied that if the case had been tried at law before the question was so much embarrassed by the multiplicity of decisions no jury would have given any damages.

Perhaps I ought to add a word about *Warren* v. *Brown* (3), which is referred to in both the judgments below. I cannot say that that case is quite satisfactory to my mind either as dealt with in the court of first instance or in the Court of Appeal. In the court of first instance the learned judge who tried the case found a special verdict, which is not very easy to understand. The room in which the light has been materially diminished "in its present state is," he says, "better lighted than the ground-floor front rooms in many of the principal streets." I do not see what bearing that fact had on the question at issue. Then, instead of keeping in view the direction which judges over and over again have said ought to be kept in view, the learned judge embarks on an inquiry to determine which of two extreme views is correct. I doubt whether either the one or the other can be accepted as a safe guide without qualification. The Court of Appeal in their turn, instead of dealing with the facts of the case before them, combat a particular view, which rightly or wrongly they attribute to WRIGHT, J. I do not think that *Warren* v. *Brown* (3) helps one much. I think that the appeal ought to be allowed with costs here and below.

LORD DAVEY.—I am of opinion that the finding of the learned judge who tried this action as to the facts of this case is borne out by the evidence, and I accept his finding as the basis of my judgment. After describing the dimensions of the room on the ground-floor of the plaintiffs' house, which is used as an office, JOYCE, J., says:

> "It is, I think, the result of the evidence that it has ordinarily, if not always, been the practice to make use of the electric light in the back part of the room, and a most extraordinary amount of light from the windows in Worship Street would be required to enable the use of the electric light in the back part of the room to be dispensed with, even on ordinary days. Practically, I think, it may be taken that the use of electric or some other artificial light is now and must always be necessary in order to light the back part of the room, even in the daytime. There is no evidence to show that such an extraordinary amount of light has been enjoyed or acquired for anything like the period of twenty years."

The learned judge sums up his finding in these words:

> "Apart from any question with respect to the back part of the plaintiffs' premises and to the extraordinary light required if it be possible to be obtained so far back in the absence of illumination by electric light, the plaintiffs' premises would still, in my opinion, after the erection of the defendant's building be well and sufficiently lighted for all ordinary purposes of occupancy as a place of business. For all ordinary days they have amply sufficient light—at present they have abundance of light, and are, in my opinion, unusually well lighted. If, as it is contended on behalf of the plaintiffs, they are entitled to the full amount of light now enjoyed without appreciable diminution, the plaintiffs would have a good cause of action upon the erection of the defendant's building, though it might perhaps be doubted whether the diminution that would be caused by the defendant's building if and when erected is sufficiently serious to entitle the plaintiffs to an injunction."

On these findings the learned judge, following the judgment of WRIGHT, J., in *Warren* v. *Brown* (3), which had not then been reversed by the Court of Appeal, held that the action failed and must be dismissed.

The Court of Appeal reversed this judgment. The legal grounds of their judgment are contained in a single sentence. COZENS-HARDY, L.J., said ([1902] 1 Ch. at pp. 310, 311):

> "If ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief."

By the expression "interfered with substantially" I understand the lord justice to mean "if the amount of light having access to the premises by means of the ancient

lights is substantially diminished." This proposition appears to me to assume or imply that the owner of the dominant tenement is entitled to have the full amount of light which has gained access to the tenement by the ancient windows during the previous twenty years maintained without substantial diminution. The "real damage" may be occasioned by an alteration in the internal structure of the dominant tenement which has been made within the period of twenty years or its adaptation within that period to some special use for which an extraordinary amount of light is required, but, nevertheless, if the proposition be sound, the owner or occupier of the tenement is entitled to be protected in the enjoyment of the light required for his altered buildings or for the special use to which he has put them. In perfect consistency with this view of the law, VAUGHAN WILLIAMS, L.J., expressed a doubt whether the rule of 45 degrees [see 12 HALSBURY'S LAWS (3rd Edn.) 585, 586] can any longer be applied even as a rough measure.

The question for your Lordships to determine is whether this view of the law is correct—or, in other words, what is the true nature and extent in English law of the easement of light. It must be regretfully admitted that the numerous decisions on this subject in the courts are not easily reconcilable and are not infrequently contradictory. No decision of this House has been referred to, except that in *Tapling* v. *Jones* (11), a decision which does not directly affect the point now before your Lordships. I do not propose to travel through the long catena of authorities. They were copiously referred to at the Bar, and the principal cases are stated and carefully analysed in the judgment of WRIGHT, J., in *Warren* v. *Brown* (3). You will find that in the earlier authorities the obscuration of light to a tenement having ancient lights is dealt with on the footing of a nuisance. In *Aldred's Case* (5) the "hindrance of light" is treated in the same category as the nuisance of fouling the air by pigsties. In *Fishmongers' Co.* v. *East India Co.* (1) LORD HARDWICKE said:

> "As to the question whether the plaintiffs' messuage is an ancient building so as to entitle them to the right of the lights, and whether the plaintiffs' lights will be darkened, I will not determine it here, for if it clearly appeared that what the defendants are doing is what the law considers as a nuisance, I would put it in a way to be tried. . . . But I am of opinion that it is not a nuisance contrary to law, for it is not sufficient to say it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the City, and here there will be 17 ft. distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but there is no reason to hinder a man from building on his own ground."

Consistent with this view is the direction of BEST, C.J., to the jury in the oft-quoted case of *Back* v. *Stacey* (6). The learned judge said (2 C. & P. at p. 466):

> "It was not sufficient to constitute an illegal obstruction that the plaintiff has in fact less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise be applied. In order to give a right of action there must be a substantial privation of light, sufficient to render the occupation uncomfortable, and to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he has formerly done."

In *Clarke* v. *Clark* (2) LORD CRANWORTH stated the question thus (1 Ch. App. at p. 17):

> "Whether the obstruction complained of is such as to deprive the complaining party of such a supply of light and air as he might reasonably calculate on enjoying."

After saying that the plaintiffs' rooms were rendered less cheerful, he adds (ibid. at pp. 19, 20):

> "But I cannot think that this is such an obstruction of light as to amount to a nuisance. . . . What the plaintiff is bound to show is that the buildings cause

such an obstruction of light as to interfere with the ordinary occupations of life."

In *Robson* v. *Whittingham* (19), decided in the following year, Knight Bruce and Turner, L.JJ., expressed themselves as entirely satisfied with Lord Cranworth's judgment, and Turner, L.J., accentuated his approval by saying that he thought this class of cases had been carried too far before the decision in *Clarke* v. *Clark* (2) was pronounced. Nothing that I can say will add to the respect and authority which the opinions of those two learned and experienced judges must command with your Lordships.

It has been thought that s. 3 of the Prescription Act, 1832, altered substantially the previously existing law as to ancient lights, and had the effect of conferring on the owner of the dominant tenement, by twenty years' enjoyment, an absolute and indefeasible right to the full amount of the light enjoyed during that period, and it must be admitted that the language of the section lends some plausibility to that opinion. It is, however, not consistent with the language of Lord Cranworth in *Clarke* v. *Clark* (2), and the point was expressly determined by James and Mellish, L.JJ., in *Kelk* v. *Pearson* (16), decided by them in the year 1871. James, L.J., there says (6 Ch. App. at p. 811):

> "I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building on his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable."

The statute, in fact, has only altered the conditions or length of user by which the right may be acquired, but not the nature of the right. In *City of London Brewery Co.* v. *Tennant* (17), Lord Selborne, L.C., expressed his complete adherence to the view of the law taken in *Kelk* v. *Pearson* (16), correcting some impressions which might have arisen from the language used in some former cases by some learned judges.

This doctrine, however, has not been unchallenged. In an Irish case of *Mackey* v. *Scottish Widows' Fund Assurance Society* (20), decided in 1877, Christian, L.J., criticised in vigorous language the judgments of James, L.J., and Lord Selborne, and held that the right was to an average maximum of the light which nature has been shedding upon the window for twenty years before the defendant interrupted it. It is also difficult to reconcile the language used by Cotton and Bowen, L.JJ., in *Scott* v. *Pape* (10), or the language of the Queen's Bench judges in *Moore* v. *Hall* (21), with the decisions in *Kelk* v. *Pearson* (16) and *City of London Brewery Co.* v. *Tennant* (17), though the authority of those cases was not in terms questioned by them. I regard the decisions in *Kelk* v. *Pearson* (16) and *City of London Brewery Co.* v. *Tennant* (17) as complementary to, and on the same lines with, Lord Cranworth's judgment in *Clarke* v. *Clark* (2), and, so regarding it, I entirely approve of it. Romer, L.J., however, in delivering the judgment of the court in *Warren* v. *Brown* (3), seems to have taken a different view of the effect of *Kelk* v. *Pearson* (16)." He says:

> "Since *Kelk* v. *Pearson* (16) it is impossible to hold properly that the statutory right is not interfered with merely because after the interference the house comes up to a supposed standard as to what a house ordinarily requires by way of light for purposes of inhabitancy or business."

He quotes some words used by Mellish, L.J. I must remark that the particular point which was under discussion in *Warren* v. *Brown* (3), and in another form in

the present case, was not before the court in *Kelk* v. *Pearson* (16). There was no question there of a claim for protection in the use of an extraordinary amount of light required for some special purpose, or required by some unusual peculiarity in the internal structure of the building. And I regard what was said by MELLISH, L.J., as directed to the arguments addressed to the court in that case. According to any standard short of holding that the right is to all the light which has come through the window, the right to light has a ragged edge to it, and it is impossible to assert that any man has a right to a fixed amount of light ascertainable by metes and bounds. I do not think that MELLISH, L.J., intended to differ from JAMES, L.J., and in *City of London Brewery Co.* v. *Tennant* (17), when JAMES, L.J., repeated the substance of what he had said in the earlier case, MELLISH, L.J., according to the report, contented himself with a simple concurrence.

I must advert for a few moments to an impression which has been entertained by some distinguished judges, and was the subject of an argument at the Bar, to the effect that within the space of a few months LORD CRANWORTH overruled himself. The judgment in *Clarke* v. *Clark* (2) was delivered on Nov. 25, 1865, and that in *Yates* v. *Jack* (18) was delivered on Mar. 24, 1866. It was thought by LORD CHELMSFORD in *Calcraft* v. *Thompson* (9) that the effect of the later case was to hold the dominant tenement entitled to the whole light that had previously been enjoyed, and WOOD, V.-C., in *Dent* v. *Auction Mart Co.* (22) to a certain extent shared the same impression. There is not a hint in the judgment in *Yates* v. *Jack* (18) which indicates that LORD CRANWORTH thought that he was departing from the law as laid down in his earlier judgment. Both cases were decided and probably reported before *Robson* v. *Whittingham* (19), but the lords justices, as we have seen, adopted *Clarke* v. *Clark* (2) as an authority which had their approval. And if the question at issue in *Yates* v. *Jack* (18) be looked at, it will be seen that the argument to which LORD CRANWORTH's judgment was directed was that it was not necessary for the plaintiff to have the ordinary quantity of light because the business which he was carrying on required a diminished quantity only. That was the argument to which LORD CRANWORTH could not accede. So understood, and reading it by the light of *Clarke* v. *Clark* (2), I do not dissent from the language used by LORD CRANWORTH in *Yates* v. *Jack* (18) (1 Ch. App. at p. 298):

> "The right conferred by the Prescription Act, 1832, is an absolute indefeasible right to the enjoyment of the light without reference to the purposes for which it has been used."

Your Lordships were told, and my experience at the Bar confirms it, that the order made in *Yates* v. *Jack* (18) has been adopted as a common form of order in cases of that description. I think this unfortunate. It was a very proper order to made in that case, and in nineteen cases out of twenty, or perhaps ninety-nine out of 100, where no question arises such as that in the present case, it would be sufficient and appropriate. But it is an erroneous proceeding to deduce an absolute rule of law from the form of an order made in a particular case. In *Lanfranchi* v. *Mackenzie* (23) MALINS, V.-C., held that a person could not, by using the dominant tenement for a period less than twenty years for some special purpose requiring an extraordinary amount of light in excess of what was required for the ordinary purposes of inhabitancy or business, entitle himself to protection for such extraordinary requirements, and thereby impose an additional restriction on his neighbour's use of his own land. In that case, as in the present one, it was not proved that the extraordinary amount of light had been used for twenty years. The VICE-CHANCELLOR, quoting the words of another judge, said (L.R. 4 Eq. at p. 428):

> "No man can by any act of his own suddenly impose a new restriction on his neighbour."

In their judgment in *Warren* v. *Brown* (3) the Court of Appeal dissented from this decision, and their opinion was the logical conclusion from the views which they expressed as to the nature and extent of the easement. I do not concur with the

A opinion of the Court of Appeal, for I think that *Lanfranchi* v. *Mackenzie* (23) was rightly decided. I agree with the VICE-CHANCELLOR that it would be contrary to the principles of the law relating to easements that the burden on the servient tenement should be increased or varied from time to time at the will of the owner of the dominant tenement. The easement is for access of light to the building, and if the building retains its substantial identity, or if the ancient lights retain their sub-
B stantial identity, it does not seem to me to depend on the use which is made of the chambers in the building or to be varied by any alteration which may be made in the internal structure of it.

I do not propose to discuss at length the question how far a variation in a tenement will destroy an easement appurtenant to it. The law on that subject is as old as *Luttrell's Case* (24). In *Martin* v. *Goble* (25) a malthouse had been converted
C into a workhouse, and it was held that the house was entitled to the degree of light necessary for a malthouse, not for a dwelling-house. That case has been the subject of much criticism, and I think that some judges have thought that the language of the Lord Chief Baron had a wider scope than it was intended to have. Following the suggestion of WOOD, V.-C., it may be supported on the ground that (to use the language of *Luttrell's Case* (24)) the alteration affected the substance and not only
D the quality of the tenement. But while agreeing that a person does not lose his easement by any change in the internal structure of his building or the use to which it is put, and that regard may be had not only to the present use, but also to any ordinary uses to which the tenement is adapted, I think it quite another question whether he is entitled to be protected at the expense of his neighbour in the enjoyment of the light for some special or extraordinary purpose. It is agreed on all
E hands that a man does not lose or restrict his right to light by non-user of his ancient lights or by not using the full measure of light which the law permits. If that measure be by common law or by the statute, the whole amount of light which has had access to his windows, cadit quæstio. But if this view of the law be not accepted, you must introduce that "supposed standard" which ROMER, L.J., repudiates. If the actual user is not the test where the use falls below the standard
F of what may reasonably be required for the ordinary uses of inhabitancy and business, why (it may be asked) should it be made a test where the use has been of a special or extraordinary character in excess of that standard. It does seem to me unreasonable to hold that where a man for his own convenience or profit converts two or more rooms of his house into one without making provision for lighting them, or converts a portion of his house into a photographic studio, or puts it to some
G similar purpose, he can suddenly call upon his neighbour to leave him a supply of light which is rendered necessary only by such alterations, and thereby impose what is in substance and in truth an increased burden on his neighbour. If the action be brought a month before the change it would be dismissed. If it be brought a month afterwards an injunction would be granted. I am of opinion that the courts have gone too far in this question of lights, and have imposed undue restrictions on
H persons in the exercise of their lawful right to build on their own land.

In the second argument before your Lordships the leading counsel for the respondents contended that his clients had for more than twenty years enjoyed the access of light over the appellant's land to their ground-floor office in its present condition. I believe that all your Lordships are agreed with JOYCE, J., that there is no proof to support such a contention. The fact relied on was not put in issue at
I the trial, and the evidence was not directed to it. If the plaintiffs had intended to claim and rely on a special easement of that description, it was for them to state their claim and prove the facts to support it. It is unnecessary to say, therefore, whether such a claim would be good in law. MALINS, V.-C., thought that it could be sustained if the special user was had with the knowledge of the owner of the servient tenement. I will only say that I see some difficulties in the way, and reserve my opinion.

I must apologise for the length at which I have trespassed on your attention. According to both principle and authority, I am of opinion that the owner or

occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, and that the question for what purpose he has thought fit to use that light, or the mode in which he finds it convenient to arrange the internal structure of his tenement, does not affect the question. The actual user will neither increase nor diminish the right. The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon, whether the obstruction complained of is a nuisance. I do not myself think that this rule is difficult of application in practice. In the majority of cases no such questions as those which have been raised in *Warren* v. *Brown* (3) and the present case occur. The experience of surveyors who are practically conversant with this matter is entitled to great respect. As is stated in the evidence, they have adopted a working rule for the purpose of advising those who consult them and settling differences by negotiation. The rule of 45 degrees is not, of course, a rule of law, and is not applicable to every case. But I agree with Lord Selborne in *City of London Brewery Co.* v. *Tennant* (17) that it may properly be used as primâ facie evidence. For these reasons I think that the appeal should be allowed, and the decree of Joyce, J., restored with costs here and below.

LORD ROBERTSON.—I agree with the opinion of Lord Davey.

LORD LINDLEY.—Joyce, J., who was asked to grant an injunction before the defendant's building had been erected, considered that, although the building would sensibly diminish the plaintiffs' light, the diminution would not materially affect their comfort or convenience, and would not be sufficient to entitle the plaintiffs to any relief, and he dismissed their action. The Court of Appeal, however, took a different view, and granted a mandatory injunction ordering the defendant to pull down part of his building which had been completed after the injunction had been refused. Hence this appeal.

The language of s. 3 of the Prescription Act, 1832, shows that in order to acquire a right to light there must be, first, access and use of light, not access alone. Access here is understood to refer to free passage of light over the servient tenement: see per Fry, L.J., in *Scott* v. *Pape* (10), and per Kay, J., in *Cooper* v. *Straker* (26). Secondly, such access and use must be to and for some dwelling-house, workshop, or other building (as to which see *Harris* v. *De Pinna* (27)). Thirdly, such access and use must be actually enjoyed therewith. Fourthly, such enjoyment must be without interruption for twenty years. Fifthly, if all these are proved, the right to the access and use of light so enjoyed becomes absolute and indefeasible unless it can be explained by some deed or writing. Pausing here for a moment, it will be observed that the statute does not in terms confer a right to light, but rather assumes its acquisition by use and enjoyment, and declares it to be "absolute and indefeasible." Again, it will be observed that nothing is said about enjoyment as of right; and notwithstanding s. 5 of the Act, which refers to the enjoyment as of right, it was early decided that as regards light claimed under s. 3 enjoyment as of right need not be alleged or proved, and that the right, whatever it may be, is acquired by twenty years' use and enjoyment without interruption and without written consent: see *Truscott* v. *Merchant Taylors' Co.* (28); *Frewen* v. *Philipps* (29); *Simper* v. *Foley* (30), and *Harbidge* v. *Warwick* (31). This was not so under the old law. As regards use and enjoyment there are some instructive decisions on unfinished and uninhabited houses, and on windows kept closed by shutters. These decisions show that a right to light may be acquired in respect of a house which has stood for twenty years without being occupied or even finished so as to be fit for occupation; and that the fact that shutters have been closed for some months at a time does not prevent the acquisition of a right to light through the windows: see *Courtauld* v. *Legh* (32); *Cooper* v. *Straker* (26); *Collis* v. *Laugher* (33); and *Smith* v. *Baxter* (34).

A These decisions did not, however, turn upon or settle with any precision the amount of light to which a right is acquired by twenty years' user. Nor is the statute clear upon this point. At one time it appears to have been considered that in all cases the size and situation of the aperture through which light had come for twenty years formed both the maximum and minimum measure of the right acquired, without reference to the use and enjoyment of the light which had so B come. This view was based on some observations made by LORD WESTBURY in *Tapling* v. *Jones* (11) (11 H.L.Cas. at pp. 305, 306) and on LORD CRANWORTH'S judgment in *Yates* v. *Jack* (18), which I will notice presently. LORD CHELMSFORD took the same view in *Calcraft* v. *Thompson* (9). But this view was emphatically negatived by the Court of Appeal in Chancery in *Kelk* v. *Pearson* (16), *City of London Brewery Co.* v. *Tennant* (17), and *Leech* v. *Schweder* (35). In *Moore* v. C *Hall* (21), however, both MELLOR and MANISTY, JJ., adopted the interpretation thus repudiated, but it does not appear that they were aware of the repudiation. *Kelk* v. *Pearson* (16) shows that in ordinary cases a person does not necessarily acquire a right to all the light which he has had for twenty years. He may have had more then he reasonably required either for domestic or business purposes; and in that case his right is limited to the amount of light reasonably required. There can be D no doubt that LORD CRANWORTH'S language in *Yates* v. *Jack* (18) and the form of injunction granted have been regarded as authorities for the view that in all cases the statute confers a right to all the light which has come to a window for twenty years; and there are passages in the judgments of COTTON and BOWEN, L.JJ., in *Scott* v. *Pape* (10) which support the same view. This is to be regretted, as it has tended to unsettle the rule laid down in *Kelk* v. *Pearson* (16).

E The decision in *Yates* v. *Jack* (18) did not, however, really go so far as has been supposed, for the plaintiff's windows were darkened to such an extent as to render the house much less convenient for purposes of business than it was before. The case did not turn on the mere fact that some diminution of light was proved. The plaintiff's right to light was clearly infringed, whether the measure of the light to which he was entitled was all that had come through his windows, or only so much F as was reasonably necessary for business purposes. If these facts are borne in mind, nothing will be found in the actual decision which conflicts with the views previously expressed by LORD CRANWORTH in *Clarke* v. *Clark* (2) and adopted by the Court of Appeal in the cases already mentioned. The common form of injunction in these cases is that adopted in *Yates* v. *Jack* (18) and *Dent* v. *Auction Mart Co.* (22). It is to restrain the defendant from erecting any building so as to G obstruct the free access of light to the ancient windows of the plaintiff as such access was enjoyed previously to the taking down of the house which formerly stood on the site of the defendant's new buildings. This form is framed upon the supposition that the plaintiff has established his right to the amount of light which he in fact enjoyed before the obstruction complained of. But it by no means follows from the form that everyone is entitled to an injunction who can prove that H he has been deprived of some of the light which he in fact had before it was interfered with. He may have had more than he can acquire a right to use and enjoy in future. I am, however, under the impression that this inference has been drawn, and that the form has been regarded as strengthening the view of the law repudiated in *Kelk* v. *Pearson* (16).

So to regard the form is, in my opinion, a mistake. The doctrine laid down in I *Back* v. *Stacey* (6), as I understand it, is the same as that laid down, although in somewhat different language, by the Court of Appeal in *Kelk* v. *Pearson* (16) and *City of London Brewery Co.* v. *Tennant* (17), and must, I think, be taken as finally established, and as good sound law which this House should adopt, notwithstanding the observations in the Irish case of *Mackey* v. *Scottish Widows' Fund Assurance Society* (20). That doctrine, as stated in *City of London Brewery Co.* v. *Tennant* (17), is that, generally speaking, an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable

use and enjoyment of his house as a dwelling-house if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, a shop, or other place of business. The expressions "the ordinary notions of mankind," "comfortable use and enjoyment," and "beneficial use and occupation," introduce elements of uncertainty; but similar uncertainty has always existed, and exists still, in all cases of nuisance; and in this country an obstruction of light has commonly been regarded as a nuisance, although the right to light has been regarded as a peculiar kind of easement.

If a more absolute standard had been adopted in all cases certainty would, no doubt, have been gained; but the consequences would frequently have been very oppressive to the owner of the servient tenement, and far more so than under the old law. The owner of the servient tenement could have done nothing on his own land which in fact diminished the light acquired by his neighbour, even if all of it was not wanted for comfortable enjoyment or business purposes. It would follow that the owner of a piece of vacant land opposite to a house in an ordinary street could not build upon it at all after twenty years. The adherence to the old but uncertain standard of comfort and convenience avoids the danger of oppression and extortion, and renders it necessary to take a wider view of each case, especially when an injunction is asked for. The decision in *Kelk* v. *Pearson* (16) has a far-reaching effect. If there is no absolute right to all the light which comes to a given window, no action will lie for an obstruction to that light unless the obstruction amounts to a nuisance. If there is no right of action, a fortiori, there is no right to an injunction to prevent a permanent diminution of light unless it amounts to a nuisance. But in considering what is an actionable nuisance regard is had not to special circumstances which cause something to be a annoyance to a particular person, but to the habits and requirements of ordinary people, and it is by no means to be taken for granted that a person who wants an extraordinary amount of light for a particular business can maintain an action for diminution of light if only his special requirements are interfered with: see, as to nuisances to persons carrying on delicate trades or requiring more comfort or freedom from annoyance than ordinary people, *Walter* v. *Selfe* (36); *Crump* v. *Lambert* (37); and *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.* (38); and as to the character of the neighbourhood, see *St. Helen's Smelting Co.* v. *Tipping* (39.)

The expression "right to light" is sanctioned by the Prescription Act, and is convenient; but its use is apt to lead to error and to forgetfulness of the burden thrown on the servient tenement. This burden, however, ought never to be lost sight of in considering the extent of the right claimed in respect of the dominant tenement. But the adoption of the more flexible standard of comfort and convenience has introduced difficulties of a serious nature, especially when dealing with places of business; and it is not surprising that different views on this subject should have been taken, and that the decisions upon it should be inconsistent with each other. That they are inconsistent is apparent from the careful review of them by WRIGHT, J., in *Warren* v. *Brown* (3). In applying the rule laid down in *Kelk* v. *Pearson* (16) it is impossible to avoid considering how much light is left and where it comes from. But the question to be decided is not how much light is left, but whether the plaintiff has been deprived of so much as to constitute an actionable nuisance. If he has, it is no defence to say that he has as much light left as most other people: see *Dent* v. *Auction Mart Co.* (22). Too much weight may have been given by WRIGHT, J., to the amount of light left in *Warren* v. *Brown* (3), and this explains the reversal of his decision by the Court of Appeal. There is no rule of law that if a person has 45 degrees of unobstructed light through a particular window left to him he cannot maintain an action for a nuisance caused by diminishing the light which formerly came through that window: *Theed* v. *Debenham* (40). But experience shows that it is, generally speaking, a fair working rule to consider that no substantial injury is done to him where an angle of 45 degrees is left to him, especially if there is good light from other directions as well. COTTON, L.J., pointed

this out in *Ecclesiastical Comrs. for England* v. *Kino* (15): see also *Parker* v. *First Avenue Hotel Co.* (41).

As regards light from other quarters, such light cannot be disregarded; for, as pointed out by JAMES, V.-C., in *Dyers' Co.* v. *King* (42), the light from other quarters and the light the obstruction of which is complained of may be so much in excess of what is protected by law as to render the interference complained of non-actionable. I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account. The purpose for which a person may desire to use a particular room or building in future does not either enlarge or diminish the easement which he has acquired. If he chooses in future to use a well-lighted room or building for a lumber room, for which little light is required, he does not lose his right to use the same room or building for some other purpose for which more light is required. *Aynsley* v. *Glover* (43) is in accordance with this view. But if a room or building has been so built as to be badly lighted, the owner or occupier cannot by enlarging the windows or altering the purpose for which he uses it increase the burden on the servient tenement. *Martin* v. *Goble* (25), where a malthouse was turned into a workhouse, may, I think, be upheld on this principle, and the observations of WOOD, V.-C., on *Martin* v. *Goble* (25) in *Dent* v. *Auction Mart Co.* (22) support this view. There was in fact no substantial interference with the light to which they were entitled.

Coming now to the present case, I am clearly of opinion that no injunction, and certainly no mandatory injunction, ought to have been granted. JOYCE, J., was asked for an injunction and he refused it, and, in my opinion, quite rightly. He came to the conclusion that, although there would be a sensible diminution of light and some inconvenience to the plaintiffs, yet they had not established by twenty years' user a right to all the light which they had had, and that the obstruction complained of would not amount to an actionable nuisance, and so infringe the plaintiffs' right. The Court of Appeal, taking a different view of the amount of light to which the plaintiffs were entitled, reversed this decision, and ordered a partial demolition of the buildings erected by the defendant. For the reasons already given, I have come to the conclusion that this was wrong. I should stop here, were it not that I feel very strongly that in any view of the case it was not one for a mandatory injunction. I am convinced that, even if the plaintiffs have a cause of action, the damages which could properly be awarded them would be very small, and to grant a mandatory injunction in such a case as this would be unduly oppressive and not in accordance with the principles on which equitable relief has been usually granted: see *Curriers' Co.* v. *Corbett* (44), *Robson* v. *Whittingham* (19), and *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (45), in all of which an injunction was refused, although the plaintiff's legal right had been infringed. In *Warren* v. *Brown* (3) the Court of Appeal only gave damages. The present case is eminently one in which damages would be an adequate remedy, even assuming that the plaintiffs could prove a small nuisance for which some damages could be properly given; and where that is the case an injunction, and especially a mandatory injunction, ought not to issue. The doctrine that where a legal right is continuously infringed an injunction to protect it ought to be granted is subject to qualification, as was carefully explained by SIR GEORGE JESSEL, M.R., in *Aynsley* v. *Glover* (43), and more recently by the Court of Appeal in *Shelfer* v. *City of London Electric Lighting Co.* (46). The result of the foregoing review of the authorities is not altogether satisfactory.

The general principle deducible from them appears to be that the right to light is, in truth, no more than a right to be protected against a particular form of nuisance, and that an action for the obstruction of light which has in fact been used and enjoyed for twenty years without interruption or written consent, cannot be sustained unless the obstruction amounts to an actionable nuisance; and this often depends upon considerations wider than facts applicable to the particular case. There are elements of uncertainty which render it impossible to lay down any

definite rule applicable to all cases. First, there is the uncertainty as to what amount of obstruction constitutes an actionable nuisance; and, secondly, there is the uncertainty as to whether the proper remedy is an injunction or damages. But, notwithstanding these elements of uncertainty, the good sense of judges and juries may be relied upon for adequately protecting rights to light on the one hand, and freedom from unnecessary burdens on the other. There must be consideration for both sides in all these controversies. In this case the Court of Appeal have, in my opinion, gone too far, and the appeal ought to be allowed, with costs here and below.

Appeal allowed.

Solicitors: *Hyde Tandy, Mahon & Sayer*; *Slaughter & May.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

R. *v.* BOND

[Court for Consideration of Crown Cases Reserved (Lord Alverstone, C.J., Kennedy, Ridley, Darling, Jelf, Bray and A. T. Lawrence, JJ.), April 30, May 26, June 12, 1906]

[Reported [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 54 W.R. 586; 22 T.L.R. 633; 50 Sol. Jo. 542; 21 Cox, C.C. 252]

Criminal Law—Evidence—Evidence of similar offences—Admissibility—General rule—Abortion—Evidence of previous illegal operation and statement by prisoner of performance of many other operations.

Apart from express statutory enactment evidence tending to show that the accused has been guilty of criminal acts other than those caused by the indictment on which he is charged cannot be given unless the acts sought to be proved are so closely and inextricably connected with the history of the offence charged as to form part of the evidence which cannot be excluded if the offence is to be proved, or are material to the question whether the acts alleged to constitute the crime charged were designed or accidental or done by mistake, or to rebut a defence which would otherwise be open to the accused, or to show a systematic course of criminal conduct, or where the accused has put his character in issue. But the utmost vigilance should be maintained in restricting the number of such cases and in seeing that the general rule of the criminal law of England which excludes evidence of prior offences is not broken or frittered away by the creation of novel and anomalous exceptions.

Per Kennedy, J., and Bray, J.: When the question of criminal intent is material, then, although in strictness the case is not one of disproving accident or mistake, evidence of prior occurrences may become admissible against the prisoner: *R.* v. *Cooper* (1) (1849), 13 J.P. 316.

The prisoner was indicted for procuring the miscarriage of J. Evidence was given that he had used certain instruments on her, and the defence was that the prisoner, a qualified surgeon, was performing a lawful operation on her and never intended the miscarriage which in fact was brought about. Evidence was tendered by the prosecution that nine months previously the prisoner had used the same instruments in the same manner on one T. with the avowed intention of procuring her miscarriage and that he had then told

her that he had performed similar operations on a number of girls with similar instruments.

Held (LORD ALVERSTONE, C.J., and RIDLEY, J., dissentientibus): the evidence was admissible.

Notes. Considered: *R.* v. *Ball*, [1911] A.C. 47. Applied: *R.* v. *Thomson* (1912), 76 J.P. 431. Considered: *R.* v. *Rodley*, [1911–13] All E.R.Rep. 688; *R.* v. *Boyle and Merchant*, [1914–15] All E.R.Rep. 553; *Perkins* v. *Jeffery*, [1914–15] All E.R.Rep. 172; *Noor Mohamed* v. *R.*, [1949] All E.R. 365. Referred to: *R.* v. *Chitson*, [1909] 2 K.B. 945; *R.* v. *Charlesworth* (1910), 4 Cr. App. Rep. 167; *R.* v. *Ellis*, [1908–10] All E.R.Rep. 488; *R.* v. *Stone* (1910), 6 Cr. App. Rep. 89; *R.* v. *Price* (1913), 9 Cr. App. Rep. 15; *R.* v. *Shellaker* (1913), 110 L.T. 351; *R.* v. *Mason* (1914), 111 L.T. 336; *Thompson* v. *D.P.P.*, [1918–19] All E.R.Rep. 521; *R.* v. *Lovegrove*, [1920] 3 K.B. 643; *R.* v. *Armstrong*, [1922] All E.R.Rep. 153; *R.* v. *Starkie*, [1922] 2 K.B. 275; *Maxwell* v. *D.P.P.*, [1934] All E.R.Rep. 168; *R.* v. *Porter* (1935), 25 Cr. App. Rep. 59; *R.* v. *Mortimer* (1936), 25 Cr. App. Rep. 150; *Harris* v. *D.P.P.*, [1952] All E.R. 1044.

As to the admissibility of evidence of offences other than that charged, see 10 HALSBURY'S LAWS (3rd Edn.) 442–445; and for cases see 14 DIGEST (Repl.) 415 et seq.

Cases referred to:

(1) *R.* v. *Cooper* (1849), 13 J.P. 316; 3 Cox, C.C. 547; 14 Digest (Repl.) 437, *4236*.

(2) *R.* v. *Geering* (1849), 18 L.J.M.C. 215; 8 Cox, C.C. 450, n.; 14 Digest (Repl.) 422, *4112*.

(3) *R.* v. *Dale* (1889), 16 Cox, C.C. 703; 14 Digest (Repl.) 431, *4180*.

(4) *R.* v. *Rearden* (1864), 4 F. & F. 76; 14 Digest (Repl.) 418, *4083*.

(5) *R.* v. *Gray* (1866), 4. F. & F. 1102; 14 Digest (Repl.) 442, *4296*.

(6) *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, *4094*.

(7) *R.* v. *Wyatt*, [1904] 1 K.B. 188; 73 L.J.K.B. 15; 68 J.P. 31; 52 W.R. 285; 20 T.L.R. 68; 48 Sol. Jo. 85; 20 Cox, C.C. 462, C.C.R.; 14 Digest (Repl.) 439, *4258*.

(8) *R.* v. *Rhodes*, [1899] 1 Q.B. 77; 68 L.J.Q.B. 83; 79 L.T. 360; 62 J.P. 774; 47 W.R. 121; 15 T.L.R. 37; 43 Sol. Jo. 45; 19 Cox, C.C. 182, C.C.R.; 14 Digest (Repl.) 438, *4245*.

(9) *R.* v. *Ollis*, [1900] 2 Q.B. 758; 69 L.J.Q.B. 918; 83 L.T. 251; 64 J.P. 518; 49 W.R. 76; 16 T.L.R. 477; 44 Sol. Jo. 593; 19 Cox, C.C. 554, C.C.R.; 14 Digest (Repl.) 438, *4248*.

(10) *R.* v. *Oddy* (1851), 2 Den. 264; T. & M. 593; 4 New Sess. Cas. 602; 20 L.J.M.C. 198; 17 L.T.O.S. 136; 15 J.P. 308; 15 Jur. 517; 5 Cox, C.C. 210, C.C.R.; 14 Digest (Repl.) 502, *4851*.

(11) *R.* v. *Cole* (1810), 3 Russell on Crime (10th Edn.), p. 848; 14 Digest (Repl.) 410, *4008*.

(12) *R.* v. *Butler* (1846), 2 Car. & Kir. 221; 2 Cox, C.C. 132; 14 Digest (Repl.) 421, *4101*.

(13) *R.* v. *Carter* (1884), 12 Q.B.D. 522; 53 L.J.M.C. 96; 50 L.T. 596; 48 J.P. 456; 32 W.R. 663; 15 Cox, C.C. 448, C.C.R.; 14 Digest (Repl.) 434, *4219*.

(14) *R.* v. *Wylie* (1804), 1 Bos. & P.N.R. 92; 127 E.R. 393; sub nom. *R.* v. *Whiley*, 2 Leach, 983; 14 Digest (Repl.) 416, *4061*.

(15) *R.* v. *Firth* (1869), L.R. 1, C.C.R. 172; 38 L.J.M.C. 54; 19 L.T. 746; 33 J.P. 212; 17 W.R. 327; 11 Cox, C.C. 234, C.C.R.; 14 Digest (Repl.) 418, *4081*.

(16) *R.* v. *Hagan* (1873), 12 Cox, C.C. 357; 14 Digest (Repl.) 415, *4046*.

(17) *R.* v. *Cotton* (1873), 12 Cox, C.C. 400; 14 Digest (Repl.) 429, *4166*.

(18) *R.* v. *Roden* (1874), 12 Cox, C.C. 630; 14 Digest (Repl.) 429, *4170*.

(19) *R.* v. *Winslow* (1860), 8 Cox, C.C. 397, N.P.; 14 Digest (Repl.) 429, *4164*.

(20) *R.* v. *Francis* (1874), L.R. 2, C.C.R. 128; 43 L.J.M.C. 97; 30 L.T. 503; 38 J.P. 469; 22 W.R. 663; 12 Cox, C.C. 612, C.C.R.; 14 Digest (Repl.) 437, *4244.*

(21) *R.* v. *Richardson* (1861), 2 F. & F. 343; 8 Cox, C.C. 448; 14 Digest (Repl.) 424, *4120.*

(22) *R.* v. *Fuller* (1816), R. & R. 308.

(23) *R.* v. *Weeks* (1861), Le. & Ca. 18; 30 L.J.M.C. 141; 4 L.T. 373; 25 J.P. 357; 7 Jur.N.S. 472; 9 W.R. 553; 8 Cox, C.C. 455, C.C.R.; 14 Digest (Repl.) 442, *4291.*

(24) *R.* v. *Colclough* (1882), 15 Cox, C.C. 92; 14 Digest (Repl.) 426, **2648.*

(25) *Blake* v. *Albion Life Assurance Society* (1878), 4 C.P.D. 94; 48 L.J.Q.B. 169; 40 L.T. 211; 27 W.R. 321; 14 Cox, C.C. 246; 22 Digest (Repl.) 67, *448.*

(26) *R.* v. *Holt* (1860), Bell, C.C. 280; 30 L.J.M.C. 11; 3 L.T. 310; 24 J.P. 757; 6 Jur.N.S. 1121; 9 W.R. 74; 8 Cox, C.C. 411, C.C.R.; 14 Digest (Repl.) 421, *4103.*

(27) *R.* v. *Dossett* (1846), 2 Car. & Kir. 306; 2 Cox, C.C. 243; 14 Digest (Repl.) 442, *4293.*

Also referred to in argument:

R. v. *Heeson* (1878), 14 Cox, C.C. 40; 14 Digest (Repl.) 415, *4051.*

R. v. *Mogg* (1830), 4 C. & P. 364; 14 Digest (Repl.) 442, *4292.*

Case Stated by A. T. Lawrence, J., for the consideration of the Court for Crown Cases Reserved.

John Bond was tried before the learned judge at Chester Assizes on Mar. 15 and 16, 1906, on an indictment under s. 58 of the Offences Against the Person Act, 1861, for feloniously using instruments upon one Ethel Annie Jones on Oct. 20, 1905, with intent thereby to procure her miscarriage. Evidence of admissions by the prisoner of the use of instruments upon Ethel Annie Jones was given by witnesses for the prosecution, but it was suggested that such use was for a lawful purpose, and with no criminal intent. The evidence of one Gertrude Sandles Taylor was tendered for the prosecution to show intent. It was objected to by the learned counsel for the prisoner on the ground that such evidence was inadmissible inasmuch as there were other indictments awaiting trial against the prisoner for offences against the same statute in respect of acts alleged to have been done by the prisoner to Gertrude Sandles Taylor in January, 1905, which acts had no reference to Ethel Annie Jones, and were not evidence of the intent with which the prisoner had used the instruments upon Ethel Annie Jones. The learned judge was of opinion, upon the authority of *R.* v. *Geering* (2) and other cases, that the evidence was admissible. The evidence of Gertrude Sandles Taylor was given, and a copy of his Lordship's note of such evidence accompanied this Case, and could be referred to as part thereof. His Lordship left the question to the jury whether or not the prisoner had used the instruments with the intent alleged in the indictment, and told them that, unless they were satisfied he had such intent, they should find him not guilty. The jury found the prisoner Guilty, and he was sentenced to three years' penal servitude, the execution of the sentence being respited until after the decision of this case. The prisoner was allowed bail. The question for the opinion of the court was whether the evidence of Gertrude Sandles Taylor was admissible. If the evidence were admissible, the conviction was to stand; if inadmissible, the conviction was to be quashed.

The evidence of Gertrude Sandles Taylor, of which the learned judge's note was set out in the Case, was shortly as follows. Taylor deposed that, in consequence of the prisoner having connection with her in January, 1905, she became pregnant; that, on informing the prisoner of her condition, he said: "I am a doctor, and will put you all right." She identified a speculum, a volsellum, and a catheter as instruments produced by him and used by him on her with the intention of procuring abortion. She also said that the prisoner had required her to promise

A that she would not tell anyone, and had stated that "he had put dozens of girls right."

Francis Williams, K.C. (with him *Ellis Griffiths*), for the prisoner.
Abel Thomas, K.C. (with him *R. V. Bankes*), for the Crown.

B *Cur. adv. vult.*

June 12, 1906. The following judgments were read.

LORD ALVERSTONE, C.J.—In this case the defendant was indicted under s. 58 of the Offences Against the Person Act, 1861, for feloniously using instruments upon one Ethel Annie Jones on Oct. 20, 1905, with intent thereby to procure C miscarriage. It was not disputed that in fact the accused had used instruments, but it was suggested that they were used for a lawful purpose and with no criminal intent. At the trial the evidence of a girl named Gertrude Taylor was tendered and admitted. The evidence of this witness was to the effect that in January, 1905, she had been staying at the house of the accused and that he had connection with her, and that subsequently, thinking that she was preg- D nant, she had informed the prisoner, and that he had used instruments of the same character upon her with a view to procuring miscarriage. My brother Lawrence, upon the authority of *R.* v. *Geering* (2), *R.* v. *Dale* (3), and other cases cited before him, admitted the evidence, and the question raised is whether it was rightly admitted.

The general rule of law applicable in such cases can, I think, be clearly stated. E It is that, apart from express statutory enactment, evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence upon which it is proved: see *R.* v. *Rearden* (4); or they are material to the question whether the acts alleged to constitute the crime were designed or accidental; *R.* v. *Gray* (5), F or to rebut a defence which would otherwise be open to the accused: see *Makin* v. *A.-G. for New South Wales* (6). As is pointed out in the last-mentioned case, the statement of these general principles is easy; in applying them it is often very difficult to draw the line and decide whether a particular piece of evidence is admissible or not. In the present case it was not disputed that the prisoner had in fact used the instruments upon the girl Jones, either, as he suggested, for G a lawful purpose, or, as it was alleged by the prosecution, for an unlawful purpose. Can it be said that the fact that he had used instruments for an unlawful purpose upon another girl some nine months before has any bearing upon the purpose for which they were used on the occasion in question?

It is, I think, easy to give illustrations of cases in which such evidence will H clearly be admissible, as, for instance, if the prosecution alleged that the accused was carrying on the business of an abortionist, and had with that object, and with that object only, on several occasions used instruments or provided drugs for reward or remuneration to himself, or if, the purpose for which the particular instruments could be used being doubtful, it was alleged that any injury caused by such use was accidental. In most cases it seems to me that evidence of the I kind would be admissible, as was recently pointed out in this court in *R.* v. *Wyatt* (7), following *R.* v. *Rhodes* (8) and *R.* v. *Ollis* (9). I have grave doubts whether the circumstances of this case are sufficient to render the evidence admissible upon the principle recognised in these cases. Primâ facie there was no necessary connection between the act charged in the present indictment and the act alleged in the evidence admitted. It might possibly be suggested that, inasmuch as it was proved or admitted that the accused had improper intercourse with the two girls Jones and Taylor, and that both of them, as the result of such intercourse, had become pregnant, the evidence tended to establish a system or course of

conduct on the part of the prisoner in cases in which he had got girls with child. I think, however, that this ground is too dangerous, and not sufficient to justify the admission of the evidence. I must not, however, be supposed to decide that there might not be cases in which the evidence would have been admissible on such grounds, but this does not appear to me to be one of them. Nor does it by any means follow that evidence will be inadmissible on the ground only that it goes to prove only one of other criminal acts, and not one of a number; there may be other circumstances showing the act sought to be proved to be part of a criminal practice or system of which the criminal offence charged in the indictment formed part. The mere fact that the evidence tendered pointed to only one act is not conclusive against the admissibility.

I would point out that in *R.* v. *Geering* (2), *R.* v. *Gray* (5), and *Makin* v. *A.-G. for New South Wales* (6) the evidence was clearly admissible in order to rebut the allegation of accident or mistake. In the present case, assuming, as I have said, the grounds upon which the evidence might be admitted not to apply, the case would appear to me to resemble *R.* v. *Oddy* (10), in which before the Prevention of Crimes Act, 1871, s. 19 [repealed by Larceny Act, 1916], evidence of the possession by the prisoner of property other than that charged in the indictment, stolen from other persons, was held not admissible.

It is necessary, however, that I should refer to *R.* v. *Dale* (3) tried at the Central Criminal Court on Aug. 16, 1889, where, on an indictment under this section for using a quill to bring about a miscarriage, counsel for the prosecution referred in his opening statement to evidence he intended to call to prove that the prisoner charged had made use of a quill for a similar purpose on other occasions. CHARLES, J., ruled that evidence of similar acts of the prisoner, practised on different women both prior to and subsequent to the offence charged in the indictment, would be admissible. If that case is to be construed to authorise the admissibility of evidence of prior acts of a similar kind where the act is admitted and the only question is the purpose for which it was done, it goes too far. The report is very meagre, but, on reference to the report in the SESSIONS CASES, vol. 110, I observe that the question was raised during counsel's opening, and that at the conclusion of the opening the prisoner pleaded Guilty, so that the point was never formally raised and argued. It may be that in that case the evidence was admissible upon some one or other of the grounds to which I have referred.

My attention has been called by my brother KENNEDY to *R.* v. *Cooper* (1). In my opinion, that case may clearly be supported on the ground that the evidence tended to show that the accused knew the consequences of his act. If it is supposed to lay down a wider principle and one which would cover this case, I do not agree with it, and I may add that it does not appear to be cited as an authority upon the point argued before us. I think it right to add that, had I thought the evidence admissible, the fact that it would have tended to establish that the accused had been guilty of another crime would not have rendered it inadmissible: see *R.* v. *Rearden* (4); *Makin* v. *A.-G. for New South Wales* (6) and other cases. For the above reasons I think that the evidence was inadmissible and that the conviction should be quashed, but, as a majority of the court are of a different opinion, the conviction will stand.

KENNEDY, J.—In this case John Bond was charged with attempting to procure abortion by using instruments on the body of Ethel Annie Jones on Oct. 20, 1905. The question for the decision of the Court for Crown Cases Reserved is as to the admissibility of the evidence of another woman, Gertrude Sandles Taylor, who was called as a witness to depose that the accused, nine months before, had been guilty of the same crime upon her, and who, in the course of her examination in chief, stated that he had then used language to her indicating that previously he had been guilty of the same crime in many

other cases. In my judgment, the question is one of great importance as affecting the fair trial of accused persons.

> "It may be laid down as a general rule that in criminal, as in civil, cases the evidence shall be confined to the point in issue."

See ROSCOE'S CRIMINAL EVIDENCE (12th Edn.), pp. 78–79.

> "Where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. It is, therefore, a general rule that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge. Therefore it is not allowable to show on the trial of an indictment that the prisoner has a general disposition to commit the same kind of offence as that on which he stands indicted":

RUSSELL ON CRIMES (6th Edn.), vol. 3, p. 403. Thus it was resolved by all the judges, nearly 100 years ago, in *R.* v. *Cole* (11) that in a prosecution for an infamous crime an admission by the prisoner that he had committed such an offence at another time and with another person, and that he had a tendency to such practices, ought not to be received in evidence. LORD CAMPBELL said in *R.* v. *Oddy* (10) (20 L.J.M.C. at p. 200): "The law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first." The same law has, twelve years ago, been re-stated in a judgment of the Privy Council.

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried":

Makin v. *A.-G. for New South Wales* (6) ([1894] A.C. at p. 65). Then follows a passage in the judgment upon which reliance is placed by the counsel for the prosecution, which it is not necessary here to quote.

Nothing can so certainly be counted upon to create a prejudice against an accused upon his trial as the disclosure to the jury of other misconduct of a kind similar to that which is the subject of the indictment; and, indeed, where the crime alleged is one of a revolting character, such as the charge against Bond in the present case, and the auditor is a person who has not been trained to think judicially, the prejudice must be almost insurmountable. Therefore, if, as is plain, we have to recognise the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England, which, to the credit, in my opinion, of English justice, excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions. So sacred in our courts has been the observance of the general rule that, on the trial of a prisoner who was indicted for stealing a shilling which had been marked and was found in his possession, evidence of the prisoner's own statement to the constable who arrested him as to his possession of the moneys of the prosecutor was ruled to be inadmissible, because it related to another felony: *R.* v. *Butler* (12). Equally significant, too, has been the recognition of the general rule on the part of our legislature. The provisions of the Criminal Evidence Act, 1898, forbid, except in special circumstances, any question as to the offences committed by the prisoner or as to his past bad character; a series of earlier statutes, including the Larceny Act, 1861 [mainly repealed], the Coinage Offences Act, 1861 [rep. Coinage Offences Act, 1936], and the Prevention of Crimes Act, 1871, secure that,

when an indictment contains a charge relating to a previous conviction as well as a charge of a subsequent offence, the prisoner shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and the jury in the first instance be charged only concerning the subsequent offence. When the legislature by the Prevention of Crimes Act, 1871, s. 19, provided that, on the trial of a person charged with having received goods knowing them to be stolen or having stolen property in his possession, evidence might be given of such person having in his possession other stolen property, and that such evidence might be taken into consideration for the purpose of proving that such person knew the property to be stolen which formed the subject of the proceedings against him, it qualified this provision by limiting the evidence to property stolen within a period of twelve months preceding the prosecution, and by the words "found in the prisoner's possession" made it requisite, in order to show, from such evidence, a guilty knowledge in the person, not merely to prove that other property stolen within the previous period of twelve months had at some time previous been dealt with by the prisoner, but also to prove that such other property was found in the prisoner's possession at the time when he was found in possession of the property which is the subject of the indictment: see *R.* v. *Carter* (13).

The established limitations of the general rule and the apparent exceptions to it "at common law," to use the language of ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (23rd Edn.), p. 306, are I venture to think, at the present time reasonably plain and referable to definite and intelligible principles, although, as the decision of the present case has amply shown, it is not always easy to say whether a particular case falls within the rule or within the apparent exception. The general rule cannot be applied where the facts which constitute distinct offences are at the same time part of the transaction which is the subject of the indictment. Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible. So in *R.* v. *Whiley* (14) (2 Leach, at p. 185), LORD ELLENBOROUGH, L.J., cited a case where a man committed three burglaries in one night and stole a shirt at one place and left it at another, and they were all so connected that the court heard the history of all the burglaries and remarked that, if crimes do intermix, the court must go through the detail. Instances are cited in RUSSELL ON CRIMES (6th Edn.), pp. 405–411; ARCHBOLD'S CRIMINAL PLEADING (23rd Edn.), pp. 307–308. *R.* v. *Firth* (15) is a recent example of this class. *R.* v. *Rearden* (4) illustrates the limitation upon the general rule in the case of rape. WILLS, J., who presided at the trial in *R.* v. *Rearden* (4), cited in support of his ruling a case on the Western Circuit of larceny of grain from a barn in which he had admitted evidence of the owner of the barn that he had watched and detected several stealings by the same person. Such prior acts formed, in point of historical and circumstantial connection, inseparable parts of the transaction which the jury had to investigate. Within the same limitation, I think, come the cases of trial for murder, or wounding with felonious intent, in which evidence is admissible to show prior assaults by the prisoner upon the murdered or injured person, or menaces uttered to him by the prisoner; or to show, conversely, irritating behaviour by the deceased to the prisoner, as in *R.* v. *Hagan* (16). The relations of the murdered or injured man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial.

In my view, if we pass from the consideration of the necessary limitation which I have just illustrated, we shall find that the cases to which ARCHBOLD refers as "apparent exceptions" at common law to the general rule are cases in which

A evidence of transactions other than the act which forms the subject of the indictment has been admitted as relevant to the issue or as negativing the defence of accident or mistake in cases in which accident or mistake, if proved, would constitute a complete defence to the accusation. This is, I think, the principle upon which the group of reported murder cases, of which *R.* v. *Geering* (2), *R.* v. *Cotton* (17), *R.* v. *Roden* (18), and *Makin* v. *A.-G. for New South Wales* (6) B are familiar examples. Evidence has been held admissible to prove the happening of like fatalities to persons other than the persons with whose murder the prisoner is charged, under circumstances in which the other fatalities may reasonably be connected with action on the part of the prisoner. *R.* v. *Geering* (2) may be taken as a type. On an indictment against a prisoner for the murder of her husband by arsenic in September, 1848, evidence was tendered by the prosecution C of arsenic having been taken by the prisoner's two sons, one of whom died in December and the other in March subsequently, and also by a third son who took arsenic in April following, but did not die. Proof was given of a similarity of symptoms in the four cases. Evidence was also tendered that the prisoner lived in the same house with her husband and sons, and that she prepared their tea, cooked their victuals, and distributed them to the four parties. It was held that D this evidence was admissible for the purpose of proving, first, that the deceased husband actually died of arsenic; secondly, that the death was not accidental, and that it was not inadmissible by reason of its tendency to prove or create a suspicion of a subsequent felony. In *Makin* v. *A.-G. for New South Wales* (6) the judgment of the Privy Council expressly approved the ruling in *R.* v. *Geering* (2) after a review of the cases, LORD HERSCHELL, L.C. (who delivered the judgment), E remarking that it could not be denied that the decisions had not been completely in accord, and disapproving of the contrary ruling in *R.* v. *Winslow* (19).

It is really upon the same grounds that in a large number of cases other than cases of murder evidence of the prior acts of the prisoner, possibly constituting crimes of the same nature as the charge upon which the prisoner is on his trial, has been admitted, although these prior acts do not historically form part F of the circumstances of that charge. Here, again, the evidence has been admitted as negativing accident or mistake in regard to the occurrence which is the subject of the indictment. In all these cases it will, I think, be found that the occurrences of which evidence was admitted were occurrences connected with intent on the part of the accused, so repeated and connected with the offence for which the person was on his trial that, according to justice as well as common sense, there could be G no serious challenge of its relevancy to the issue as to accident or mistake on the part of the accused in the particular case which formed the subject of the indictment.

> "When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned is deemed to be relevant":

H STEPHEN'S DIGEST OF THE LAW OF EVIDENCE (6th Edn.), art. 12. The principle was clearly stated by LORD RUSSELL OF KILLOWEN, C.J., quoting LORD COLERIDGE, C.J., in *R.* v. *Francis* (20), when delivering the judgment of the court in *R.* v. *Rhodes* (8). He said ([1899] 1 Q.B. at p. 82) that the evidence

> "tends to show that he [the prisoner] was pursuing a course of similar acts; I and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely that he should be so often, than once, and every circumstance which shows he was not under a mistake on any one of these occasions shows he was not on the last."

So in a later case, cited in argument in the present case—*R.* v. *Ollis* (9)—WRIGHT, J., expounded the principle in similar terms, dwelling upon the importance of the element of nearness in point of time and circumstances in determining the

relevancy, and, therefore, the admissibility, of the evidence as to other acts of the accused. The learned judge said ([1900] 2 Q.B. at p. 768):

> "The evidence tended to show that the conduct of the prisoner, in tendering drafts on a bank at which he had no living account, was not inadvertent or accidental, but was part of a systematic fraud, extending over a period immediately preceding and following the date of the offence charged; and the case in this respect seems to me to be governed by *R.* v. *Francis* (20) and *R.* v. *Rhodes* (8)."

BRUCE, J., one of the dissenting judges in *R.* v. *Ollis* (9), lays down the law to the like effect (ibid. at p. 774):

> "A line of cases has established the rule that when it becomes material to establish that an act charged in the indictment, and proved to have been done, was intentional and not accidental, evidence is admissible of similar acts done by the same person, having no bearing upon, or connection with, the acts charged in the indictment, save that the acts are similar and done by the same person. This rule is sometimes stated, I think inaccurately, to be a rule which admits indirect evidence of this class to prove guilty knowledge. The evidence is, I believe, admissible under the rule I have mentioned only on the ground that it tends to negative mistake or accident. It is quite true that in many cases to negative mistake or accident is to leave no other alternative but that the act was intentionally done with a criminal intent. But the ground on which this indirect evidence is admissible is that it tends to negative mistake or accident."

It is in strict accordance with the principle enunciated by these authorities that evidence of the conduct of the prisoner on other occasions was admitted in cases of arson (*R.* v. *Gray*, (5)), of embezzlement (*R.* v. *Richardson* (21)), of false pretences (*R.* v. *Francis* (20); *R.* v. *Rhodes* (8)), of coining (*R.* v. *Fuller* (22); *R.* v. *Weeks* (23)), of forgery (*R.* v. *Whiley* (14); *R.* v. *Colclough* (24)), and of obtaining credit by fraud (*R.* v. *Wyatt* (7)). In all these cases it was necessary to negative accident or mistake; in all of them the multiplication of similar acts having some connection in their circumstances to the act which was the subject-matter of the trial was admitted to proof as evidence showing systematic conduct of the prisoner at the time of the offence charged against him, and, therefore, negativing accident or mistake on his part in the last case. But it must be admitted that there are judicial dicta which, although deserving of respect, cannot be treated with the weight which attaches to a decision. I believe that these principles which I have indicated govern most of the cases cited for the prosecution. There is authority which, speaking for myself, I am not prepared to overrule, that when the question of criminal intent is material, then, although in strictness perhaps the case is not one of disproving mere accident or mistake, evidence of prior occurrences may become admissible against the prisoner. I say this with special regard to the authority of *R.* v. *Cooper* (1), which has never been dissented from, a case in which the point was fully argued before CRESSWELL, J. It was not cited to us in argument, and, therefore, I think it well to state the salient principles and the reasoning of the judge who presided at the trial, which makes the case peculiarly relevant to the matter now before us, because he makes use of a charge of abduction as an illustration of the admissibility of a number of similar acts to negative innocence of intent.

In the present case, as it appears to me, there is not in dispute a question of accident or mistake. It was not disputed that the accused, a qualified surgeon as I understand the facts, but not then in active practice, had used the surgical instruments upon Ethel Annie Jones. Did he use them for a lawful or for an unlawful purpose? That is the sole issue; in other words, had he or had he not in using them the mens rea? In my opinion, if the evidence had consisted solely of the single act alleged by the witness Gertrude Taylor as to the act done to her

nine months before, it ought not to have been admitted, because a single isolated act is not just ground for any inference, and an act from which an inference is not justly to be drawn ought not to be allowed to go before the jury. If such evidence was admissible, then in all cases involving the presence of mens rea (and most serious crimes do involve it) it seems that it would be permissible to show that on any previous occasion within any reasonable limit of time the person had been guilty of similar misconduct, and in effect we should be doing that which would be both unfair to the accused and which LORD CAMPBELL condemned as proving one crime in order to raise a presumption that another crime had been committed by the perpetrator of the first. Peculiarly dangerous and most unfair to the accused would be the admission of such a single act. The evidence which directly implicated the accused is the evidence of a woman who was herself party to the alleged crime, and who was morally, if not in the strict legal sense, an accomplice of the accused person. She was an adult person who knew, according to her account, for what purpose the operation was to be performed, and consented to the performance. The evidence which was admitted, and in regard to which the question for the court has arisen, is the evidence of a witness who was, if the evidence was true, also a consenting party to the illegal operation which the prisoner performed and so far an accomplice in his criminal conduct. It is useless to dwell on the danger to innocence of evidence of this description. But the evidence given by Taylor was not confined to evidence of a single act. It included a statement by the prisoner to Taylor that might justly be interpreted to mean that he had successfully performed a similar operation upon dozens of girls with similar instruments; in other words, that he had often used the same instruments before, and had always found abortion follow. Upon the reasoning of CRESSWELL, J., in *R.* v. *Cooper* (1) (especially 3 Cox, C.C. at p. 550), and upon the authority of that judgment, it appears to me that such evidence is admissible, and that the ruling of CHARLES, J., in *R.* v. *Dale* (3) in which it was proposed to prove repeated acts of the same character over a period, as well as the ruling of my brother LAWRENCE in this case, may be upheld.

RIDLEY, J.—I have had the opportunity of reading the judgment of the LORD CHIEF JUSTICE, and I agree with the conclusion to which he has come, and am of opinion that the evidence ought not to have been admitted.

DARLING, J.—The defendant was indicted for on Oct. 20, 1905, feloniously using certain instruments upon one Ethel Jones with intent thereby to procure her miscarriage. It is unquestioned that the defendant had in fact used instruments upon Ethel Jones, and for the defence it was suggested that he did so in operating for a lawful purpose. The defendant is qualified as a surgeon, but there was no evidence that he practised as such. Ethel Jones was his servant, and alleged that she was pregnant by him. The prosecution tendered, and the judge admitted, the evidence of Gertrude Taylor, and the question for us is whether that evidence was admissible in law. Her testimony was to the effect that in January, 1905, she stayed for fourteen days with defendant, that she became pregnant by him, that he operated upon her with instruments like those he used on Ethel Jones, and that he told her that the operation would fetch away the child.

The direct effect of Taylor's evidence is to prove that the defendant had been guilty of another crime than this charged in the indictment, but similar in character. Now, it is not to be rejected on that ground. I have tried to ascertain the principle which must be relied upon as justifying its acceptance or rejection; and I find it in FOSTER'S CROWN LAW DISCOURSE I., p. 246, where it is said:

> "The rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue is founded on sound sense and common justice. For no man is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life."

The same rule is thus expressed by LORD CAMPBELL in *Oddy's Case* (10) (20 L.J.M.C. at p. 200):

> "The law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first."

That he was speaking of a crime evidence as to which would have been altogether "foreign to the point in issue," to use FOSTER's phrase, appears, I think, by this observation of his Lordship made in the course of counsel's argument (ibid. at p. 199):

> "In the French courts the case against an accused person is often commenced by evidence that he had previously committed offences of the same sort as that which forms the subject of inquiry. But that is not the practice of our law."

The reason for the practice in the French courts of admitting evidence of many matters which we should certainly describe as "foreign to the point at issue" is that the CODE D'INSTRUCTION CRIMINELLE, liv. 2, tit. 2, s. 241, provides:

> "L'acte d'accusation exposera 1° la nature du délit qui forme la base de l'accusation: 2° le fait et toutes les circonstances qui peuvent aggraver on diminuer la peine."

By this means various matters are, in France, laid before the jury which have no connection with the crime charged, but are such as in England are brought to the knowledge of the judge alone (perhaps by means of the calendar) or are proved after verdict. The jury, in France, then find the fact with extenuating or aggravating circumstances for the purposes of affecting the sentence, which is heavier on an habitual evil liver.

I should greatly regret a close assimilation of our criminal procedure to that of France, but I think it well to note that the French rules as to evidence necessarily differ from ours by reason of the wide difference between the functions of judges and juries under French and English law. Indeed, it can hardly be said that, in one sense, the French courts are bound by rules of evidence at all. Yet, subject to observance of the rule as laid down by FOSTER, our law does undoubtedly allow evidence of another crime in order to negative some possible defence, such as accident or mistake, or to show a systematic course of conduct, or guilty knowledge, where that is material. For each of these propositions there is ample authority in *R.* v. *Geering* (2), in *R.* v. *Rhodes* (8), in *R.* v. *Weeks* (23), in *R.* v. *Francis* (20), and in *R.* v. *Wyatt* (7). Still it has been argued that such evidence may not be admitted to prove intent. It cannot be said that no evidence is admissible to prove intent, for declarations of a defendant's intention and unequivocal acts of his are every day given in evidence with that object. Moreover, accident is negatived merely in order to prove design, which involves intent. System is proved for the same reason, and proof of scienter is merely a step towards that end. I do not quote a number of cases which have been decided on this point, because very many of them were reviewed in *Makin* v. *A.-G. for New South Wales* (6), and the LORD CHANCELLOR there said ([1894] A.C. at p. 65):

> "It cannot be denied that the decisions have not always been completely in accord."

In the same case, however, he there laid down the law, in delivering the judgment of the Privy Council (ibid.)

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the

A mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

B I do not suppose LORD HERSCHELL meant that such evidence might be called to rebut any defence possibly open, but of an intention to rely on which there was no probability whatever.

In the present case, however, the evidence objected to was called to overthrow a defence already set up and admitted to be the defendant's answer to the charge. C It appears that the defence adopted by the defendant was that he was performing a lawful operation in using instruments adapted to procure abortion. Where ignorance is the defence relied on, the cases I have cited show that evidence is admissible to prove knowledge. Where accident is suggested as a defence, evidence is equally admissible to disprove that, by showing design. And it follows that such evidence may go to prove further what particular design actuated D the perpetrator of the act. Such evidence assuredly cannot be inadmissible merely because it is more cogent in so far as it shows not only the existence of some design, but also precisely what that design was. Here the defence suggested was that the act charged was done designedly, but that the design was lawful, and the reason of its being so is indicated. Then this evidence is tendered by the prosecution to the effect that on another woman, pregnant by him, the defendant E had performed a similar act or operation with like instruments, and had then stated in effect that his design on that occasion was unlawful—viz., to procure abortion.

In my opinion, this evidence of Taylor's was not irrelevant or foreign to the point in issue, that issue being not what did he do, but with what object did he do it. That issue involves the state of his knowledge or belief as to the F effect of such an operation. Taylor's evidence went to prove that, contrary to the defendant's allegation in defence as to his being engaged in doing a lawful act, he was doing a thing which in his view was apt to procure abortion, and that, because it was so, he had already done it with that unlawful avowed knowledge and purpose. This evidence, therefore, tends to prove that defendant had, in repeating his former conduct, an intention different from that alleged by him in G his defence, so it is not foreign to the point of it, nor less relevant because it goes to prove the charge in the indictment.

I have not affected to judge whether *R.* v. *Dale* (3) was rightly decided, for I do not think it necessary to reply upon that decision of CHARLES, J., in order to uphold this conviction. But, even were that ruling wrong, I think this conviction could still be sustained, nor does it appear to me advisable to strive H for increase in the technicality of our rules of evidence so as to narrow yet more the approaches to the source of justice. Our law already, and for good reason, undoubtedly excludes evidence of many matters which anyone in his own daily affairs of moment would regard as important in coming to a decision. The observations of LORD CAMPBELL show that much would be excluded at a trial merely because the defendant would, in the then state of the law, have found I it hard to bring evidence in contradiction. When the application of this doctrine is contended for, it seems to me important to bear in mind that a defendant on a criminal charge might not in LORD CAMPBELL's day give evidence, nor could his wife. These disabilities no longer exist, and provided he have due notice, an accused person may fairly be confronted with evidence relevant to the issue now that he may give his own testimony, although it would have been hard to admit it when the witness-box was forbidden to him. I believe that to quash this conviction would necessitate the interpretation of our rules of evidence so in favour of the accused as to exclude such proof of guilty knowledge

as hitherto has been admissible, and might, perhaps, give occasion for the repetition of the bitter saying: "Il s'en faut bien que l'innocence trouve autant de protection que le crime." Since writing my judgment, I have had the advantage of reading my brother BRAY'S judgment, and I agree that the conviction can also be sustained for the reasons he gives to that effect.

JELF, J.—I am of opinion that the evidence was admissible, and that the conviction ought to stand. It is, no doubt, contrary to the law of this country (as it is repugnant to the British sense of justice) to admit against a prisoner who is on his trial for one offence evidence that he has on another occasion committed another or even a similar offence, merely with the object of showing that he is on that account a person more likely to have committed the offence with which he is charged, except (and the exception is significant) that, if a prisoner endeavours to establish a good character as making it improbable that he should have committed the crime charged against him, the prosecution may rebut this inference by proving even a previous conviction: see as to this exception the cases collected in ARCHBOLD'S CRIMINAL PLEADING (23rd Edn.), p. 313. But it often happens both in civil and criminal cases that evidence is tendered on several alternative grounds, and yet it is never objected that if on any ground it is admissible that ground must not prevail because on some other ground it would be inadmissible and prejudicial. In such cases it is usual for the judge (not always very successfully) to caution the jury against being biased by treating the evidence in the objectionable sense.

In regard to the class of evidence with which we have to deal, I think we all agree that the touchstone by which the evidence in question in the present case is to be deemed admissible or not is most carefully defined in the judgment of LORD HERSCHELL in *Makin* v. *A.-G. for New South Wales* (6) expressly approved of and adopted ten years later by the Court for the Consideration of Crown Cases Reserved in *R.* v. *Wyatt* (7). Those cases crystallise the doctrine laid down in the long series of decisions which have been cited to us—namely, that (apart from legislative enactments which deal with certain special cases) the common law test of admissibility is that the evidence adduced is "relevant to an issue before the jury," it being added that "it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would be otherwise open to the accused." The judgment in *R.* v. *Wyatt* (7) applies to that case the description of evidence spoken of by LORD HERSCHELL in these words ([1904] 1 K.B. at p. 193):

> "The evidence objected to was clearly admissible as tending to establish a systematic course of conduct on the part of the accused, and as negativing any accident or mistake or the existence of any reasonable or honest motive."

These last words are equivalent to and confirm LORD HERSCHELL'S expression "to rebut a defence which would be otherwise open to the accused."

In the present case the use of the instruments upon Ethel Jones was admitted, but it was suggested on the prisoner's behalf that the use was for a lawful purpose, and not with any criminal design. In effect the prisoner set up the defence: "In using the instruments I had no design to procure a miscarriage; if the thing which I did procured or tended to procure a miscarriage" (a fact I do not understand to have been denied) "that came about accidentally and not designedly." This surely was "a defence open to the accused" which the prosecution might "rebut"; a defence, at all events, clearly ejusdem generis with the particular defences mentioned by LORD HERSCHELL. It asserted "the existence of a reasonable or honest motive" which the prosecution might "negative." And upon the question whether there was or was not a design on the prisoner's part to procure the miscarriage of Ethel Jones, evidence that on any other occasion he had done the same thing with similar instruments under similar circumstances

A with that design upon another girl seems to me to have a distinct bearing. The fact that only one other case was brought forward, and that case nine months old, goes, to my mind, only to the weight and not to the admissibility of the evidence. The subject of inquiry is the state of mind of the prisoner when he used the instruments on Ethel Jones, and the improbability that on one occasion under precisely similar circumstances he should have the design to procure a B miscarriage and on the other occasion should have another and an innocent object would tend to show (and that is all that is necessary) that he had the bad design in regard to Ethel Jones. Of course, if instances are multiplied, the weight of the evidence is greatly increased, and if a system is shown it may be irresistible. But, to my mind, it is quite unnecessary to show a system which is only a question of degree. If it were necessary to go beyond the two instances, this can generally C only be done by proving a series of instances, and, if the opposite view prevails, it would be impossible to prove such a series, as the first instance (besides the one charged) would be shut out in limine—or else the court would have to decide according to the statement of counsel as to what he expected to be able to prove, and, after they had admitted evidence of the first instance, the rest might break down. In short, I cannot think that the admissibility of the evidence can D depend upon the accuracy or astuteness of counsel's opening statement. If he tenders the evidence mainly on the right ground, the ultimate bearing of it must depend upon what it turns out to be. For instance, if it wholly fails to come up to the proof suggested it ought to be expunged, and in some cases, owing to the prejudice created by its inadvertent admission, the jury might have to be discharged and the case tried before a fresh jury. If the proof of the evidence E afterwards given by Gertrude Taylor had been handed up to the judge, he would, I think, have been bound to admit it.

This leads me to this final point on which, if necessary, this case might be rested. While, to my mind, it is not necessary to prove a system, yet the evidence of Gertrude Taylor does abundantly prove a system on the part of the prisoner to procure miscarriage in girls in the way described. For when she said she was F in the family way he said "he would put her all right," and proceeded to use these instruments, saying also on the same subject that "he had put dozens of girls right." If this does not establish against the prisoner out of his own mouth that he was systematically guilty of the crime which he is charged with committing against Ethel Jones, I fail to see what evidence can suffice. For all these reasons I think the evidence was quite rightly admitted by my brother A. T. LAWRENCE, G and that the conviction should be affirmed.

BRAY, J.—It is unnecessary for me to recapitulate the facts, as they have been already fully stated, and I come at once to the question whether the evidence of Gertrude Taylor was admissible.

A careful examination of the cases where evidence of this kind has been admitted H shows that they may be grouped under three heads: (i) Where the prosecution seeks to prove a system or course of conduct; (ii) where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake; (iii) where the prosecutor seeks to prove knowledge by the prisoner of some fact. *Blake* v. *Albion Life Assurance Society* (25), a civil case, well illustrates the first class. I LORD LINDLEY says (4 C.P.D. at pp. 106, 107):

> "Nothing could seem, at first sight, more plain and straightforward, and there would be no appearance of fraud; but then the plaintiff proposed to adduce evidence to show that the transaction was one of a fraudulent class. Was he, or was he not, to be precluded from doing it? I think that he was quite at liberty to put his case in that way, and could only do so by going into a great number of other transactions having some features in common with this. I agree that in order to prove that A. has committed a fraud on B., it is neither sufficient nor even relevant to prove that A. committed frauds upon C., D.,

and E. Stopping there, I admit that proposition. But let it be shown that the fraud on B. is one of a class of other transactions, having common features, then I disagree altogether with that proposition. . . . The answer to the objection that evidence of frauds on other persons cannot be admitted, is that this transaction is one of a class, that there are features in common, the features in common being the false pretence and a knowledge of that false pretence on the part of the defendant company, and the moment that is shown the plaintiff's case is established."

The word "system" implies a connection between the acts of which evidence is sought to be given and the act with which the prisoner is charged. A number of acts of theft do not, as a rule, constitute a system. They are isolated acts having no connection with one another. On the other hand, the transactions of a "long firm" are the result of a formulated scheme, and part of a system. The ground on which, in cases of this class, evidence is admitted of acts not charged in the indictment is, in my opinion, that the case which the prosecution seeks to prove is that the prisoner has in his mind a scheme or plan, say, for obtaining money by fraud, and that the other acts, of which evidence is sought to be given, when proved will show the existence of the plan, and, therefore, the guilty mind of the prisoner. Other cases of this class are *R.* v. *Rhodes* (8) and *R.* v. *Ollis* (9) (where see the judgment of WRIGHT, J., [1900] 2 Q.B. at p. 768. *R.* v. *Oddy* (10), on the other hand, shows that, where there was no system and no connection between the acts, the evidence is inadmissible: see also *R.* v. *Holt* (26).

Of the second class, *R.* v. *Geering* (2) is a good example. In order to show that the prisoner administered the poison for the purpose of killing the husband, the prosecution required to negative accident or mistake. For this purpose evidence was admitted of the death of two of the prisoner's sons from the same poison about the same time, and while they were living with the prisoner and had eaten food prepared by her. The principle on which this evidence was admitted is not expressly stated further than by saying that it was admissible to disprove accident or mistake, but it obviously is this: if there had been but the one case charged in the indictment, it was possible, though not probable, that the arsenic might have got into the food by accident or mistake, but when two cases are proved where death happened on previous occasions to two other inmates under similar circumstances, accident or mistake becomes so improbable as to be almost impossible. The proof of each additional case increases the improbability of accident or mistake, and, therefore, tends to disprove it. It was necessary, of course, to show that the other deaths happened under similar circumstances, but it was not necessary to prove a system or that the prisoner had conceived a plan to poison all her friends. One other death under similar circumstances would tend to show the improbability of accident or mistake, and would on that ground be admissible. There are several other cases decided on the same principle, such as *Makin v. A.-G. for New South Wales* (6); *R.* v. *Dossett* (27); *R.* v. *Gray* (5), *R.* v. *Francis* (20) and the cases of uttering counterfeit coin will come under the third class, and to some extent also fall within the other two classes. It was necessary for the prosecution to show that the prisoner knew that the articles of jewellery which he was pawning or endeavouring to pawn were false, and that the coin he was uttering was counterfeit, and one other act beyond the acts charged in the indictment might tend to prove the knowledge and would, therefore, be admissible.

It remains to be considered whether the evidence of Gertrude Taylor comes within any of these three classes. I will take the third class first. The prosecution had, no doubt, to prove that the prisoner knew that these instruments which he used were capable of being used for the purpose of procuring abortion, and the evidence of Gertrude Taylor went to prove such knowledge on the part of the prisoner, but the case does not show that the knowledge of the prisoner was really in dispute, and, if the prosecution had claimed at the trial that the evidence

A should be admitted on this ground, I think the prisoner's counsel would have stated that it was no part of the defence that the prisoner did not know, that his case was that the prisoner was a doctor, and, therefore, of course knew that such instruments might be used to procure abortion, as well as for lawful purposes, and that the whole question was whether they were in fact used for an unlawful purpose. In that event, I think, the evidence would not have been admissible. B The prosecution could not, under such circumstances as these, say that the evidence was required to prove knowledge; it would be obvious that it was wanted for some other purpose. I think, bearing in mind the strong prejudice that would necessarily be created in the minds of the jury by evidence of this class, which shows that the prisoner had been guilty on another occasion of a similar offence, the greatest care ought to be taken to reject such evidence unless it is plainly C necessary to prove something which is really in issue. It is true that in *Makin* v. *A.-G. for New South Wales* (6) LORD HERSCHELL says ([1894] A.C. at p. 65), "or to rebut a defence which would otherwise be open to the accused," but I do not think his mind was directed to such a case as I have assumed, and, indeed, it could hardly be said that such a defence would be open after such a statement from the prisoner's counsel. In my opinion, if the prosecution sought to justify the D admission of the evidence of Gertrude Taylor solely on this ground, we ought to hold that it was not admissible.

I come now to the second class. In my opinion, it cannot be said that this evidence went to negative accident or mistake in the case charged in the indictment. The prisoner's case was that he used the instruments for a lawful purpose and not by accident or mistake. It was said, however, that, according E to the prisoner's case, miscarriage followed accidentally the use of these instruments, and that is true, but in Taylor's case miscarriage did not follow the use of these instruments, and her evidence did not tend to show that such instruments might not have been lawfully used; it merely showed that in her case they were used with an unlawful intention, but without any result. I see nothing inconsistent in a doctor one day using these instruments for an unlawful purpose and in another F case many months afterwards using them for a lawful purpose unless you show a course of conduct and not merely one or two isolated cases.

It follows from what I have stated that if the evidence of Taylor was admissible, it must be because it falls under the first class. It is here that, in my opinion, the principal difficulty arises. I have no doubt, according to the principles laid down in cases in this class, it would be permissible to call evidence to show that G the prisoner carried on the business of an abortionist, but I think it would also be permissible to show something perhaps a little short of this—viz., that he was in the habit of treating women in a state of pregnancy with a view to procure abortion. I think this would be a system or course of conduct within the cases. But I do not think the proof of but one similar case without any H special connection with the case charged in the indictment would prove, or, indeed, would be evidence of, such a system. Of course, it may be said that if two cases will not do, how many will? But this is a difficulty which always arises in such cases. To prove that a man was twice drunk and nothing more will not prove that he is an habitual drunkard. I think when evidence of this class is tendered, the judge should require an assurance from the counsel for the prosecution I that in his opinion he has evidence of a sufficient number of cases to prove a system. In criminal trials no difficulty can arise, because the judge has before him the depositions of the witnesses called before the magistrate, and the proofs of any additional witnesses proposed to be called. He can, therefore, see for himself whether the evidence is sufficient and, in my opinion, before admitting evidence of this kind the judge should satisfy himself that the evidence tendered will, if true, establish or tend to establish what I have called a system. If, therefore, all that Taylor proved was that the prisoner had attempted to procure abortion in her case, such evidence should not, in my opinion, have been admitted.

In my view, however, Taylor's evidence, when looked at, went, if true, to prove much more. Counsel for the Crown called our attention to the statement that the prisoner had told her "that he had put dozens of girls right," and to other statements that she said he had made—viz., "that he was a doctor and would put her all right," and "that it [referring to the instrument] would fetch it away." In my opinion, Taylor's evidence, when looked at as a whole, is evidence of a system on the part of the prisoner. It may be said that such evidence as this from a girl of bad reputation may be untrue and merely worthless, and so it may be in some cases, though not here, but it is evidence which must be weighed by the jury. When once it is seen that a part of her evidence tends to show a system, her whole evidence, in my opinion, becomes admissible. When evidence has been given of a system, it becomes permissible then to prove any case which forms part of the system, and the operations which the prisoner attempted on her tended to corroborate the evidence she gave as to the statements made to her. In my opinion, therefore, the whole of Taylor's evidence was admissible. But it is said that it was not tendered on this particular ground, and counsel for the Crown very fairly admitted that he did not expressly put forward this argument. In my opinion, this admission forms no good ground for quashing the conviction, if we can see that no ground for its rejection could have been successfully put forward by the counsel for the prisoner. The Case states, and, in my opinion, rightly states, that if the evidence was admissible the conviction is to stand. Further, it does not state, and, in my opinion, also rightly, any particular ground as the ground on which the evidence was either tendered or admitted. The standing or quashing of the conviction ought not, in my opinion, to depend on whether the counsel for the prosecution put forward the right or the wrong ground. If there was a right ground, as, in my opinion, there was, on which this evidence could be admitted, no injustice has been done to the prisoner by admitting it; and to allow the prisoner to escape owing to a possible mistake, and I do not admit that there was a mistake on the part of the prosecuting counsel, would be to allow him to escape on the merest technicality, and would work great injustice. My answer, therefore, to the question asked in the case, whether this evidence was admissible, must be in the affirmative, and that the conviction should stand.

Since writing this judgment, my attention has been called by my brother KENNEDY to *R.* v. *Cooper* (1), which, though not precisely in point, I think strongly confirms the opinion I have given. CRESSWELL, J., sums up the position when he says (3 Cox, C.C. at p. 550):

> "His whole conduct is to be interpreted with reference to the charge made against him, and I think what was said by him under similar circumstances to the present is admissible."

A. T. LAWRENCE, J.—I am of opinion that the evidence of the girl Taylor was admissible, and that the conviction should be affirmed. The general rule is stated by LORD HERSCHELL in *Makin* v. *A.-G. for New South Wales* (6) in these terms ([1894] A.C. at p. 65):

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

A The relevance depends upon the issues actually in contest; whenever it is an issue whether the prisoner, though he did the act alleged, did it without any intention—i.e., accidentally or without any criminal intention, i.e., innocently—such evidence may be given. By showing that the prisoner did an act of the same character under similar circumstances on other occasions, accident becomes improbable. That the same accident should repeatedly occur to the same person is unusual, B especially so when it confers a benefit on him. The degree of improbability will depend upon the number of times it is shown to have occurred and the similarity of the circumstances on each occasion. If the act charged is manifestly an intentional act, but the defence is that it was honestly or properly done, such evidence is admissible to rebut this defence by showing knowledge of some fact essential to guilty knowledge, or by showing that in other cases similar acts C have been committed by the prisoner by the like means under like circumstances. The number and the peculiarity of the circumstances tend to show the improbability of the innocent intention. It is for this reason that in cases of fraud, where it is necessary to show a fraudulent intention in the prisoner, other acts of the like character are briefly described as a system. There is no special rule of the law of evidence applicable to accident or to system. These are merely convenient D phrases indicative of cases in which evidence of this character is admissible.

A system is not necessarily criminal; most men carry on business on a system; they may even be said to live on a system. Where, however, acts are of such a character that, taken alone, they may be innocent, but which result in benefit or reward to the actor, and loss or suffering to the patient, repeated instances of such acts at least show that experience has fully informed the actor of all their E elements and details, and it is only reasonable to infer that the act is designed and intentional, and its motive the benefit or reward to himself or the loss or suffering to some third person. The mind of the prisoner can only be revealed by his words or by his acts. It is in many cases impossible to form a sound conclusion upon the state of his mind at a given moment, unless his words and acts under similar circumstances are subjected to investigation. It is for this reason F I think the words of LORD HERSCHELL, "to rebut a defence which would otherwise be open to the accused," are an essential part of the proposition of law. The idea is also expressed by LORD ALVERSTONE, C.J., in *R.* v. *Wyatt* (7), when he says ([1904] 1 K.B. at p. 193) that such evidence is admissible

> "as negativing any accident or mistake, or the existence of any reasonable or G honest motive."

Any statement of the law which omits this latter part of the proposition would seriously cramp the administration of justice, and cannot be supported on principle. ROSCOE, in his DIGEST OF EVIDENCE IN CRIMINAL CASES (12th Edn.), at p. 80, says:

> H "There are cases in which much greater latitude is permitted, and evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intention in doing the act complained of."

The authorities, in my opinion, support this view. In *Blake* v. *Albion Life* I *Assurance Society* (25) it was necessary to show that the defendant company knew of the frauds of Howard at the time they received the plaintiff's money. The acts of the company towards the plaintiff were all, taken alone, ordinary business transactions; in order to show knowledge of the fraud it was necessary to show that they had had other transactions of a similar character with other persons, and that "Howard" was sometimes "Gard" and sometimes "Rogers" and other assumed names, but that on each occasion the premium went to the company and no loan to the assured. In *R.* v. *Francis* (20) guilty knowledge that a certain ring was falsely described as a diamond ring was shown by evidence of a previous

dealing with a chain and several attempts to deal with other rings within a short space of time. Here the connection between the several acts lay in the nature of the goods, trinkets, and jewellery, and the class of persons defrauded or attempted to be defrauded—viz., pawnbrokers. This rendered a plan or scheme of fraud probable. In *R.* v. *Rhodes* (8) evidence of two instances of obtaining eggs by the false pretence of an advertisement was admitted, although these eggs were obtained subsequently to the acts charged in the indictment. The business to which this advertisement related was said by the prosecution to be a sham or bogus business, and these two instances were held to throw a light back upon the prisoner's state of mind when he obtained the eggs for which he was indicted, the nexus or connection being the same advertisement of the same business.

In *R.* v. *Ollis* (9) the prisoner was charged with obtaining money by false pretences on three cheques on June 24, June 26, and July 6. At the trial evidence was admitted relating to a cheque which the prisoner was alleged to have obtained fraudulently by giving another valueless cheque, dated July 5, for it. The prisoner had already been tried and acquitted of this fraud. It was held to be rightly admitted as evidence of guilty knowledge. BRUCE, J., differed because he considered the important question was the prisoner's knowledge of the state of his banking account, and it was not shown that the cheque of July 5 had been returned dishonoured before July 6, when he gave the last of the cheques mentioned in the indictment. Inasmuch as the prisoner had been adjudicated a bankrupt in the previous May, and the account at the bank upon which all the cheques were drawn showed a credit balance of only 3s. 6d., and nothing had been paid into or drawn out of it for three years, the majority of the court thought the evidence admissible, LORD RUSSELL OF KILLOWEN saying that the criticisms of BRUCE, J., went rather to the weight of the evidence than to its admissibility. In *R.* v. *Wyatt* (7) the prisoner was charged with obtaining credit (for lodgings and food) by fraud. Evidence was admitted of his having obtained lodgings, etc., at several other places and having left without paying for them.

Evidence of the same character has been admitted for many years in coining cases, in uttering forged documents, in embezzlement, and in murders. The cases relied on as opposed to this view are not so when looked into. In *R.* v. *Oddy* (10) the charge was one of larceny and receiving of cloth, and evidence was tendered that other cloth which had been stolen was found in the house of the accused. This evidence was rejected as not being admissible to show guilty knowledge when receiving the cloth covered by the indictment. There was here no connection between the charge and the fact tendered in evidence, except that both related to cloth. Each was found shortly after it was stolen, and several months had elapsed between the two larcenies. Recent possession of stolen goods is evidence of the larceny of the goods in question. It would be illogical to hold that the same fact—viz., recent possession—can be evidence of two crimes so widely different in the detail of their circumstances as theft and receiving knowing the thing to be stolen. In *R.* v. *Holt* (26) evidence of facts alleged to constitute a similar pretence to that charge was rejected. It was inadmissible, for the pretence charged was that the prisoner had pretended that he had authority to receive money on behalf of his principal when he had not, and the only defence raised was that in fact he had such authority. It was not relevant to that issue to show he had received other money on the same statement. It tended to support the defence quite as much as the prosecution: see BLACKBURN, J., in *R.* v. *Francis* (20) (L.R. 2 C.C.R., at p. 130). In *R.* v. *Dale* (3) as reported, the admissibility of evidence of this class would seem to have been carried too far. The report lends colour to the view that the evidence was admissible when the only issue raised was as to the fact of the prisoner having used the instrument. In such a case such evidence would not be admissible. It is to be observed, however, that the only ruling of the learned judge was one given during the opening statement of counsel for the prosecution. The evidence never was in fact admitted, for the prisoner pleaded Guilty before any evidence was tendered.

A In all cases, in order to make evidence of this class admissible, there must be some connection between the facts of the crime charged in the indictment and the facts proved in evidence. In proximity of time, in method, or in circumstances there must be a nexus between the two sets of facts, otherwise no inference can be safely deduced therefrom. In the present case the prosecutrix Ethel Jones was an inmate of the prisoner's house. He had induced her to have sexual inter-
B course with him by promising to "keep her right." When she feared she was in trouble he said he would do so, and he used instruments upon her which he said would bring it away. When arrested he stated he had used the instruments for a lawful purpose, and that, when she became very ill in consequence, he administered drugs to allay the pain. In support of this defence it was suggested that he used the instruments when examining her for leuchorrhœa, and that the
C subsequent illness was neither foreseen nor intended by him. The evidence of Taylor was tendered to rebut this defence. It was shown that she, too, was an inmate of his house; that he had induced her to have sexual intercourse with him; that when her periods should have arrived and before she left for home he used the same instruments in the same way, saying "he would put her right as he had dozens of other girls before." If evidence of system were needed, this was such
D evidence. So also was the evidence as to a statement made by Nellie Cornes, a servant of the prisoner, who was present at the operation, which statement was to the effect that the prisoner "had put her all right." The operation was unsuccessful in the case of Taylor. But that was due, not to the nature of the operation, but to the stage of the pregnancy then reached. For the respondent told the witness that, if she did not get right, not to go more than six weeks, and
E then he would operate again. In due time a child was born, for the maintenance of which the prisoner consented to an affiliation order. It is impossible, without reversing a long series of cases, to say that the evidence of Taylor was not admissible. It showed that the illness of the prosecutrix was the result of design and not of accident; it showed that the prisoner's scheme or system, when the indulgence of his passions had got girls into trouble, was to use these instruments
F upon them to relieve himself from the burden of paternity. It tended to rebut the defence he set up of an innocent operation, and to negative any reasonable or honest motive for its performance.

Solicitors: *Flux, Leadbitter, & Neighbour*, for *Garnett*, Crewe; *Cooke & Son*, Crewe.

[*Reported by* A. A. Bethune, Esq., *Barrister-at-Law.*]

A

BULLOCK *v.* LONDON GENERAL OMNIBUS CO. AND OTHERS

[Court of Appeal (Sir Richard Henn Collins, M.R., Cozens-Hardy and Farwell, L.JJ.), November 14, 1906]

[Reported [1907] 1 K.B. 264; 76 L.J.K.B. 127; 95 L.T. 905; 23 T.L.R. 62; 51 Sol. Jo. 66]

B

Costs—"Bullock order"—Reasonable joinder of two or more defendants—Success of plaintiff against one defendant and failure against other—Jurisdiction to order unsuccessful defendant to pay costs due from plaintiff to successful defendant.

Where it is reasonable for a plaintiff to join two or more defendants to an action, whether for contract or tort, and in the event he succeeds against one defendant and fails against the other defendant or defendants the judge has jurisdiction to order the unsuccessful defendant to pay not only the plaintiff's costs but also the amount of the costs which the plaintiff would have to pay to the successful defendant or defendants.

C

The plaintiff sued two defendants for damages for personal injuries caused, as she alleged, by their joint negligence, or, alternatively, by the separate negligence of each defendant. Each defendant asserted before action, and alleged in his defence, that the injuries were caused by the negligence of the other defendant. At the trial of the action with a jury, a verdict was found against one defendant and in favour of the other defendant. The judge before whom the action was tried made an order that the unsuccessful defendant should pay to the plaintiff the amount of the costs which she would have to pay to the successful defendant.

D

E

Held: the judge had jurisdiction to make the order, and had properly exercised his discretion.

Practice—Joinder of causes of action—Common question of law or fact—Allegation of joint tort coupled with claims for separate torts against joint tortfeasors—R.S.C., Ord. 16, r. 1, r. 4.

F

It is permissible to join in a statement of claim an allegation of a joint tort coupled with alternative claims for separate torts by the alleged joint tortfeasors where any common question of law or fact arises.

Practice—Statement of claim—Objection—Misjoinder of causes of action—Need to take objection at earliest opportunity.

G

An objection to a statement of claim on the ground that it contains a misjoinder of causes of action must be taken at the earliest opportunity. It is too late to take such an objection after verdict when it might have been taken before verdict.

Notes. Referred to: *Dryden* v. *Surrey County Council and Stewart*, [1936] 2 All E.R. 535; *Heap* v. *Ind Coope and Allsopp, Ltd.*, [1940] 3 All E.R. 634; *Hong* v. *A. and R. Brown, Ltd.*, [1948] 1 All E.R. 185.

H

As to joinder of claims and of parties and "Bullock" orders, see 30 Halsbury's Laws (3rd Edn.) 308–310, 317, 318; and for cases see Digest: Pleading and Practice 140–147, 399 et seq., 877–880.

I

Cases referred to:

(1) *Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K.B. 533; 72 L.J.K.B. 761; 89 L.T. 159; 52 W.R. 33, C.A.; Digest (Practice) 877, *4178*.

(2) *Sadler* v. *Great Western Rail. Co.*, [1896] A.C. 450; 65 L.J.Q.B. 462; 74 L.T. 561; 45 W.R. 51; 12 T.L.R. 394, H.L.; Digest (Pleading) 141, *1270*.

(3) *Smurthwaite* v. *Hannay*, [1894] A.C. 494; 63 L.J.Q.B. 737; 71 L.T. 157; 43 W.R. 113; 10 T.L.R. 649; 7 Asp.M.L.C. 485; 6 R. 299, H.L.; Digest (Pleading) 141, *1265*.

(4) *Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q.B. 504; 69 L.J.Q.B. 147; 81 L.T. 684; 44 Sol. Jo. 156; 7 Mans. 347, C.A.; Digest (Pleading) 143, *1278*.

Also referred to in argument:

Gower v. *Couldridge*, [1898] 1 Q.B. 348; 67 L.J.Q.B. 251; 77 L.T. 707; 46 W.R. 214; 14 T.L.R. 165; 42 Sol. Jo. 197, C.A.; Digest (Pleading) 142, *1275*.

Thompson v. *L.C.C.*, [1899] 1 Q.B. 840; 62 L.J.Q.B. 625; 80 L.T. 512; 47 W.R. 433; 43 Sol. Jo. 379, C.A.

The River Lagan (1888), 57 L.J.P. 28; 58 L.T. 773; 6 Asp.M.L.C. 281; 1 Digest (Repl.) 247, *1431*.

Bostock v. *Ramsey U.D.C.*, [1900] 2 Q.B. 616; 69 L.J.Q.B. 945; 83 L.T. 358; 64 J.P. 660; 16 T.L.R. 520; 44 Sol. Jo. 642, C.A.; Digest (Practice) 896, *4372*.

Appeal by the defendants, the London General Omnibus Co., from an order of BRAY, J., after the trial of the action with a jury.

McCall, K.C., and *Ernest Charles* for the London General Omnibus Co.

D. M. Kerly for the plaintiff.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal by the defendants, the London General Omnibus Co., from an order of BRAY, J., made after the trial of the action. The action was brought by the plaintiff to recover damages for personal injuries. The plaintiff joined as defendants in the action the London General Omnibus Co. and Trollope & Sons and Colls & Sons, Ltd., who were the respective owners of the vehicles which in her view took part in bringing about the injuries which she sustained. The plaintiff's case was framed so as to set up three alternatives: first, that the two defendants were jointly guilty of negligence and jointly liable, and, secondly, and, thirdly, that each of the defendants was separately guilty of negligence and separately liable. The result of the trial was a verdict for the plaintiff against the London General Omnibus Co., and a verdict against the plaintiff in favour of the other defendants. In that state of facts BRAY, J., allowed the costs to follow the event in the sense that he ordered the London General Omnibus Co. to pay the costs of the plaintiff and the plaintiff to pay the costs of the other defendants, and then, by a subsequent order he ordered that the costs which the plaintiff would have to pay to the other defendants should be added to the costs recoverable by her from the London General Omnibus Co. The ground upon which he made that order was that it was clear from the attitude of the London General Omnibus Co., and from the allegations in their statement of defence, that it was reasonable for the plaintiff to add the other company as defendants.

It seems to me to be quite clear that the learned judge had jurisdiction to make that order under the provisions of the Supreme Court of Judicature Act, 1890, s. 5 of which [see now Supreme Court of Judicature Act, 1925, s. 50 (1)] provides:

> "Subject to the Supreme Court of Judicature Acts, and the rules of court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

Those provisions are as wide as can be for giving discretion to a judge as to costs. But the question does not depend upon my own opinion, because the point has been decided by the judgment of STIRLING, L.J., in *Sanderson* v. *Blyth Theatre Co.* (1), where he said ([1903] 2 K.B. at p. 543):

> "This particular form of order was, as SIR GEORGE JESSEL, M.R., calls it, 'machinery' for properly disposing of the costs, and this is shown by the change

in the form of order when, as in the case of the Attorney-General, the plaintiff could not be ordered to pay costs. Having regard to this and to the express directions of Ord. 65, r. 27, reg. 37, I think that the term 'costs' in s. 5 of the Judicature Act, 1890, ought to be read as including costs which a particular party may be ordered to pay in the first instance and then to have over against another."

Therefore, in my opinion, any objection based upon the want of jurisdiction must fail.

Another point was raised. It was said that there was some ground for impugning the order of the learned judge because there had been a misjoinder of causes of action in this case. If there was, the defendants ought to have taken the objection at the earliest opportunity. They did not, however, take any steps to do so, and the case was disposed of by the verdict of the jury. It is much too late to take such an objection after verdict when it might have been taken before verdict. But I fail to see how any such irregularity, if there were any, could have any effect upon the jurisdiction of the judge to make this order.

I will now consider the merits of the case. It seems to me to be clear that the learned judge has given effect to every consideration of common sense and justice. Looking at the statement of claim I think that it is not open to the objections which have been made against it. It does allege a joint tort with alternative claims for separate torts. This, therefore, is not the case of an allegation of a joint tort made up of several separate torts, as in *Sadler* v. *Great Western Rail. Co.* (2), where there was no distinct allegation of a joint tort. For the reasons given in that case I think that in the present case a joint tort was properly pleaded under Ord. 16, r. 4. The point is not whether the plaintiff has succeeded in proving a joint tort, but what a person about to bring an action can do when he is in real doubt as to the true facts of the case. Order 16, r. 4, was intended to meet that kind of case where the plaintiff is uncertain as to the persons who are really liable, and gives him the right to meet every possible emergency by alleging every possible cause of action, leaving it to be determined in the action what is the right cause of action. Rule 4 provides:

"All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment."

That leave to allege alternative causes of action in one writ involves that it may turn out that the plaintiff is right only as to one alternative, and is wrong as to the other or others.

I think that the provisions of Orders 16 and 18 and the authorities which have been cited have really no bearing upon the question which is now before us. In *Sadler* v. *Great Western Rail. Co.* (2) there was no allegation of a joint tort, and in *Smurthwaite* v. *Hannay* (3) there was clearly a joinder of different causes of action. Further, the effect of those decisions has been qualified by the further words which were subsequently added to r. 1 of Ord. 16. Then we come to *Sanderson* v. *Blyth Theatre Co.* (1), which seems to me to be a conclusive authority in favour of the plaintiff. The headnote to the report of that case is as follows ([1903] 2 K.B. 533):

"In an action in the King's Bench Division, claiming relief against the defendants in the alternative, the court has jurisdiction in a proper case to order the unsuccessful defendant to pay the costs of the successful defendant, or to order the plaintiff to pay the costs of the successful defendant, and then to add those costs to the costs which the unsuccessful defendant is ordered to pay to the plaintiff. The latter course should be adopted when the action is tried with a jury and the judge does not think that there is 'good cause' for depriving the successful defendant of costs."

That was a decision in a case of contract, and it has been contended that there is some distinction in this respect between a case of contract and a case of tort. I can see no such distinction. Rule 4 of Ord. 16 does not suggest any distinction between tort and contract, and some of the rules seem clearly to contemplate cases of tort—for instance, r. 7, which uses the word "redress," which is not appropriate to a case of contract. If the contention of the defendants were right, the plaintiff ought to have brought three actions, one against both defendants jointly and also an action against each of the defendants separately. That would be a ridiculous result. I think that the learned judge properly exercised a jurisdiction which he possessed and properly made this order. This appeal, therefore, fails, and must be dismissed.

COZENS-HARDY, L.J.—I am of the same opinion. The main point raised by the defendants was upon the question of jurisdiction. I think that it is sufficient to say that it was too late to raise that point after verdict and judgment, when the defendants are not seeking to set aside the verdict and judgment. But I will not leave the matter there. A certain amount of confusion has arisen in this case through not recognising the material change which has been made in Ord. 16 since the decision in *Smurthwaite* v. *Hannay* (3). That case was decided under the old r. 1, which was the same as that contained in the schedule to the Supreme Court of Judicature Act, 1875. It ran thus:

> "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether severally, jointly, or in the alternative."

It was held that that rule only contemplated a single cause of action, because the words were "the right." After the decision of the House of Lords that rule was amended and now provides:

> "All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or of fact would arise. . . ."

I think that it is difficult since that amendment of the rule to say that it deals only with parties and not with causes of action. It seems to me that the alteration of the rule was made to meet cases similar to that of *Smurthwaite* v. *Hannay* (3).

In the present case, after the trial, verdict and judgment were given in favour of the plaintiff against the London General Omnibus Co., and against the plaintiff in favour of the other defendants. It seems to me that the only question is as to the meaning of the "costs" to which the plaintiff is entitled as against the London General Omnibus Co. With regard to that I would like to read the passage from the judgment of ROMER, L.J., in *Sanderson* v. *Blyth Theatre Co.* (1), where he said ([1903] 2 K.B. at p. 539):

> "Under the Judicature Act, 1890, s. 5, and Ord. 65, r. 1, the court has full power over the costs of all parties to such an action; and, in my opinion, it has jurisdiction to order the plaintiff to pay the costs of the defendant against whom the action fails, and to add those costs to his own to be paid by the defendant against whom the action has succeeded, and whose conduct has necessitated the action. This jurisdiction has been frequently exercised in Chancery in proper cases, and can, of course, be exercised in the King's Bench Division. The costs so recovered over by the plaintiff are in no true sense damages, but are ordered to be paid by the unsuccessful defendant, on the ground that in such an action as I am considering those costs have been reasonably and properly incurred by the plaintiff as between him and the last-named defendant."

That was the principle which BRAY, J., adopted. I think, therefore, that he had jurisdiction to make this order, and that he properly exercised his discretion.

FARWELL, L.J.—I agree. *Sanderson* v. *Blyth Theatre Co.* (1) is a clear authority upon this question in a case of contract. In my opinion, *Frankenburg* v. *Great Horseless Carriage Co.* (4) is a clear authority in favour of the plaintiff when the action is one of tort. In that case SIR NATHANIEL LINDLEY, M.R., said ([1900] 1 Q.B. at pp. 508, 509):

> "The company may, however, be in such a state of impecuniosity that it cannot give him his money back, and, therefore, he asks for damages against the directors. That, no doubt, is a different species of relief; but to say that there should be as many actions as there are classes of defendants would be to render these actions unmaintainable."

It was held that, in an action against a company and its directors in respect of an improper prospectus, the action was not bad for joining separate causes of action against separate defendants. The jurisdiction which the judge has to order how the costs are to be paid arises out of his jurisdiction to try the action. His jurisdiction over the costs cannot be attacked without attacking his jurisdiction to try the action, and, therefore, the defendants are logically driven to say that there ought to be judgment for them in the action. It is, in my opinion, impossible to allow such an objection on the ground of a misjoinder after verdict and judgment in the action. I agree that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Hicks, Davis & Hunt*; *Langhams.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

SCARBOROUGH AND ANOTHER *v.* COSGROVE

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.), July 28, 29, 31, August 11, 1905]

[Reported [1905] 2 K.B. 805; 74 L.J.K.B. 892; 93 L.T. 530; 54 W.R. 100; 21 T.L.R. 754]

Boarding-House—Liability of proprietor—Care of guest's property—Requirement of proper and reasonable care—Guest not permitted to keep key of room—Theft by fellow guest.

The keeper of a boarding-house is bound by implication of law to take proper and reasonable care of the baggage of a guest, and he is responsible for the negligence of a servant to whom he has delegated the performance of some part of the duty.

The plaintiffs, husband and wife, engaged a bedroom at a boarding-house kept by the defendant. There was only one key to the door of the room, and the manageress employed by the defendant told the plaintiffs that they must not take it away, as it was required to enable the servants to enter the room to clean and tidy it. The female plaintiff put a locked satchel in which was a jewel box containing jewels into a drawer in a chest of drawers in the room. There was no key to the chest of drawers, nor was there any other receptacle in the room capable of being locked. In the daytime, during the plaintiff's absence from the house, the jewels were stolen from the drawer by another guest who was staying at the house. At the trial of an action by the plaintiffs to recover damages from the defendant for the loss of the

jewellery, the learned judge held that a boarding-house keeper was under no duty to take care of his lodger's goods unless they were handed over to him for safe custody, and was only liable for misfeasance, and he held that there was no case to go to the jury and gave judgment for the defendant. Upon an application for a new trial,

Held: by the nature of the contract between the plaintiffs and the defendant the custody of the plaintiffs' effects must have been in the defendant when the plaintiffs were not in their room; the consideration paid by the plaintiffs entitled them to reasonable protection where the conditions to which they were expected to conform put it out of their power to look after their effects themselves; and, therefore, the case must go down for a new trial.

Notes. Applied: *Caldecutt* v. *Piesse* (1932), 49 T.L.R. 26. Considered: *Olley* v. *Marlborough Court, Ltd.*, [1949] 1 All E.R. 127; *Tinsley* v. *Dudley*, [1951] 1 All E.R. 252; *Cole* v. *Lejeune*, [1951] 2 T.L.R. 308.

As to the position and liability of a boarding-house keeper, see 21 HALSBURY'S LAWS (3rd Edn.) 444, 445, 453; and for cases see 29 DIGEST 12, 30 DIGEST (Repl.) 545.

Cases referred to:

(1) *Holder* v. *Soulby* (1860), 8 C.B.N.S. 254; 29 L.J.C.P. 246; 2 L.T. 219; 25 J.P. 311; 6 Jur.N.S. 1031; 8 W.R. 438; 141 E.R. 1163; 29 Digest 12, *153.*

(2) *Dansey* v. *Richardson* (1854), 3 E. & B. 144; 2 C.L.R. 1449; 23 L.J.Q.B. 217; 118 E.R. 1095; sub nom. *Dancey* v. *Richardson*, 18 Jur. 721; 29 Digest 3, *17.*

(3) *Calye's Case* (1584), 8 Co. Rep. 32a; 77 E.R. 520; sub nom. *Windham and Meads Case*, 4 Leon. 96; 29 Digest 2, *1.*

Also referred to in argument:

Clench v. *D'Arenburg* (1883), Cab. & El. 42; 30 Digest (Repl.) 545, *1792.*

Application by the plaintiffs for judgment or a new trial in an action tried before DARLING, J., with a jury.

Cababé for the plaintiffs.

Duke, K.C., and *Herbert Jacobs* for the defendants.

Cur. adv. vult.

Aug. 11, 1905. The following judgments were read.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal by the plaintiffs from the judgment of DARLING, J., for the defendant in an action brought by the plaintiffs for damages for the loss of jewellery, due, as they alleged, to the negligence of the defendant, in whose boarding-house the plaintiffs were guests. It was admitted that the jewellery was stolen by another guest, who was received into the boarding-house while the plaintiffs were stopping there, and who turned out to be a thief well known to the police. The plaintiffs had been stopping in the house some months earlier; and there was evidence that the female plaintiff had told the manageress that she had some property with her that she wished to keep under lock and key, and had asked for a second key of the bedroom door; that she had been told in answer that only one door key was supplied, and that it must not be taken away, as it was required for the purpose of giving the servants access to the room; and that the room would be perfectly safe, as the people in the house were all known. Some months later the plaintiffs came a second time to the house, and were put again into the same room, in which a chest of drawers had been in the meantime placed, but there were no keys for any of the drawers, nor was there any receptacle capable of being locked. The plaintiff complained to the manageress, who said she would speak to the defendant. The female plaintiff had with her a jewel case containing jewellery which she required

PUBL. LONDIN UNIV.

for personal use. She placed the jewel case locked in a locked satchel, which she deposited in one of the drawers. During the plaintiff's absence from the house in the course of the day of Nov. 26 the satchel was cut open and the jewel case abstracted, and it was for this loss that the action was brought. The plaintiffs contended that the defendant was bound to take reasonable care of the persons and chattels of his guests, and that the system of one key only for the bedroom, which guests were debarred from taking away, the absence of keys for drawers, etc., alone or coupled with the fact that no steps were taken to ascertain the respectability of guests before admission, disclosed a want of due care on the part of the defendant which had led to the loss of their jewellery. DARLING, J., withdrew the case from the jury, holding that to found liability in a boarding-house keeper

> "there must be something more than negligence, there must be something which the law calls misfeasance, and negligence in this case was not enough."

He, therefore, gave judgment for the defendant. In doing so, he acted on the authority of *Holder* v. *Soulby* (1).

The questions, therefore, are: Was the defendant exempt from liability for negligence short of misfeasance? If not, was there evidence of such negligence fit for the consideration of the jury? I think the case cited does go the full length of the proposition laid down by the learned judge; but before examining it I desire to refer to the earlier case decided in the Court of Queen's Bench which seems to me to be in conflict with it, and which I think must be admitted to be at least equal authority—*Dansey* v. *Richardson* (2). There the action was brought by a guest at a boarding-house for the loss of a dressing-case stolen while the plaintiff was a guest. There was evidence that the theft was facilitated by the defendant's servant having left the street door ajar. ERLE, J., who tried the case, in substance directed that a boarding-house keeper was bound to exercise due and reasonable care as to the guests' property to the same extent that a prudent person would take of her own; but he told the jury that it would not be enough to fix the defendant, if they thought the servant was negligent, unless they thought the defendant was aware of anything which made it negligent in her to keep that servant. On a rule to show cause the court, LORD CAMPBELL, C.J., and COLERIDGE, WIGHTMAN and ERLE, JJ., were, according to the headnote, agreed that a boarding-house keeper "undertakes by implication of law, although nothing is expressed, to take due and proper care of a guest's baggage," but they were divided on the question of the extent of the liability of the mistress for the servant's negligence, WIGHTMAN and ERLE, JJ., holding that she was exempt unless proved to have been guilty of negligence herself, LORD CAMPBELL, C.J., and COLERIDGE, J., holding that there was no distinction between the negligence of the defendant and of her servant in the course of her employment.

As to the duty, therefore, there is the authority of the full court that the boarding-house keeper is bound by implication of law to take ordinary care of her guests' baggage. It is true that in the subsequent case of *Holder* v. *Soulby* (1), ERLE, C.J., who had directed the jury as above stated, said that he

> "did not intend to say that a lodging-house keeper was bound to take such care of a lodger's goods as a prudent owner would take of his own property."

But, even with this qualification, the first proposition affirmed in *Dansey* v. *Richardson* (2) has the authority of three judges at all events. *Holder* v. *Soulby* (1) was decided on demurrer, and related to a lodging-house only, though I confess this does not seem to me to make any difference in principle. ERLE, C.J., begins his judgment with these words:

> "In the first count the plaintiff claims to be entitled to recover on the mere relation of lodger with the landlord, and assumes that the law creates a duty on the part of the latter to take due and proper care of his lodger's goods. . . . Now, it is clear that no case, or treatise, or judge has ever affirmed that proposition."

A This is strange, as six years before LORD CAMPBELL, C.J., in *Dansey* v. *Richardson* (2) had said (3 E. & B. at 664):

> "I think that the application for a nonsuit was properly refused, and that the defendant was not entitled to a verdict on the fourth plea denying that the plaintiff was received into the boarding-house with her goods on the terms
B mentioned in the declaration [i.e., to take due and reasonable care of the plaintiff's goods whilst they were in the house and whilst the plaintiff was such guest for hire and reward to the defendant]. The defendant did receive the plaintiff with her goods on the terms . . . of taking due and reasonable care of her goods while they were in the said house and plaintiff remained a guest therein."

C COLERIDGE, J., says (ibid. at pp. 158, 159):

> "Unless it can be established that the defendant was not bound to take any care, it must be admitted that she was bound to take due and reasonable care. It seems to me perfectly clear she was bound to take some care, and that my brother ERLE was quite right in refusing to non-suit. I agree that it [the
D liability of an innkeeper] cannot be extended in all respects to the boarding-house keeper. But the liability of this last must be measured by what is reasonable."

WIGHTMAN, J., said (ibid. at p. 155):

> "I can find no authority for holding that a boarding-house keeper . . . is bound
E to take more care about the goods of his guest, which are no further given into his care than by being in his house with the guest, than he, as a prudent owner, would take in respect to his own. If he is bound to no more care than that, my brother ERLE's direction seems to me to be perfectly right."

The direction was as shown above.

F It is certainly strange that, in view of the passage which I have cited, ERLE, C.J., should have made the observation which I have quoted. It seems obvious, too, that the other members of the court were under a misapprehension of the true effect of *Dansey* v. *Richardson* (2). BYLES, J., does not allude to it at all, presumably on the ground stated by KEATING, J. (8 C.B.N.S. at p. 270):

G > "After the explanation given by my Lord, that case is clearly no authority for the maintenance of this action."

But accepting ERLE, C.J.'s qualification of his own judgment, the passages I have cited from the other judgments cannot be explained away, and, unless they can be explained away, they are decisive of the main point in this case, even if it were assumed that the view of ERLE and WIGHTMAN, JJ., as to the limit of the
H master's liability for the servant's negligence were to prevail.

The present case was withdrawn from the jury, and if the standard of the defendant's duty was reasonable care, the facts proved might have raised a question for the jury whether they did not establish personal negligence within the limits laid down by ERLE and WIGHTMAN, JJ., in the manageress of the boarding-house
I or in the defendant himself. I think, however, the court, having been equally divided on this particular aspect of the case, and *Holder* v. *Soulby* (1) not touching it at all, we are at liberty to choose for ourselves between the two conflicting opinions. To my mind, the reasoning of COLERIDGE, J., and LORD CAMPBELL, C.J., seems conclusive on the whole question, both as to the existence of the duty and the incidental responsibility of the master for the negligence of the servant delegated by the master for the performance of some part of that duty. I think there is a fallacy in the suggestion that because a boarding or lodging-house keeper does not come under the full liability of an innkeeper, he is exempt from all

obligation to take care. The instance in *Calye's Case* (3) of a man

> "lodged with another who is not an innholder, upon request, if he be robbed in his house by the servants of him who lodged him or any other he shall not answer for it,"

does not establish it, and is not inconsistent with a duty to take ordinary care. The object of the illustration is merely to show that a guest lodging with another is not entitled to the same degree of protection as he would be entitled to in an inn. But the instance confers no immunity upon lodging-house keepers from such liability as would otherwise arise from their receiving into their charge for reward a guest and his baggage. Nor does there seem any reason in principle why they should be so exempt. The general control of the house must be in the keeper. By the nature of the arrangement itself the custody of the lodger's effects must be in him when the lodger is not in his room, and the consideration paid ought as a matter of business to secure some protection to the lodger where the ordinary conditions to which he is expected to conform put it out of his own power to look after his effects himself. I can see no reason why there should be a presumption of immunity in his case from the common duty of a person accepting a charge to exercise at least ordinary care; a fortiori where he undertakes it for reward. The guest and baggage are both in a house of which he has the control, and his obligations to both of them arise in the same way out of the relation itself. It seems to me that the onus lies on those who affirm there is no duty. I cannot help thinking that the notion that such is the law arises from a misunderstanding of the passage about a lodger in *Calye's Case* (3), to which I have already referred.

For the reasons I have given, I think *Holder* v. *Soulby* (1) cannot countervail the authority of *Dansey* v. *Richardson* (2), and that the judgments of Lord Campbell, C.J., and Coleridge, J., ought to prevail where they differ from the other members of the court. To come to the facts of the present case, if the reason upon which the learned judge acted in withdrawing the case from the jury cannot prevail, I think the evidence raised a question for the jury whether there was a failure of reasonable care on the part of the defendant to which the loss of the plaintiff's jewellery was attributable. I think they were the proper tribunal to decide it, and that we should be usurping their functions if we withheld it from their consideration. I abstain from commenting further on the inferences which might be drawn from the evidence, as I am of opinion the case must go down for a new trial.

ROMER, L.J.—After the full way in which the Master of the Rolls has dealt in his judgment with *Dansey* v. *Richardson* (2) and *Holder* v. *Soulby* (1), I do not propose to examine in detail those cases or the judgments delivered in them. But certainly those cases have not left the law concerning the liability of a boarding-house keeper to a paying guest in respect of the latter's luggage in a perfectly settled or satisfactory state, and I think it right, therefore, to state my opinion on the subject.

One thing is clear—namely, that the liability of the landlord of the boarding-house in respect of the luggage is not co-extensive with the liability of an ordinary innkeeper, but what the extent of the liability is remains to be considered. It appears to me that, before that can be ascertained, it is necessary, at any rate to a certain extent, to inquire into the particular circumstances of each case. It may be that some of the luggage has been committed temporarily, or during the stay of the lodger, into the sole custody of the landlord. In that case, clearly, there would be a duty on the part of the landlord to take reasonable care of it. On the other hand, there may be cases where, by arrangement between the parties, the guest has taken upon himself solely the care of his luggage, and in those cases, whatever may be the duties of the landlord towards his guest, they could not be treated as based on the footing that in any sense he had the custody or partial

A custody of the luggage. The difficulty as to the law arises in cases like the present, which are intermediate between the two I have just mentioned, and where the luggage cannot be said to be in the sole custody of either the landlord or the guest. In the present case the luggage was placed in a room which was appropriated as a bedroom for the sole use of the guest, but the guest had not the sole control of the room. The servants of the landlord had the duty and B right of coming to the room for all necessary or proper purposes of cleaning and so forth. The key of the room was committed to the care of the guest during the night, or during her visits to the room in the daytime, but at other times the key had to be in the custody of the landlord's servants.

The question then arises as to what, if any, is the duty of a landlord in such a case towards his guest in respect of the care of the luggage left in the room. I C think that it cannot be said that the landlord is under an absolute duty to take reasonable care of the luggage if by the word "care" it is implied that the landlord is in the same position as if the care and custody of the luggage had been committed solely to him. That, in my opinion, cannot be implied, without further knowledge of the facts, merely from the position of a boarding-house keeper towards his paying guest; and I think this was the view taken by D ERLE, C.J., in *Dansey* v. *Richardson* (2) and *Holder* v. *Soulby* (1), and accounts for many of the observations in his judgments. On the other hand, it appears to me not correct to say that in such a case there is not some duty by the landlord to his guest which may affect the question as to liability for loss of the luggage. Seeing that the landlord carries on his business of a boarding-house keeper for reward, I think he is bound to carry on that business with reasonable care, E having regard to the nature and normal conduct of the business as known to the guest, or as represented to the guest by him; and if by reason of a breach of that duty on his part the luggage is lost I can see no reason why he should not be held liable for the loss to the guest.

In the present action was there or not on the evidence such a sufficient case made by the plaintiffs, the guests, of such breach and consequent loss, as to call F upon the defendant, the keeper of the boarding-house, for an answer? On the whole, though at one time I felt considerable doubt on the point, I have come to the conclusion that such a sufficient case was made out, so that, if the defendant did not meet it, the matter was fit for the consideration of the jury, and should have been left to them. Seeing that there is to be a new trial, it is not advisable that the evidence given on behalf of the plaintiff should be elaborately discussed G by us. But I may say that one of the considerations which has pressed on me is that, on the evidence as it stands, unanswered at present by the defendant, the business appears to have been represented by the defendant to the plaintiffs as one where the guests staying in the house were known to the defendant, and where, consequently, there was comparatively little risk in the system adopted by the defendant in the management of the business as to only one key being kept H for the purposes of the guest and the purposes of the defendant's servants, whereas it now appears from the evidence, as it at present stands, that the defendant admitted the guest who stole the plaintiffs' chattels, without any knowledge of him, and without any references or introduction, or inquiry as to his respectability. I think, therefore, there should be a new trial.

I **MATHEW, L.J.**—SIR RICHARD HENN COLLINS, M.R., has read my judgment and agrees with it.

New trial ordered.

Solicitors: *J. Westcott*; *T. V. Fox.*

[*Reported by* E. A. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

R. *v.* OSBORNE

[Court for Consideration of Crown Cases Reserved (Lord Alverstone, C.J., Kennedy, Ridley, Channell and Phillimore, JJ.), January 28, February 20, 1905]

B

[Reported [1905] 1 K.B. 551; 74 L.J.K.B. 311; 92 L.T. 393; 69 J.P. 189; 53 W.R. 494; 21 T.L.R. 288]

Criminal Law—Evidence—Complaint—Complaint made in answer to question—Consent not in issue—Consistency of conduct of prosecutrix with her evidence—Direction to jury.

C

In cases of rape, indecent assault, and similar offences the mere fact that a complaint by the prosecutrix in the absence of the prisoner is made in answer to a question is not of itself sufficient to make it inadmissible. A question of a suggestive or leading character—e.g., "Did So-and-so (naming the prisoner) assault you?", or "Did he do this or that to you?"—or a question of an intimidating character, will make evidence of the answer inadmissible, but a question put to the prosecutrix such as: "What is the matter?" or "Why are you crying?" will not do so. In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the prosecutrix, must be left to the discretion of the judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the prosecutrix was about to make, it is not rendered inadmissible by the fact that the questioner happened to speak first. Such a complaint is admissible in a case where consent is not material and so the complaint cannot be put forward as negativing consent—e.g., indecent assault on a girl under thirteen—as being evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box. The judge must be careful to inform the jury that the evidence of the complaint is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the credibility of the prosecutrix, and, when consent is in issue, of the absence of consent.

D

E

F

Notes. Applied: *Chesney* v. *Newsholme*, *Newsholme* v. *Chesney* (2), [1908] P. 301. Considered: *R.* v. *Norcott*, [1917] 1 K.B. 347. Applied: *R.* v. *Camelleri*, [1922] 2 K.B. 122. Distinguished: *R.* v. *Whitehead*, [1928] All E.R.Rep. 186. Referred to: *R.* v. *Lee* (1911), 7 Cr. App. Rep. 31; *R.* v. *Wannell* (1922), 87 J.P. 48; *R.* v. *Lovell* (1923), 129 L.T. 638; *R.* v. *Coulson*, [1927] 20 Cr. App. Rep. 100; *Gillie* v. *Posho*, Ltd., [1939] 2 All E.R. 196.

G

As to evidence of complaints, see 10 Halsbury's Laws (3rd Edn.) 468; and for cases see 14 Digest (Repl.) 452–456.

H

Cases referred to:

(1) *R.* v. *Merry* (1900), 19 Cox, C.C. 442; 14 Digest (Repl.) 454, *4405*.
(2) *R.* v. *Lillyman*, [1896] 2 Q.B. 167; 65 L.J.M.C. 195; 74 L.T. 730; 60 J.P. 536; 44 W.R. 654; 12 T.L.R. 473; 40 Sol. Jo. 584; 18 Cox, C.C. 346, C.C.R.; 14 Digest (Repl.) 453, *4390*.
(3) *R.* v. *Kingham* (1902), 66 J.P. 393; 14 Digest (Repl.) 453, *4394*.
(4) *R.* v. *Kiddle* (1898), 19 Cox, C.C. 77; 14 Digest (Repl.) 453, *4393*.
(5) *R.* v. *Folley* (1896), 60 J.P. 569; 14 Digest (Repl.) 452, *4380*.
(6) *Commonwealth* v. *Cleary* (1898), 172 Mass. 175.
(7) *Commonwealth* v. *Roosnell* (1886), 143 Mass. 32.
(8) *Commonwealth* v. *Hackett* (1898), 170 Mass. 194, 196.

I

Also referred to in argument:

R. v. *Rowland* (1898), 62 J.P. 459; 14 Digest (Repl.) 453, *4391*.

A *R.* v. *Brasier* (1779), 1 Leach, 199; 1 East, P.C. 443, C.C.R.; 14 Digest (Repl.) 524, *5080.*

Case Stated for the opinion of the court by the chairman of Worcestershire Quarter Sessions,

The prisoner, William Henry Osborne, was indicted for indecently assaulting B Keziah Parkes. It was proved that the prisoner kept a fried fish shop in Kidderminster at about a distance of five minutes' walk from where the prosecutrix resided, and that on the day in question Keziah Parkes, a girl of the age of twelve years, with her sister, Nelly Parkes aged eight, and a girl named Mary Moule aged eleven, went to the prisoner's shop about 3.30 in the afternoon for the purpose of buying some fried potato chips. They had been in the habit of going to the C shop and of selling dripping to the prisoner. Mary Moule asked the prisoner if he wanted any dripping, and he replied that they could fetch him some if they would come back at once. Mary Moule and Nelly Parkes went to fetch the dripping. Keziah Parkes asked if she should go with them, but the prisoner said: "No, stop with me." As soon as the other girls were gone prisoner took Keziah Parkes into the back kitchen, pulled her on to his lap, put his hand up her D clothes, and undid her drawers and felt her private parts. Keziah Parkes offered no resistance or objection. He then put her down on to the ground and took her up again. A girl came into the front shop and the prisoner put Keziah Parkes down. When the girl left prisoner came into the kitchen and asked Keziah Parkes to come back on his lap, but she refused and ran off towards home. On her way home she met Mary Moule and her sister coming back to the shop. E They asked her "why she was going home and why she did not wait till they came back." She had not spoken to them when this question was asked.

Mary Moule was called as a witness at the trial and asked, when she met Keziah Parkes in the street: "Did you speak to her?" Moule replied, "Yes; I asked her why she did not stop for me." The question was then asked: "What did she say?" Counsel for the prisoner objected to this question on the grounds F (i) that an answer given by a prosecutrix to a question in a charge of indecent assault could not be given in evidence, as such an answer was not a complaint within the meaning of *R.* v. *Lillyman* (2); and (ii) that, as the girl was under the age of thirteen, her consent was not material to the charge, and consequently any statement she made, whether in reply to a question or otherwise, could not be given in evidence as the rule in *R.* v. *Lillyman* (2) applied only to cases G where want of consent was a material element in the charge. Counsel for the prisoner relied upon the decision of *R.* v. *Merry* (1), that an answer to a question was not a complaint, and also on the decision in *R.* v. *Kingham* (3), that where consent was not a material element the statement of the prosecutrix was not admissible. Counsel for the prosecution relied upon the decision in *R.* v. *Kiddle* (4), where it was decided that the rule in *R.* v. *Lillyman* (2) applied to cases H where the girl on whom the offence was alleged to have been committed was of such tender years that the court directed her evidence to be taken, but not upon oath, and where the question of her consent was immaterial.

The chairman, being of opinion that the conduct of the prosecutrix in running away home and not waiting for her companions was part of the res gestæ, and that her statement would be evidence of why she ran away home, was of opinion I that neither the rule in *R.* v. *Merry* (1) nor the rule in *R.* v. *Kingham* (3) applied in this case, or, if either of them did apply, that such decisions were not in accordance with *R.* v. *Folley* (5) and *R.* v. *Kiddle* (4). In accordance with those cases he allowed the question to be put. Moule replied to the question why the prosecutrix did not stop for her: "Because she did not like the prisoner, and would not go near him again, as he unbuttoned her drawers; that was all she said." The police constable who arrested the prisoner swore that at the police-station, when the prisoner was in custody, he told the prisoner that he would be charged with indecent assault upon Keziah Parkes, that he cautioned him, and

then the prisoner replied: "She came and sat on my lap herself. She has done it many times, and is more to blame than me." The prisoner pleaded Not Guilty, and was found Guilty with a recommendation to mercy, and judgment was postponed, the prisoner being liberated on recognisance bail to appear and receive judgment, himself in £10 and one surety in £10.

The questions of law for the consideration of the court were: (i) Whether the fact that a statement made by a prosecutrix to a third person immediately after an alleged indecent assault in answer to a question from such person prevented such statement being given in evidence in accordance with the rule laid down in *R.* v. *Lillyman* (2). (ii) If such a statement could be given in evidence, although it was an answer to a question, did the fact that the offence charged was one where the consent of the prosecutrix was immaterial render such statement inadmissible? (iii) Could such a statement be given in evidence when the prosecutrix did not state that the act charged was done against her will?

Marchant for the prisoner.
J. B. Matthews for the Crown.

Cur. adv. vult.

Feb. 20, 1905. The judgment of the court was read by

RIDLEY, J.—The prisoner Osborne was tried at Worcestershire Quarter Sessions on an indictment containing two counts—the first for indecent assault, and the second for common assault on Keziah Parkes, a girl twelve years old. It appeared that Keziah Parkes, along with a younger sister and another girl named Mary Moule, of a similar age, went to a shop kept by the prisoner for the purpose of buying chips. Two of the girls—namely, Moule and the younger sister—went out of the shop on an errand, and during their absence the alleged assault was committed by him on Keziah. She then left the shop, and on her way home met Mary Moule with her sister coming back to the shop. Mary Moule was called at the trial, and was asked when she met Keziah Parkes in the street: "Did you speak to her?" Moule replied: "Yes; I asked her why she did not stop for me." The next question put to the witness was: "What did she say?" Objection was then taken for the prisoner that the witness's answer was not admissible in evidence, but the chairman admitted the evidence. The girl's evidence was as follows: "Because she did not like the prisoner and would not go near him again, as he unbuttoned her drawers. That was all she said." The prisoner was convicted, and the point raised for our decision is whether this ruling was right.

It was contended for the prisoner that the evidence was inadmissible—first, because the answer made by the girl was not a complaint, but a statement or conversation, having been made in answer to a question; and, secondly, because, as Keziah Parkes was under the age of thirteen, her consent was not material to the charge. As to the first point, *R.* v. *Merry* (1) was quoted. In that case a question had been put to a girl of nine years old by her mother, in a case of indecent assault, and the learned judge ruled that, as the proposed evidence was a statement made in answer to a question, it was a conversation and not a complaint, and he declined to allow it to be given in evidence. It does not appear, however, from the report what the question was that was put to the girl. It appears to us that the mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as not being a complaint. Questions of a suggestive or leading character will, indeed, have that effect, and will render it inadmissible; but a question such as this put by the mother or other person: "What is the matter?" or "Why are you crying?" will not do so. These are natural questions which a person will be likely to put. On the other hand, if she were asked, "Did So-and-so (naming the prisoner) assault you?" "Did he do this and that to you?" then the result would be different, and the statement ought to be rejected. In each case the decision

A on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens B to speak first. In this particular case we think that the chairman of quarter sessions acted rightly, and that the putting of this particular question did not render the statement inadmissible.

Upon the second point it was contended that, although under the decision of *R.* v. *Lillyman* (2) the particulars of a complaint made may, in some circumstances, be given in evidence on a charge of rape, that ruling does not extend to a charge C of criminal knowledge or indecent assault where, as in the present case, consent is not legally material. This contention is supported by *R.* v. *Kingham* (3), decided in 1902; but, on the other hand, in *R.* v. *Kiddle* (4), decided in 1898, it was ruled that the decision in question does extend to all charges of this character, whether consent is a defence or not. In *R.* v. *Lillyman* (2) the prisoner was charged on an indictment containing three counts—first, attempt to have carnal D knowledge of a girl above thirteen and under sixteen; second, an assault with intent to ravish her; third, an indecent assault. The prisoner was found Guilty upon the first count only, and upon that count, in order to establish guilt, it was not necessary to prove want of consent. But the prosecutrix swore that what was done to her was done without her consent; and the court, in giving judgment, said that, as she had so deposed, the complaint was admissible. Two points were E taken and argued—first, whether the fact that the complaint was made was evidence; second, whether particulars of it could be given; and it is to the latter of these that the greater part of the judgment relates. This point was not argued before us, as distinguished from the first point on the present occasion; and the only question, therefore, for our determination is whether, where consent is no part of the charge, the complaint is admissible.

F By the judgment in *R.* v. *Lillyman* (2) it was decided that the complaint was admissible, not as evidence of the facts complained of, nor as being a part of the res gestæ (which it was not), but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains. Counsel for the prisoner argued upon this that the reasons so given were one only, and that the G consistency of the complaint with the story given by the prosecutrix was material only so far as the latter alleged non-consent. If however, that argument were sound, the words in question might have been omitted from the sentence, and it would have been sufficient to say that the complaint was admissible only and solely because it negatived consent. We think, however, if it were a question of the meaning of words, that the better construction of the judgment is that, H while the court dealt with the charge in question as involving in fact, though not in law, the question of consent on the part of the prosecutrix, yet the reasons given for admitting the complaint were two—first, that it was consistent with her story in the witness-box; and, secondly, that it was inconsistent with consent. The reasoning proceeded thus: On the second and third counts consent was material in law; on the first it was material in fact. There is for this purpose no difference I between the two. It is not, therefore, because the charge itself involves proof of the absence of consent that the evidence is admissible. On the contrary, the prosecutrix herself can make it evidence by deposing that she did not consent when that is no part of the charge. In other words, whether non-consent be legally a necessary part of the issue, or whether, on the other hand, it is what may be called a collateral issue of fact, the complaint becomes admissible. But how does non-consent become a collateral issue of fact? The answer must be, in consequence of the story told by the prosecutrix in the witness-box. And the judgment treats the two cases on the same footing. If non-consent be a part of the

story told by the prosecutrix, or if it be legally a part of the charge, in each case alike the complaint is admissible. But, if that is so, does not the reasoning apply equally to other parts of the story, and not merely to the part in which the prosecutrix has denied consent? If not, it seems illogical to allow, as the court did allow, that the whole of the story may be given in evidence.

The true result is, we think, that, while the decision in *R.* v. *Lillyman* (2) is not strictly on all fours with the present case, yet the reasoning which it contains answers the question now raised for decision. But, however that may be, it appears to us that, in accordance with principle, such complaints are admissible, not merely as negativing consent, but because they are consistent with the story of the prosecutrix. In all ordinary cases, indeed, the principle must be observed which rejects statements made by anyone in the prisoner's absence. Charges of this kind form an exceptional class and in them such statements ought, under proper safeguards, to be admitted. Their consistency with the story told is, from the very nature of such cases, of special importance. Did the woman make a complaint at once? If so, that is consistent with her story. Did she not do so? That is inconsistent. And in either case the matter is important for the jury. It is in accordance with this view that in early times it was incumbent on the woman who brought an appeal of rape to prove that while the offence was recent she raised "hue and cry" in the neighbouring towns, and showed her injuries and clothes to men, and that the appellee might raise as a defence the denial that she had raised the hue and cry. The passages in BRACTON, DE CORONA, lib. iii, fol. 147, and in the PLEAS OF THE CROWN, SELDEN SOCIETY, vol. 1, WARWICKSHIRE EYRE, A.D. 1221, p. 109, as also in the MIRROR OF JUSTICES, SELDEN SOCIETY, vol. 7, EXCEPTIONS, cap. 21, p. 103, are interesting and instructive as showing that the distinction in this special class of case has been recognised from the earliest times. The hue and cry was the phrase used generally for the pursuit of a felon; but we have not found any other case than rape in which it was for the prosecution to show that they had raised it, or in which it was a defence to show that it had not been raised. It is, however, right to refer to a passage in BRACTON, DE CORONA, lib. iii, fol. 139, in which describes the objection made by an appellee that the hue and cry had not been raised as ista generalis exceptio et prima: see the passage referred to in STEPHEN'S HISTORY OF CRIMINAL LAW, vol. 1, p. 246. But it seems to have been specially applicable to this class of case only. A former weighty authority for the existence of this exception to an acknowledged general rule is to be found in HALE'S PLEAS OF THE CROWN, vol. 1, p. 633, where it is stated that the party ravished is to give evidence on oath, and her credibility must be left to the jury:

> "For instance, if the witness be of good fame, if she presently discovered the offence, made pursuit after the offender, showed circumstances and signs of the injury . . . these and the like are concurring evidence to give greater probability to her testimony, when proved by others as well as herself. But, on the other side, if she concealed the injury for any considerable time after she had opportunity to complain . . . and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her story is false or feigned."

We think that these words may be taken as stating the law accurately, and they indicate that these complaints are to be admitted, not only because they bear on the probability of her testimony in a case in which, without such or other corroboration, reliance might be placed on her testimony.

Our atention has been called to *Commonwealth* v. *Cleary* (6), decided by the Supreme Judicial Court of Massachusetts. In that case the indictments were for unlawfully abusing a child under the age of sixteen years. The girl had made a complaint, and the fact was given in evidence. No question arose as to the admissibility of its details; but the point reserved for the decision of the court

A on conviction of the prisoner, was whether the proof of the complaint could be admitted. The argument proceeded on the question whether it was too remote in point of time; but HOLMES, J., in giving the judgment of the court, said:

> "It is not argued that the common law in cases of rape does not apply. See *Commonwealth* v. *Roosnell* (7); *Commonwealth* v. *Hackett* (8). The rule that
B in trials for rape the government may or must prove that the woman concerned made complaint soon after the commission of the offence is a perverted survival of the ancient requirement that she should make hue and cry as a preliminary to bringing her appeal: GLANVILLE XIV., c. 6; BRACTON, fol. 147a; FLETA, c. 25, s. 14; St. 4 Edw. 1, St. 2. Appeals became obsolete, and left rape to be dealt with by indictment before the development of the modern
C law of evidence."

He then quotes the passage from HALE'S PLEAS OF THE CROWN, above set out, and says:

> "If it means what it has been taken to mean, that the government can prove fresh complaint as part of its original case, it cannot be justified by the general
D principles of evidence which now prevail. . . . The evidence is not admitted as part of the res gestæ, or as evidence of the truth of the thing alleged, or solely for the purpose of disproving consent, but for the more general purpose of confirming the story of the ravished woman. *R.* v. *Lillyman* (2) . . . The test is whether, according to the principles of the exception her having made the complaint tends to corroborate testimony given by the child at the trial."

E For these reasons the evidence was in that case held to be admissible.

With that statement of the law we concur. We are, at the same time, not insensible of the great importance of carefully observing the proper limits within which such evidence should be given. It is only to cases of this kind that the authorities on which our judgment rests apply; and our judgment also is to them restricted. It applies only where there is a complaint not elicited by questions
F of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and, when consent is in issue, of the absence
G of consent. For these reasons we think the conviction should be affirmed.

Conviction affirmed.

Solicitors: *G. A. Weston*, Kidderminster; *Stallard & Turner*, for *A. Spencer Thursfield*, Kidderminster.

[*Reported by* A. A. BETHUNE, ESQ., *Barrister-at-Law.*]

A

R. *v.* DAVIES

[King's Bench Division (Lord Alverstone, C.J., Wills and Darling, JJ.), November 6, 28, 1905]

[Reported [1906] 1 K.B. 32; 75 L.J.K.B. 104; 93 L.T. 722; 22 T.L.R. 97; 54 W.R. 107; 50 Sol. Jo. 77]

B

Contempt of Court—Prejudicing fair trial of legal proceedings—Jurisdiction of King's Bench Division to punish contempt of inferior court—Quarter sessions —Protection of public from mischief arising if authority of courts undermined.

The King's Bench Division of the High Court, inheriting all the jurisdiction and powers of the Court of King's Bench, has jurisdiction summarily to punish by attachment any person guilty of contempt of an inferior court (e.g., quarter sessions) where that court has not the power to protect itself. The principle underlying the cases in which persons have been punished for attacks on courts and interferences with the due execution of their duties and orders is not the need to protect either the court as a whole or the individual judges of the court from a repetition of the offence against them; it is the need to protect the public, and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief they will incur if the authority of the tribunal, which exists for their good alone, be undermined. There is no difference in principle between direct attacks on courts or judges and the publication of writings the tendency of which is to deprive inferior courts of the possibility of doing impartial justice.

C

D

E

Contempt of Court—Prejudicing fair trial of legal proceedings—Applicant charged before justices with offence triable at quarter sessions—Further offence charged triable only at assizes—Committal to assizes—Contemptuous matter published before further offence charged—Contempt of assize court.

On Sept. 5, 1905, the applicant was charged before magistrates with having abandoned her infant child, an offence triable at quarter sessions. On Sept. 5, 8, 9 and 12 the respondent published in a local newspaper articles stating that she had been engaged in baby farming and guilty of criminal offences. On Sept. 27 a charge of attempting to murder the child was preferred against her, an offence triable only at assizes. On Oct. 11 the magistrates committed her for trial at the next assizes of the county. On a rule nisi calling on the respondent to show cause why he should not be attached for his contempt in publishing comments calculated to prejudice the trial of the applicant,

F

G

Held: although, when the matter complained of was published it was uncertain to what court the applicant would be committed, or whether she would be committed at all, and although the charge against her had been altered, the articles in question were calculated to prejudice the fair trial of the accused whatever form the charge might ultimately take and in whatever court she was tried, and their publication constituted a contempt of court.

H

Notes. Considered: *R.* v. *Clarke, Ex parte Crippen*, [1908–10] All E.R.Rep. 915. Applied *R.* v. *Editor of "Daily Mail," Ex parte Farnsworth*, [1921] All E.R.Rep. 476. Considered: *R.* v. *Judge, Ex parte Isle of Ely Justices*, [1931] All E.R.Rep. 613. Referred to: *Louth Northern Division Case* (1910), 6 O'M. & H. 103; *R.* v. *Edwards, Ex parte Welsh Church Temporalities Comrs.* (1933), 49 T.L.R. 383.

I

As to speeches or writings tending to defeat the ends of justice, and the protection of inferior courts, see 8 Halsbury's Laws (3rd Edn.) 6–12, 19, 20; and for cases see 16 Digest (Repl.) 14, 16, 21 et seq.

Cases referred to:

(1) *R.* v. *Parke*, [1903] 2 K.B. 432; 89 L.T. 439; 67 J.P. 421; 52 W.R. 215; 19 T.L.R. 627; sub nom. *R.* v. *Parke, Ex parte Dougal*, 72 L.J.K.B. 839; 47 Sol. Jo. 692, D.C.; 16 Digest (Repl.) 25, *192*.

(2) *R.* v. *Almon* (1765), Wilm. 243; 97 E.R. 94; 16 Digest (Repl.) 6, *2*.
(3) *Helmore* v. *Smith* (*No. 2*) (1886), 35 Ch.D. 449; 56 L.J. 145; 56 L.T. 72; sub nom. *Helmore* v. *Smith*, *Ex parte Smith*, 35 W.R. 157; 3 T.L.R. 139, C.A.; Digest Supp.
(4) *R.* v. *Ramsey and Foote* (1883), Cab. & El. 126; 48 L.T. 733; 15 Cox, C.C. 231; 15 Digest (Repl.) 880, *8486*.
(5) *Burgh* v. *Blunt* (1717), 10 Mod. Rep. 349; 88 E.R. 759; 16 Digest (Repl.) 14, *61*.
(6) *R.* v. *Burchett* (1723), 1 Stra. 567; 8 Mod. Rep. 208; 93 E.R. 704; 16 Digest (Repl.) 13, *51*.
(7) *R.* v. *Langston*, unreported; cited in 10 Mod. Rep. at p. 350.
(8) *Re Application for an Attachment for Contempt of Court* (1886), 2 T.L.R. 351, D.C.; 16 Digest (Repl.) 13, *54*.
(9) *Gordon* v. *Jones* (1896), 31 L.J. 8; 16 Digest (Repl.) 12, *43*.
(10) *R.* v. *Armstrong* (1894), Times, May 9; 16 Digest (Repl.) 12, *42*.
(11) *Re Clements and Costa Rica Republic* v. *Erlanger* (1877), 46 L.J.Ch. 375; sub nom. *Costa Rica Republic* v. *Erlanger*, 36 L.T. 332, C.A.; 16 Digest (Repl.) 16, *97*.

Rule Nisi calling on David Davies, the editor, printer, and publisher of the "South Wales Daily Post," to show cause why a writ of attachment should not issue against him for his contempt in printing and publishing, or causing to be printed and published, in the newspaper of Sept. 5, 8, 9, and 12, 1905, comments calculated to prejudice one Henrietta Hunter upon her trial at the then forthcoming assizes for the county of Glamorgan upon charges of the attempted murder of and of abandoning a child.

It was stated in the affidavit made by the solicitor for the applicant, upon which the rule was granted, that on Sept. 1, 1905, an infant child was abandoned at Morriston, near Swansea, in the county of Glamorgan. On Sept. 2 Henrietta Hunter was arrested on a charge of abandoning the child at Morriston on Sept. 1. On Sept. 27 a charge of attempted murder was preferred against her. She was brought before the justices at Swansea, and on Oct. 11 she was committed for trial to the next Glamorganshire Assizes on a charge of attempted murder of the child, which it was alleged was abandoned by her on Sept. 1. At Swansea there was printed and published by the respondent (Davies) a newspaper called the "South Wales Daily Post," and he was the editor and publisher. The issue of the "South Wales Daily Post" for Sept. 5, 1905, contained an article entitled "Abandoned by the Hedgeside," and after a report of the police-court proceedings a paragraph headed "Antecedents of the accused" was published, with a statement alleged to have been made by Mrs. Hunter and comment on the alleged statement. In the issue of the newspaper for Sept. 8 the respondent printed and published an article entitled "Traffic in Babies." This article, among other things, alleged that the statements published in the issue of Sept. 5 were amply borne out by further information which had come to his hands, and, further, that such information showed Mrs. Hunter to be one Dora Johnstone. The article further stated that under that name she had been guilty of wholesale child farming and had been convicted of fraud, and it gave a list of convictions of Dora Johnstone at Bristol. A paragraph which was headed "Dora Johnstone's Llanelly Victims" proceeded to state the methods of Dora Johnstone, who, it was suggested, did an extensive business in baby farming. The article further stated that there was no doubt in the minds of the police that the name Henrietta Hunter was only one of her several aliases, and it proceeded to give details of letters alleged to have been left behind by Henrietta Hunter at Llanelly, and also interviews with other persons who it was alleged had been duped. A further article in the newspaper of Sept. 9 contained a report of an interview and a statement alleged to have been made by several persons, and the article commenced: "The latest development in the Swansea sensation is in Swansea itself, and serves to show how extensive Mrs. Hunter's dealings

undoubtedly were. There now lies in Danygraig Cemetery a five months old mite in a grave under a name not its own." In the issue of Sept. 12 there was an article entitled "Baby Farming Sensation," and certain comments were published. The "South Wales Daily Post" was a newspaper with a very large circulation, and contained a statement that such circulation was guaranteed to be at least three times as large as that of any other newspaper in that district. Henrietta Hunter was at the time the articles were published charged with only the abandonment of one child, the same child in respect of which she had been committed for trial on a charge of attempted murder. She denied that she was the woman Dora Johnstone, and further denied that she had been before convicted.

The deponent stated that he had been instructed to defend Mrs. Hunter, and that, in his opinion, the articles complained of would greatly prejudice her fair trial by reason of the alleged previous convictions having been published and other matter that would not be admissible as evidence, and allegations having been made and statements published by persons who would not be subjected to cross-examination, and also by reason of the fact that her alleged antecedents had been referred to in detail, and that there had been a suggestion that she had been trafficking in babies and baby farming in an extensive manner, when no evidence of any kind had been produced to that effect; that she had been committed for trial to the assizes for the county of Glamorgan on Nov. 21 on a charge of attempted murder of the child and also on a further charge of abandoning the same child; and that the jury for the assizes which would be held at Cardiff were or might be readers of the "South Wales Daily Post," as the jury would be drawn from various parts of the county. The respondent made an affidavit in reply, in which (among other things) he stated that his newspaper was an evening newspaper, and that the chief paragraphs complained of were taken from a morning paper; that he was absent when one of the publications was issued and was unaware of such publication; and he pointed out that at the time the articles were published the only charge against the woman was that of abandoning the child, which could be tried at quarter sessions, and that it was not until Sept. 27, and, therefore, after the publications had ceased, that the charge of attempted murder was preferred. He expressed his deep regret that the articles had been published, and stated that he had no intention of prejudicing the fair trial of the case.

Bankes, K.C. (*Ellis Hill* with him), for the respondent, showed cause.
R. E. Vaughan-Williams in support of the rule.

Cur. adv. vult.

Nov. 28, 1905. **WILLS, J.,** read the following judgment of the court.—This is an application to commit the respondent for contempt of court. The circumstances which have given rise to it are as follows. A woman was arrested on Sept. 2, 1905, on a charge of abandoning a child at Morriston, Glamorgan. She was brought before the magistrates at Swansea on Sept. 5. The respondent is the editor, printer, and publisher of the "South Wales Daily Post," a newspaper published at Swansea. In the issue of his paper published on the evening of Sept. 5 there appeared a report of the proceedings before the justices, followed by a statement headed: "Antecedents of the Accused," and in the issue of Sept. 8 another article entitled: "Traffic in Babies," and in the issues of Sept. 9 and 12 further articles relating to the accused person. They contained a great number of statements calculated to give an exceedingly unfavourable impression of the prisoner, and notably the article of Sept. 8 stated that she had been guilty of wholesale child farming and alleged her identity with one Dora Johnstone, who, it was alleged, had more than once been convicted of fraud. It is, however, not necessary to give any more specific account of their contents, inasmuch as counsel for the respondent admitted that nothing could be said in defence or even in palliation of the act of publishing such articles concerning a person under remand upon a charge which might lead to her committal. He confined his argument to denying the jurisdiction

of this court to deal with the present application on the ground that as the offence charged could be tried at quarter sessions, the offence was one against the quarter sessions and could not be dealt with summarily by this court.

It would, perhaps, be enough to say that, inasmuch as the question whether the committal should take place to the assizes or quarter sessions depended in all probability upon the mere accident of which tribunal might hold its sittings before the other, it was just as much a contempt of the assize court as of quarter sessions, and, if so, our judgment in *R.* v. *Parke* (1) applies. We adhere to the view we expressed in that case, that the publication of such articles is a contempt of the court which ultimately tries the case after committal, although at the time when they are published it cannot be known whether there will be a committal or not. Their tendency is to poison the stream of justice in that court, though at the time of their publication the stream had not reached it, and as such articles are calculated to interfere with the power of the court (whatever it be) that tries the case to do effective justice, it is a contempt of any court which very well may try the case but in fact does not do so, as well as of the court which actually tries it. What actually happened was that ultimately, some time after the publication of the articles now complained of, the prisoner was committed on a charge of attempting to murder the child who was the subject of the original charge, and, of course, upon such a charge she was committed to the assizes. We think that, although the original charge has been altered, the case is still intimately connected with the original charge and relates to the same subject-matter, that the articles in question are equally calculated to prejudice the fair trial of the accused whatever form the charge might ultimately take, and that their publication does constitute a contempt of the assize court to which the woman has been committed. It matters not whether the uncertainty at the time the articles were published extended only to the forum to which the case should be sent or to the question whether a committal would take place at all, or to both. In each of such cases the mischief is the same, and the court which might have to try the case would find its authority equally undermined beforehand.

We think it right to repeat in this connection a passage in the judgment in *R.* v. *Parke* (1) ([1903] 2 K.B. at pp. 436, 437), which expresses the deliberate opinion of the court as constituted when this case was argued, as well as of the court as constituted when *R.* v. *Parke* (1) was decided:

> "It has been argued, however, that publication of articles of the kind in question cannot be treated as a contempt of the assize court unless the committal has actually taken place and a bill been found, when only, it is urged, is there a case pending in the assize court, and when, it is also urged, the jurisdiction ought to be exercised by that court itself. A moment's consideration, it seems to us, is sufficient to dispose of such a proposition. The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency, and sometimes their object, is to deprive the court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression 'contempt of court.' If it be once grasped that such is the nature of the offence, what possible difference can it make whether the particular court which is thus sought to be deprived of its independence and its power of effecting the great end for which it is created, be at that moment in session or even actually constituted or not? It is perfectly certain that by law it will and must be constituted, and that when constituted it and it alone can take cognisance of the particular offence which is the subject of the preliminary inquiry. The wrong can hardly be the less because the purpose or the tendency of the act

complained of is that the assize court never shall have undisturbed power to fulfil its functions satisfactorily. The High Court exists always. To provide beforehand that one of its branches, which, although it does not at the moment exist, yet must, both according to immemorial custom and now also by statutes and rules having the same effect, come into existence, shall be hampered and hindered in the effectual discharge of its duties as soon as it is constituted, if called upon to try a particular case which it is at all events proposed to bring into that court, is surely an offence against the High Court itself."

It is true that, in *R.* v. *Parke* (1), the only uncertainty was whether the accused person would be committed to any court, the offence charged being one which in case of committal must go to the assizes. We cannot see that the additional element of uncertainty, that the case could be tried at quarter sessions, makes any difference in principle or prevents the interference with the due course of justice, in a case which may come to the assizes, from being a contempt of that court, and we are of opinion that upon these grounds alone the present application ought to be granted.

But inasmuch as a further question of great and growing importance—namely, the jurisdiction of this court to treat attacks of this kind upon the independence and usefulness of inferior tribunals as offences to be dealt with, brevi manu, by this court in its summary jurisdiction—has been raised and argued, we think it desirable to deliver our judgment upon this point also, and to treat the case as if a committal had actually taken place to quarter sessions. The present King's Bench Division of the High Court stands in the place of the three ancient superior courts of common law, and besides representing the powers and exercising the authority of the Courts of Common Pleas and Exchequer, inherits all the jurisdiction and powers of the Court of King's Bench. From the most ancient times, that court exercised functions which belonged to no other court in the kingdom. The high nature of those functions is described in emphatic language by Lord Coke in the Fourth Institute, c. 7, on "The Court of King's Bench," and in Hawkins' Pleas of the Crown under the same title, Book 2, c. 3, to which we refer only to show the supreme place in the judicature assigned to that court. There is no doubt that the great functions of this court as of all others must be exercised, as pointed out by Lord Coke, "according to due course of law." His general attribution to it of the power to

> "correct errors and misdemeanours extra-judicial tending to the breach of the peace or oppression of the subjects . . . or any other manner of misgovernment,"

as well as Hawkins' wider and more elaborate description of the like powers, refers to every kind of misdemeanour, including those which are properly the subject of indictment or criminal information, as well as those which are punishable summarily by attachment, and, therefore, throws no light upon the question whether a particular offence falls under the one head or the other or both. They do serve to show the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior courts, and that it is in a special manner the guardian and protector of public justice throughout the kingdom.

Offences of the exact kind in question in this case are necessarily of modern origin. They could not exist to any appreciable extent, if at all, before printing was freely resorted to, and, as long as it was unlawful even to publish reports of proceedings before magistrates on account of their supposed tendency to interfere with a fair trial, persons who knew that this was unlawful were not very likely to go to the further length of announcing and commenting upon supposed facts to the prejudice of a prisoner which had not even come before the magistrates. Down to 1792 the judge at the trial determined as a matter of law whether a particular writing was a libel or not, and, looking to the legal definition of a libel, it is obvious that writers of all kinds stood in far greater danger than they have done since the Libel Act, 1792, and for a long time after that there is no doubt that persons who published libels of any kind were in more peril than at present. We have pointed

out in the judgment in *R.* v. *Parke* (1) ([1903] 2 K.B. at p. 438), that from 1811 to 1888 but one case has been recorded in which the publication of reports of proceedings before justices tending to committal, or of extraneous matter connected with such reports, has come under judicial cognisance. That case occurred in 1886, and for reasons which we will give later on we are of opinion that little reliance can be placed upon it. We mention these facts to show how impossible it is that precedents earlier than some twenty years ago for cases like the present can be found or expected, and, if there is no great amount of direct authority in favour of the view that such an offence is summarily punishable by this court, it is at all events conceded by counsel for the respondent that he has been able to find none to the contrary.

We are, therefore, driven to consider the question in the first instance from the point of view of principle, and in the second in the light of the reported cases during the last twenty years with such small help as can be gathered from older authorities. There is no doubt that almost all the cases of contempt of court to be found in the books are cases in which the act so called and so dealt with has been some act in defiance of one of the superior courts, in which case, of course, no one of those courts interfered with the other. Each of the three courts of common law and also the Court of Chancery possessed ample powers to protect itself and to punish conduct which it deemed to be so derogatory of its own authority as to constitute a contempt of court. It is very natural, therefore, that the language generally used in such cases should refer to the power of the superior court to insure respect for itself or its orders, and should not go beyond that. The almost total absence of any recorded case in which a contempt of an inferior court has come into question is an abundant proof that serious offences of this kind were very rare. They were also always punishable by indictment, and in olden days, when means of communication were slow, uncertain, and expensive, there was an inducement to refrain from appealing to the Court of King's Bench, which no longer exists. In these circumstances, the absence or scantiness of precedent is not to be wondered at, and in this connection we may cite a passage from HAWKINS' PLEAS OF THE CROWN, Book 2, c. 3, s. 4, in which, speaking of the Court of King's Bench, after a general description of the jurisdiction of the court to prevent abuses and oppression, he says:

> "Neither is it necessary in a prosecution of any such offence in this court to show a precedent of the like crime formerly punished here, agreeing with the present in all its circumstances, for this court, being the custos morum of all the subjects of the realm, wherever it meets with an offence contrary to the first principles of common justice and of dangerous consequence to the public if not restrained, will adapt such a punishment to it as is suitable to the heinousness of it."

Those observations are as applicable to the exercise of summary jurisdiction as to the proceeding by indictment.

What, then, is the principle which is the root of and underlies the cases in which persons have been punished for attacks upon courts and interferences with the due execution of their orders? It will be found to be not the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the offence to them, but of protecting the public, and especially those who either voluntarily or by compulsion are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired: see the judgment prepared by WILMOT, C.J., in *R.* v. *Almon* (2) in 1765, but not delivered, because the case was allowed to drop: WILMOT'S OPINIONS, at p. 256. The word "authority" is used by him to express "the deference and respect which is paid" to the judges of a court and their acts "from an opinion of their justice and integrity." These words are apt with respect to the particular case with which he was dealing. But what possible difference in principle can there be in respect of direct attacks upon courts or judges and of writings the tendency of which is to deprive the inferior courts beforehand of the possibility of doing even-handed and

impartial justice according to the due course of law? To hold that there was a distinction would give colour to the notion, which cannot be too strongly repudiated, that the offended dignity of a particular court or of the persons who compose it is the subject of punishment in such a case. In *Helmore* v. *Smith* (*No. 2*) (3), BOWEN, L.J., said (35 Ch.D. at p. 455):

> "The object of the discipline enforced by the court in case of contempt of court is not to vindicate the dignity of the court or the person of the judge, but to prevent undue interference with the administration of justice."

And a considerable part of the undelivered judgment of WILMOT, C.J., to which we have referred, is devoted to showing that the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone. He adds that such conduct is pre-eminently the proper subject of summary jurisdiction. Attacks upon the judges, he says,

> "excite in the minds of the people a general dissatisfaction with all judicial determinations . . . and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever—not for the sake of the judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial and to be universally thought so are both absolutely necessary for the giving justice that free, open, and uninterrupted current which it has for many ages found all over this kingdom": WILMOT'S OPINIONS, pp. 255, 256.

With a few verbal alterations these eloquent words will apply with at least equal force to writings whose direct tendency is to prevent a fair and impartial trial, or at least one that can be so considered, from being had in courts of inferior jurisdiction which have not the power of protecting themselves from such encroachments upon their independence. The public mischief is identical, and in each instance the undoubted possible recourse to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy. It is true that the summary remedy with its consequent withdrawal of the offence from the cognisance of a jury, is not to be resorted to if the ordinary methods of prosecution can satisfactorily accomplish the desired result—namely, to put an effectual and timely check upon such malpractices. But they do not. WILMOT, C.J., said:

> "I am as great a friend to trials of facts by a jury, and would step as far to support them as any judge who ever did or now does sit in Westminster Hall, but if to deter men from offering any indignities to courts of justice [and we may well add from interfering with the due course of justice] it is a part of the legal system of justice in this kingdom that the court should call upon the delinquents to answer for such indignities [to which we add 'misconduct'] in a summary manner by attachment, we are as much bound to execute this part of the system as any other."

The several parts of the system, he adds (p. 258),

> "act in combination together to attain the only end and object of all laws, the safety and security of the people"

—words which it appears to us are as appropriate to the question we have in hand as they were in the case with which he was dealing, to the application under different circumstances of the same great principle that courts and the administration of justice exist for the benefit of the people, that for the benefit of the people their independence must be protected from unauthorised interference, and that the law provides effective means by which this end can be secured. If it is to be secured at all in the case of the inferior courts, it can only be secured by the action of this court, for they have not the power to protect themselves; and if it be true that the King's Bench is in any sense the custos morum of the kingdom, it must be

its function to apply, with the necessary adaptations to the altered circumstances of the present day, the same great principles which it has always upheld.

To use the words of LORD COLERIDGE:

> "Law grows, and though principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the time."

The quotation is from the summing-up in *R.* v. *Ramsey and Foote* (4), on a trial for publishing a blasphemous libel. The case was tried at nisi prius on April 24, 1883, and the summing-up was published by LORD COLERIDGE, as appears from the preface, in the form of a separate pamphlet. The passage cited is from p. 11 and p. 12. The truth is that the constant use of the term "contempt of court"—owing to the fact that in the vast majority of cases the particular offence in question was an actual and direct setting at defiance of the orders of the Superior Court appealed to, in which the phrase "contempt of court" has strictly and in the narrowest sense its apt description and its indiscriminate application to all of the superior courts—has tended to obscure both the foundation and object of the jurisdiction and to throw into the shade the essential difference between the jurisdiction exercised by the Court of King's Bench and that of the other courts, which possessed none of the relations with the inferior courts which have always appertained to the King's Bench. The preservation of the purity of the stream of justice in the case of the other courts could affect no other court than that which was exercising the jurisdiction. They were not the custodes morum (to use HAWKINS' phrase) in any sense analogous to that which the phrase bears when applied to the King's Bench, whose particular function it was to exercise superintendence over the inferior courts and confine them to their proper duties. This, however, as it seems to me, was only one exercise of the duty of seeing that they did impartial justice, and if and when the attainment of that end required that the misdeeds of others should be corrected, as well as the misfeasances of the inferior courts themselves, it seems to us that it is no departure from principle, but only its legitimate application to a new state of things, if others, whose conduct tends to prevent the due performance of their duties by those courts, have to be corrected as well as the courts themselves.

We proceed to examine the very few authorities bearing upon the subject closely enough to be of any value—so far at least as we have been able to discover them. Of old cases of this character we have found but two—*Burgh* v. *Blunt* (5) and *R.* v. *Burchett* (6). *Burgh* v. *Blunt* (5) was heard in Hilary Term, 3 Geo. 1 (1717). It was a motion for attachment against the judge of the Court of Holdernesse for disobeying a tolt, whereby the cause was to have been removed into the county court, from whence, as SERJEANT CHESSHYRE who moved the rule,

> "believed the parties [according to the report] designed by a pone to remove it into the Court of Common Pleas; and though, by a recordare, it might have been removed at once into the Court of Common Pleas, yet the parties might take this way if they pleased."

He urged that

> "disobedience to the tolt was a contempt to the law of the land over which the Court of King's Bench were guardians; that that court was invested with a general jurisdiction over inferior courts and was to take care not only that they did not transgress their jurisdiction, but likewise that they proceeded regularly in matters confessedly within their jurisdiction."

The court evinced some reluctance to grant the rule, EYRE, J., observing that the proper course was to proceed in the first instance by mandamus, and PARKER, C.J., pointing out that prohibition or a writ of false judgment would be effective remedies; but upon a statement by SERJEANT PAGE that a rule in the like case had been granted to him in *R.* v. *Langston* (7) they granted the rule. What became of it does not appear. It will be observed that no attempt was made to show that the disobedience was contumelious. The court was evidently disposed to treat it as an

error of the inferior court, which must have been the court of a wapentake, hundred, or lordship. A

The nature of the writ of tolt appears from FITZHERBERT'S NATURA BREVIUM, 3F. It was a writ issued by the sheriff of the county to remove the plaint into the county court. It was a writ which the plaintiff might have as a matter of course, and the defendant only upon cause shown. The pone was a writ which is also described in FITZHERBERT, in a number of passages to which reference will be found B in the index. It and the recordare were both writs to remove a case from an inferior court into the Court of Common Pleas. Both were obtainable in many instances by the plaintiff without showing cause, by the defendant upon cause shown, and in some instances either plaintiff or defendant must show cause. As both parties were stated to be willing to remove the case into the Common Pleas, and it is not stated that it was one of the exceptional cases in which the plaintiff C must show cause, it is not surprising that the court should be inclined to treat it, as it certainly would be treated in the like circumstances by this court, as an unnecessary application, and be disposed to refuse it. If it is to be taken as suggesting that the Court of King's Bench will in no case interfere in such a case, it is contrary to a great body of ancient law. The Court of King's Bench may

D

> "award an attachment against any such court [that is, judge] usurping a jurisdiction no way belonging to it, and putting the subject to unnecessary vexation by colour of a judicial proceeding wholly unwarranted by law, and therefore, prohibited by it": HAWKINS' PLEAS OF THE CROWN, Book 2, c. 22, s. 25.

He points out that it is more usual to award prohibition in the first instance, but E mentions several analogous cases in which the attachment will go in the first instance. *Burgh* v. *Blunt* (5) is so far removed from the case before us in its circumstances and in the principles involved that it cannot be regarded as any authority against the proposition contended for by the applicant in the present case.

R. v. *Burchett* (6) occurred in Trinity Term 9 Geo. 1 (1723). The very meagre report is as follows (1 Stra. 567): F

> "The court ordered an attachment nisi against the town clerk of Guilford and a defendant convicted on the Game Act for granting and suing out a replevin of goods distrained for the penalty. But on showing cause the next term, when EYRE, J., only was present, he discharged the rule, because it was only a contempt to the inferior jurisdiction of the justices, and in that case G B.R. never interposes."

It cannot be considered as a decision of any great weight. It is obvious that no question of general importance was involved in what had been done by the local court, which was probably nothing more than a mistaken exercise of jurisdiction, more properly to be remedied by a prohibition than by attachment. But for what it is worth, it is the judgment of a single judge, not necessarily that the jurisdiction H did not exist, but that in the case of acts which could be treated only as contempts of magistrates it was not the practice of the Court of King's Bench to interfere. The wider question whether, when beyond the mere interference with the process of the magistrates' court there was involved the grave danger to the public of prejudicing the fair trial of a case to be heard in an inferior court, the jurisdiction existed cannot have been raised, or the report could hardly have been so per- I functory, nor would it have been decided by a single judge. The circumstances of that case cannot be compared with those with which we have to deal; nor was there any appreciable risk of the class of inroads upon the independence of the inferior tribunals which the altered conditions of to-day have brought into prominence, and made it necessary for us to consider very seriously and anxiously the nature of the jurisdiction we are asked to exercise, and the principles upon which it is based.

The modern cases which throw any sort of light upon the question are three, and three only, of those enumerated and from a somewhat different point of view dis-

cussed in *R.* v. *Parke* (1). We have been unable to make any addition to the list. There are a certain number of cases of this kind in respect of publications during the pendency of an election petition. They are for the most part reported as cases in the "King's Bench Division," but it must be remembered that since the year 1880 that Division represents the old Court of Common Pleas in which all election petitions, since they were transferred to the judges, had to be brought, and while the three superior courts of common law existed as separate entities they were always brought in the Common Pleas, and in dealing with them the King's Bench Division was only exercising the functions of the old Common Pleas and of the old King's Bench. We propose to state very shortly what these cases come to. They range only from 1886 to 1895, and it is necessary to premise that until the argument in *R.* v. *Parke* (1) took place and attention was called to the fact that the Central Criminal Court, under the Central Criminal Court Act, 1834, s. 1, sits by virtue of a general commission, and that by ss. 16 and 29 of the Supreme Court of Judicature Act, 1873 [see now Supreme Court of Judicature Act, 1925, ss. 18, 70], it became a branch of the High Court, there had been a very general misapprehension, which was undoubtedly shared by the court in several of the cases referred to, as to the position and rank of the Central Criminal Court, which had been looked upon as a court of separate, if not also of inferior jurisdiction. It is necessary to bear this in mind because in that light alone can the decisions be duly estimated as bearing upon the present question.

In two of the cases, in one of which proceedings were pending before the magistrates with a view to a committal to the Central Criminal Court, and in the other the prisoner had been committed to that court, a rule against persons who had published articles calculated to prejudice the fair trial of the accused was refused. In the first case, heard in the year 1886, before LORD COLERIDGE, C.J., and HAWKINS, J., the court treated it as clear that they had no jurisdiction: see *Re Application for an Attachment for Contempt of Court* (8); *R.* v. *Parke* (1) ([1903] 2 K.B. at p. 439). There is no report of the second case (*Gordon* v. *Jones* (9)) save a short notice in the LAW JOURNAL newspaper of Jan. 4, 1896, at p. 8. In neither was there any serious argument, and none of the important considerations upon which our judgment is based was advanced. It is said in the few lines in which the case is reported that the rule was refused on the ground of want of jurisdiction. It seems difficult to reconcile this statement with the fact that in the third of the three cases we have been referred to (*R.* v. *Armstrong* (10)) WRIGHT, J., one of the judges who refused the rule in *Gordon* v. *Jones* (9), had said that he would pause long before coming to the conclusion that the court had no jurisdiction in such a case, or with the fact that the court allowed the rule to drop on an undertaking by the defendant to pay the costs, a term which they could hardly have imposed had they thought that there was no jurisdiction. The scanty reports of these cases—each of which relates to publications affecting cases committed or likely to be committed to the Central Criminal Court—do not explicitly state that the Central Criminal Court was treated as a court of inferior jurisdiction, but we think it must have been so. All the matters complained of were acts done not in the face of the court, and the effect of the Supreme Court of Judicature Act, 1873, was nowhere brought to the notice of the court. It appears to us that the state of the authorities, such as they are, is such as to leave the question, as was pointed out in *R.* v. *Parke* (1), entirely open for our decision. Our attention has been called to observations of SIR GEORGE JESSEL, M.R., in *Re Clements and Costa Rica Republic* v. *Erlanger* (11) (46 L.J.Ch. at p. 383) as to the necessity of caution in dealing with a matter where the liberty of the subject is concerned. Such considerations have been fully present to our minds and certainly needed no authority to enforce them. It is because we think that we are creating no new jurisdiction, but are acting strictly in conformity with the cardinal principles upon which is founded the jurisdiction to commit for conduct tending improperly to interfere with the administration of justice, that we have come to the conclusion at which we have arrived. To confine the application of such principles to facts identical with or closely resembling those of preceding

cases, and to hold that, because in times long gone by the chief, if not the only, danger to be guarded against was the illegal exercise of arbitrary power by inferior courts and their officers, therefore the power of this court extends no further, and that the King's Bench cannot afford protection to such courts as well as administer correction to them would, we think, be to mistake the application of a principle for the principle itself. The mischief to be stopped is, in the case of the inferior courts, identical with that which exists when the due administration of justice in the Superior Courts is improperly interfered with. The reason why the Court of King's Bench did not concern itself with contempts of the other Superior Courts was that they possessed ample means and occasions for protecting themselves. Inferior courts have not such powers, although some of them—quarter sessions, for example—try many more cases than are tried at assizes, and have a very extended and important jurisdiction. The danger is perhaps greater to them than it is to the Superior Courts of having their efficiency impaired by publications such as those which have given rise to the present proceedings. Thinking, as we do, that the application now before us asks for nothing more than the legitimate application to new circumstances of the old principles of the common law, we have come to the conclusion that we ought to grant the remedy invoked, and it remains only to consider the penalty that ought to be inflicted. We have again looked through the articles complained of. They contain a number of statements respecting the person charged of a character likely seriously to prejudice her case, to create a feeling against her, and to affect the minds of persons who might take part in her trial. In our opinion, such a case demands a severe punishment. We order David Davies to pay a fine of £100 and the costs of these proceedings.

Rule absolute.

Solicitors: *Smith, Rundell & Dods*, for *Harold Lloyd & Cross*, Cardiff; *Soames, Edwards & Jones.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

A

MERCER AND OTHERS *v.* DENNE

[CHANCERY DIVISION (Farwell, J.), March 10, 11, 12, 14, June 14, 15, 16, 17, 25, 1904]

B [Reported [1904] 2 Ch. 534; 74 L.J.Ch. 71; 91 L.T. 513; 68 J.P. 479; 53 W.R. 55; 20 T.L.R. 609; 3 L.G.R. 385]

[COURT OF APPEAL (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.), July 10, 11, 13, 14, 17, 18, 20, 21, 22, 24, 25, 26, August 11, 1905]

C [Reported [1905] 2 Ch. 538; 74 L.J.Ch. 723; 93 L.T. 412; 70 J.P. 65; 54 W.R. 303; 21 T.L.R. 760; 3 L.G.R. 1293]

Custom—Extension—New methods of conducting trade subject to custom—Adoption of modern inventions.

A general custom may be extended to new things which are within the reason of that custom, for those entitled to the benefit of a custom ought not to be deprived of that benefit simply because they take advantage of modern inventions or new operations, so long as they do not thereby throw an unreasonable burden on a landowner affected.

D

Custom—Locality—Accretion to land subject to custom by recession of sea—Added land rendered subject to custom.

Where, owing to the gradual and imperceptible recession of the sea from land which is subject to a custom land is added thereto, the doctrine of accretion applies and the land which has been added by accretion takes the character of the land to which it has been added and is subject to the custom which has affected that land.

E

Custom—Fishermen entitled to dry nets on private land—Validity.

A custom by which the fishermen of a parish were entitled to dry their nets at all times necessary or proper for the purposes of their trade on a piece of land in private ownership was good although the method of dealing with the nets had changed from time to time owing to the introduction of new and improved methods and it was sought to act under the custom on land which, owing to the recession of the sea, had accreted to the land originally subject to the custom.

F

G So **held** by the COURT OF APPEAL affirming a decision of FARWELL, L.J.

Custom—Certainty—Variability in application—Variation from time to time of number of persons entitled to enjoy custom—Reasonableness—Time for ascertainment—Prejudice to private interests—Public benefit—Locality—Limit of land affected—Definition not required of greater clarity than that necessary in grant for same purpose—Difference between custom and prescription—Evidence against custom—Impossibility of existence in time of Richard I—Burden of proof.

H

A custom must be certain, reasonable, commencing from time immemorial, and continued without interruption. A custom is not uncertain because it is not invariable in every part, e.g., a custom may be well laid in the inhabitants of a town although the number of persons entitled to enjoy it will vary from time to time. The time for ascertaining whether or not a custom is reasonable is its inception. It is not unreasonable because it is prejudicial to the interests of a private individual if it is for the benefit of the commonwealth because such benefit renders its lawful commencement reasonably probable. With regard to the limits of land affected by a custom, it is not necessary to define those limits more clearly than those of land comprised in a grant for the same purpose. The same principle must apply, the difference between custom and prescription being only that the right to the former must be claimed

I

by or in respect of a locality and the right to the latter by a person or corporation, but the rules affecting the subject-matter are in each case the same. A custom may be defeated by proof that it could not have existed in the time of Richard I, but the party seeking the defeat of the custom must demonstrate its impossibility, and the onus is on him to do so if the existence of the custom has been proved for a long period: per FARWELL, J.

Notes. Considered: *North Staffordshire Railway* v. *Hanley Corpn.* (1909), 73 J.P. 477. Referred to: *Assheton-Smith* v. *Owen* (1905), 94 L.T. 42; *Fitzhardinge* v. *Purcell* (1908), 77 L.J.Ch. 529; *Johnson* v. *Clark*, [1908] 1 Ch. 303; *Re Fountaine, Fountaine* v. *Amherst* (1909), 78 L.J.Ch. 648; *Heyne* v. *Fischel* (1913), 110 L.T. 264; *Re Petition of Right*, [1915] 3 K.B. 649; *Collis* v. *Amphlett*, [1918] 1 Ch. 232; *Pettit* v. *Lilley*, [1946] 1 All E.R. 593.

As to custom and usage, see 11 HALSBURY'S LAWS (3rd Edn.) 158 et seq.; and for cases see 17 DIGEST (Repl.) 3 et seq.

Cases referred to:

(1) *Blundell* v. *Catterall* (1921), 5 B. & Ald. 268; 106 E.R. 1190; 25 Digest 8, *48*.

(2) *Tanistry Case* (1608), Dav. Ir. 28; 17 Digest (Repl.) 13, **31*.

(3) *Fitch* v. *Rawling* (1795), 2 Hy. Bl. 393; 126 E.R. 614; 17 Digest (Repl.) 15, *165*.

(4) *Baker* v. *Brereman* (1635), Cro. Car. 418; 79 E.R. 964; 17 Digest (Repl.) 15, *159*.

(5) *Pain* v. *Patrick* (1690), 3 Mod. Rep. 289; 87 E.R. 191; sub nom. *Payne* v. *Partridge*, 1 Show. 255; Comb. 180; Holt, K.B. 6; Carth. 191; 17 Digest (Repl.) 7, *38*.

(6) *Lockwood* v. *Wood* (1844), 6 Q.B. 50; 13 L.J.Q.B. 365; 3 L.T.O.S. 139; 8 Jur. 543; 115 E.R. 19, Ex. Ch.; 17 Digest (Repl.) 4, *6*.

(7) *Tyson* v. *Smith* (1838), 9 Ad. & El. 406; 3 J.P. 65; 112 E.R. 1265; sub nom. *Smith* v. *Tyson*, 1 Per. & Dav. 307; 1 Will. Woll. & H. 749, Ex. Ch.; 17 Digest (Repl.) 3, *5*.

(8) *Race* v. *Ward* (1855), 4 E. & B. 702; 24 L.J.Q.B. 153; 24 L.T.O.S. 270; 19 J.P. 563; 1 Jur.N.S. 704; 3 W.R. 240; 3 C.L.R. 744; 119 E.R. 259; 17 Digest (Repl.) 21, *247*.

(9) *Marquis of Salisbury* v. *Gladstone* (1861), 9 H.L.Cas. 692; 34 L.J.C.P. 222; 4 L.T. 849; 8 Jur.N.S. 625; 9 W.R. 930; 11 E.R. 900, H.L.; 17 Digest (Repl.) 12, *115*.

(10) *Abbot* v. *Weekly* (1665), 1 Lev. 176; 83 E.R. 357; 17 Digest (Repl.) 15, *163*.

(11) *Hall* v. *Nottingham* (1875), 1 Ex.D. 1; 45 L.J.Q.B. 50; 33 L.T. 697; 24 W.R. 58; 17 Digest (Repl.) 4, *8*.

(12) *Dyce* v. *Hay* (1852), 1 Macq. 305, H.L.; 19 Digest (Repl.) 15, *42*.

(13) *Shuttleworth* v. *Le Fleming* (1865), 19 C.B.N.S. 687; 34 L.J.C.P. 309; 11 Jur.N.S. 841; 14 W.R. 13; 144 E.R. 956; 25 Digest 22, *190*.

(14) *Mounsey* v. *Ismay* (1865), 3 H. & C. 486; 34 L.J.Ex. 52; 12 L.T. 26; 11 Jur.N.S. 141; 13 W.R. 521; 159 E.R. 621; 17 Digest (Repl.) 21, *244*.

(15) *Simpson* v. *Wells* (1872), L.R. 7 Q.B. 214; 41 L.J.M.C. 105; 26 L.T. 163; 36 J.P. 774; 17 Digest (Repl.) 8, *54*.

(16) *Goodman* v. *Saltash Corpn.* (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 31 W.R. 293, H.L.; 25 Digest 28, *262*.

(17) *Bennington* v. *Taylor* (1700), 2 Lut. 1517; 125 E.R. 835; 33 Digest 544, *253*.

(18) *A.-G.* v. *Chambers*, *A.-G.* v. *Rees* (1859), 4 De G. & J. 55; 45 E.R. 22; sub nom. *A.-G.* v. *Lewis*, *A.-G.* v. *Rees*, 33 L.T.O.S. 189; 23 J.P. 308; 5 Jur.N.S. 745; 7 W.R. 404, L.C.; 44 Digest 68, *495*.

(19) *Re Hull and Selby Rail. Co.* (1839), 5 M. & W. 327; 8 L.J.Ex. 260; 44 Digest 68, *492*.

(20) *Foster* v. *Wright* (1878), 4 C.P.D. 438; 49 L.J.Q.B. 97; 44 J.P. 7; 25 Digest 14, *109*.

(21) *London City* v. *Vanacker* (1699), Carth. 480; Holt, K.B. 431; 1 Ld. Raym. 496; 5 Mod. Rep. 438; 12 Mod. Rep. 269; 1 Salk. 142; 90 E.R. 876; 17 Digest (Repl.) 17, *194.*

(22) *R.* v. *Lord Yarborough* (1828), 2 Bli.N.S. 147; 1 Dow. & Cl. 178; 4 E.R. 1087; sub nom. *Gifford* v. *Lord Yarborough*, 5 Bing. 163, H.L.; 17 Digest (Repl.) 5, *13.*

Also referred to in argument:

Truro Corpn. v. *Rowe*, [1901] 2 K.B. 870; 70 L.J.K.B. 1026; 85 L.T. 422; 65 J.P. 806; 50 W.R. 151; 17 T.L.R. 773; on appeal, [1902] 2 K.B. 709; 71 L.J.K.B. 974; 87 L.T. 386; 51 W.R. 68; 66 J.P. 821; 18 T.L.R. 820, C.A.; 17 Digest (Repl.) 11, *86.*

Hindson v. *Ashby*, [1896] 2 Ch. 1; 65 L.J.Ch. 515; 74 L.T. 327; 60 J.P. 484; 45 W.R. 252; 12 T.L.R. 314; 40 Sol. Jo. 417, C.A.; 25 Digest 14, *111.*

Linn-Regis Corpn. v. *Taylor* (1684), 3 Lev. 160; 83 E.R. 629; 17 Digest (Repl.) 5, *20.*

Rangeley v. *Midland Rail. Co.* (1868), 3 Ch. App. 306; 37 L.J.Ch. 313; 18 L.T. 69; 16 W.R. 547, L.JJ.; 19 Digest (Repl.) 12, *25.*

Hammerton v. *Honey* (1876), 24 W.R. 603; 17 Digest (Repl.) 4, *9.*

Dalton v. *Angus* (1881), 6 App. Cas. 740; 46 J.P. 132; 30 W.R. 191, H.L.; sub nom. *Public Works Comrs.* v. *Angus & Co.*, *Dalton* v. *Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844; 19 Digest (Repl.) 6, *4.*

Bass v. *Gregory* (1890), 25 Q.B.D. 481; 59 L.J.Q.B. 574; 55 J.P. 119; 6 T.L.R. 412; 19 Digest (Repl.) 71, *402.*

Cowling v. *Higginson* (1838), 4 M. & W. 245; 1 Horn & H. 269; 7 L.J.Ex. 265; 150 E.R. 1420; 19 Digest (Repl.) 122, *754.*

Wimbledon and Putney Commons Conservators v. *Dixon* (1875), 1 Ch.D. 362; 45 L.J.Ch. 353; 33 L.T. 679; 40 J.P. 102; 24 W.R. 466, C.A.; 19 Digest (Repl.) 14, *37.*

Carlisle Corpn. v. *Graham* (1869), L.R. 4 Exch. 361; 38 L.J.Ex. 226; 21 L.T. 333; 18 W.R. 318; 25 Digest 14, *108.*

Millechamp v. *Johnson* (1746), Willes, 205n: 125 E.R. 1133; 17 Digest (Repl.) 14, *142.*

Simpson v. *Godmanchester Corpn.*, [1897] A.C. 696; 66 L.J.Ch. 770; 77 L.T. 409; 13 T.L.R. 544, H.L.; 19 Digest (Repl.) 13, *29.*

Lemaitre v. *Davis* (1881), 19 Ch.D. 281; 51 L.J.Ch. 173; 46 L.T. 407; 46 J.P. 324; 30 W.R. 360; 19 Digest (Repl.) 73, *414.*

Appeal from a decision of FARWELL, J., (infra) in an action in which the plaintiffs Joseph Mercer and two others, inhabitants of the parish of Walmer, in the county of Kent, carrying on there the trade or business of fishermen, sought on behalf of themselves and all other persons engaged in the same business in that parish a declaration that they were entitled by custom to a right to dry their nets on ground owned by the defendant adjoining the sea and an injunction to restrain the defendant, his servants, agents, and workmen, from inclosing, building upon, or otherwise dealing with, any part of the ground in question so as in any manner to prevent, disturb, or interfere with the exercise or enjoyment by the plaintiffs or other such inhabitants as aforesaid, or any of them, of their rights over the same.

Upjohn, K.C., and *R. J. Parker* for the plaintiffs.
Eve, K.C., *Jenkins, K.C.*, *Gatey* and *Stuart Moore* for the defendant.

June 25, 1904. **FARWELL, J.**—The plaintiffs claim a declaration that they and all other the inhabitants of Walmer carrying on the trade or business of fishermen are entitled as of right at all times necessary or proper for the purposes of their trade or business to spread and dry their nets on a piece of shingle or beach

lying just above high-water mark between Walmer Place and Walmer Castle, and an injunction restraining the defendant from building on the premises so as to interfere with their right. The piece of land in question in this action is about eleven acres in extent, and is of little (if any) value except to the fishermen for drying their nets or to the defendant for building purposes—objects which are unfortunately inconsistent with one another. During the whole of living memory extending over upwards of seventy years in the case of the plaintiffs' witnesses (who were a body of honest and straightforward seafaring men, whose evidence appeared to me to be deserving of entire credit) and by reputation for many years before their birth, the fishermen of Walmer (by which I mean the inhabitants of the parish of Walmer who are fishermen) have used this piece of ground for the purposes of drying their nets. The practice has varied somewhat during the last seventy years. There are three fisheries now practised at Walmer—the mackerel, the herring, and the sprat fisheries. The mackerel season is from May to July and in September and October, the herring fishery from October to Christmas, and the sprat fishery from November to March. Down to some thirty or thirty-five years ago herring nets and mackerel nets were cutched or tanned at the commencement of and in preparation for the fishery season, and were then spread out to dry on the piece of ground in question, and at the end of the season the boats were brought up close to this piece of ground and the nets were taken directly to it and spread out on it or, if the weather did not permit of that, the nets were landed nearer the town and were then brought in carts to this piece of ground and spread out to dry before being put away for the winter, and this practice still remains with regard to the mackerel nets. Down to the same period the sprat nets were not spread on this piece of ground at all. About thirty or thirty-five years ago, the practice of oiling the herring nets instead of cutching them and of oiling the sprat nets came into use, and these nets were also spread on the same piece of ground to dry. The time required for drying after oiling is longer than was required for the earlier process, and sprat nets are now put on the land at a period during which no nets used to be put there so far as living memory goes. The fishermen have occasionally in former years dried their nets in different places along the beach, but this piece of ground in question is that which has always been used, and to the extent of covering its whole area at times, and has been known to the fishermen and their forefathers and spoken of amongst them as their own ground.

On these facts the plaintiffs claim to have established the existence of a custom for all inhabitants of Walmer being fishermen to dry their nets on this piece of ground at such periods as may from time to time be necessary for the due prosecution of their trade as fishermen according to the varying exigencies of the fishing industry and the requirements of improved nets. The defendant objects (i) that there is no reported case in which a custom for the fishermen of a parish to dry their nets on a particular piece of land has ever been decided, and that such a custom ought not now to be held good; and (ii) that a custom for any variation from the ancient times of user or ancient kinds of nets is bad for uncertainty. I cannot find that the validity of a custom for the fishermen of a parish or town to dry their nets in a particular close has ever been expressly decided, but this is probably due to the fact that such validity has never been questioned. Although the case in the Year Book 8 Edw. 4, c. 18, which is translated by Holroyd, J., in *Blundell* v. *Catterall* (1) is referred to as an authority on the point in several subsequent books, I think that the point was assumed, not decided therein; and this is probably due to the fact stated by Professor Maitland in his admirable preface to the Year Books now in course of publication by the Selden Society (vol. 17, p. 14), that the reports in Year Books were "instructions for pleaders rather than the authoritative fixation of points of substantive law." The general law was assumed; the point of interest to certain "sad and grave men" who reported was the form of pleading. Thus Hale (De Portibus Maris), published by Mr.

HARGRAVE in 1786, says, at p. 86:

"Look at the book of 8 Ed. 4, 18, for the custom of Kent, for fishermen to dry their nets upon the land, though it be the soil of private men,"

referring to the Year Book as stating the existence of a well-known custom. In *Tanistry* (2) it is stated by counsel as an instance of a well-known custom,

"so to turn the plough on the headland of another in favour of husbandry, and to dry nets on the land of another in favour of fishery and navigation."

This passage is set out verbatim in ROLLE'S ABR. CUSTOM, F.2, as a correct statement of the law.

In *Fitch* v. *Rawling* (3), BULLER, J., says (2 Hy. Bl. at p. 398):

"With respect to the case *Bro. Abr. Custom* (*pl.* 46), there the custom was holden to be bad, not because it was for the fishermen of Kent to dry their nets on the plaintiff's land (which the case in CRO. CAR. shows to be good), but either because the digging in the soil in order to pitch stakes to hang nets on, was unnecessary, or it tended to the disturbance of the inheritance."

Here, again, I am unable to verify the reference, for *Baker* v. *Brereman* (4) appears to state only that inhabitants cannot prescribe for a profit à prendre in alieno solo "for fishermen to dry their nets for the public benefit or for easement," and I can find no other case in CRO. CAR. on the subject. In *Pain* v. *Patrick* (5) the court, in holding that the custom in that case was well alleged, said (3 Mod. Rep. at p. 294):

"This may be as well alleged as a custom to turn a plough upon another man's land, or for a fisherman to mend his nets there."

In BACON'S ABR. CUSTOM, p. 566 (the first edition of which was published in 1736), this custom is given as good, "so a custom to dry nets upon the land of another; for this is in favour of fishing and navigation." I have failed to find the marginal reference which he gives as his authority—(5 Co. 84)—and which is also given by TINDAL, C.J., in *Lockwood* v. *Wood* (6), but the LORD CHIEF JUSTICE treats the custom as of known validity in 1844. He says (6 Q.B. at p. 64):

"A custom which has existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm. . . . Thus a custom for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom."

In *Tyson* v. *Smith* (7) the same LORD CHIEF JUSTICE says (9 Ad. & El. at p. 421):

"Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another in favour of husbandry, or to dry nets on the land of another in favour of fishing and for the benefit of navigation."

In *Race* v. *Ward* (8) LORD CAMPBELL in speaking of the right of the inhabitants of a district by custom to go on the soil of another and take water, says (4 E. & B. at p. 710) that in 15 Edw. 4, 29 A, CATESBY, J., treats it as good and likens it to a custom for all the fishermen, inhabitants in a particular vill, to dry their nets on a particular close.

Although, therefore, I have failed to find any express decision, there are so many opinions in favour of the validity of the custom expressed by so many eminent lawyers, that it would be impossible for me to disregard them, and on principle the custom is, in my opinion, good. A custom must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption. It is not unreasonable because it is prejudicial to the interests of a private individual if it is for the benefit of the commonwealth, because such benefit renders

its lawful commencement reasonably probable. As LORD CRANWORTH says in *Marquis of Salisbury* v. *Gladstone* (9) (9 H.L.Cas. at pp. 701, 702):

> "In truth, I believe, that when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom."

This has considerable bearing on the argument of counsel for the defendant that the custom alleged in this action is uncertain; his contention is, in effect, that the custom must be to dry nets, not for the purposes of fishing generally, but at particular times and for particular fish. But this is to discard the kernel for the shell, and might result in making an arrangement that was in its inception reasonable, because of public benefit, become actually injurious to public interests. If the fishermen of Walmer may dry their nets only on the condition of fishing for such fish and at such times and with such nets as the fishermen in the reign of Richard I used to do, all improvements and progress are debarred. But there is no authority or principle for any such contention.

A custom is not uncertain because it is not invariable in every part. Thus, a custom to pay a year's improved value for a fine on a copyhold is good, though the value is a thing uncertain, for the value may be at any time ascertained: STEPHENS' COMMENTARIES (14th Edn.) vol. 1, p. 28. Again, the very statement that a custom may be well laid in the inhabitants of a town shows that the number of persons entitled to enjoy it will vary from time to time. In *Abbot* v. *Weekly* (10), a custom for all the inhabitants of a vill to dance on the plaintiff's close at all times of the year was held good, and this was followed in *Hall* v. *Nottingham* (11), where it was held that a custom for the inhabitants of a parish to enter upon certain land of the plaintiff and erect a maypole thereon and dance round it and otherwise enjoy on the land any lawful and innocent recreation at any time of the year was held good. In *Dyce* v. *Hay* (12) LORD ST. LEONARDS says (1 Macq. at pp. 312, 313) that

> "there is no rule in the law of Scotland which prevents modern inventions and new operations from being governed by old and settled legal principles. Thus, when the art of bleaching came into use, there was nothing in its novelty which should exclude it from the benefit of a servitude or easement, if such servitude or easement on other legal grounds was maintainable. The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles."

Counsel for the plaintiffs pointed out that this is fully borne out by *Fitch* v. *Rawling* (3), where a custom for all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes in the close of A. at all seasonable times of the year was held to justify the defendants in playing cricket there, although it is reasonably certain that cricket was unknown until long after the time of Richard I: see STRUTT'S PASTIMES (1801 Edn.) at pp. 83, 84, and that, if it came within the description of any of the newly imagined games in the reign of Edward IV, it was illegal by the Act of 17 Edw. 4, c. 3, which was not repealed until the reign of Henry VIII. It is clear from that Act, and the Act of 12 Ric. 2, c. 6, that the number and nature of the games that were lawful varied from time to time, but it has never yet been suggested that such variations rendered the custom to play all lawful games void for uncertainty, and I can see no reason for holding that a custom to dry nets at all times seasonable for fishing is bad, although the periods and numbers and sorts of nets may vary.

During the trial the defendant desired to set up a plea that the beach in question, or a great part of it, had come into existence of late years, and to contend that it followed therefrom that no custom to dry nets thereon could have existed for the requisite period. I, accordingly, allowed the trial to stand over, and gave both parties liberty to amend and to adduce further evidence. With regard to the plaintiffs' amendments to para. 3 of the statement of claim, I am bound by and follow *Shuttleworth* v. *Le Fleming* (13) and *Mounsey* v. *Ismay* (14). The defendant has amended by adding these allegations:

> "In and prior to the year 1799 and for many years subsequent thereto the beach ground was below high-water mark, and subject to the flux and reflux of the time, and until comparatively recent years was wholly unsuitable and, in fact, incapable of being used for the purposes alleged by the plaintiffs, and was formed by gradual accretion and the receding of the sea, and is now above high-water mark and does not now form any part of the seashore or foreshore."

I have had a considerable amount of evidence relating thereto. I have rejected a number of plans as inadmissible, but as I was told that the case was likely to go to the Court of Appeal, I have taken evidence concerning them as though I had not excluded them, and I can only say that, if I had not rejected them as inadmissible, I should have discarded them as worthless. [HIS LORDSHIP discussed the evidence and continued:] I find the facts to be as follows. The beach in question is a ridge, which from time immemorial has acted as a barrier against the sea for the protection of the land behind it. That land is on so low a level that but for the beach it must have been submerged, but it has never been so during historic times. I accept the opinion of Mr. Whitaker [one of the plaintiff's witnesses] on this point, and it is corroborated by the nature of the subsoil, as proved by the contractor, who excavated part of it to a depth of 5ft. in making sewers, and by the discovery of a Romano-British burying-place in the grounds of Walmer Lodge. I find, also, that the coast in this neighbourhood has for the last century at any rate been subject to fluctuations by way of increase by accretion and of decrease by demolition owing to the action of the winds. When the prevailing wind blows on shore for a cycle of years, the process of accretion goes on, but the prevailing winds alternate over long series of years, and consequently the actual line of high-water varies according to the duration of such prevailing winds and their aggregate action. The actual ascertainment with certainty of high-water mark at a given date is a matter of difficulty and time, and cannot be effected by a mere survey. No ancient plans or maps can be relied on as showing high-water mark, and no charts prior to 1795. The two charts which have been put in are Spencer's of 1795 and Bullock's of 1844, both of which are trustworthy. But with regard to Spencer's chart there is a difficulty in ascertaining which of the three lines shown on the chart is intended to be the high-water mark, and which is the low-water mark. I accept Commander Jarrard's [one of the plaintiffs' witnesses] opinion that the two dotted lines represent the high- and low-water mark, partly on his authority, and partly because, if the thick black line is taken, as the defendant's witnesses contend, the area between high and low water would be 590 ft., an area much too large to be appropriate to anything but the beach generally, and one of the two dotted lines would be unaccounted for; for, adopting these two charts, I find that in 1795 the high-water mark was approximately in the same place as at present, that in 1844 the sea had advanced 50 or 60 yards, and that at the present time the amount of beach has been regained. The defendant has thereby proved that in 1844 a considerable portion of the beach in question (say, three acres) was below high-water mark, and was, therefore, inappropriate for drying nets, and he argues that he has thereby shown that to the extent of that portion the custom must have commenced since the time of Richard I.

A defendant may, no doubt, defeat a custom by showing that it could not have existed in the time of Richard I, but he must demonstrate its impossibility, and

the onus is on him to do so if the existence of the custom has been proved for a long period, as was done, for instance, in *Simpson* v. *Wells* (15), where the claim of a custom to set up stalls at the statute sessions for the hiring of servants was defeated by showing that such sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edward III. But no such impossibility is shown in the present case. If the beach was of its present extent in 1795, why am I bound to infer that it cannot have been the same in 1186 from the mere fact that between 1795 and 1844 the extent diminished and has since again increased? The mere non-user during the period that the sea flowed over the spot is immaterial, for it was no interruption of the right, but only of the possession, and "an interruption of possession only for ten or twenty years will not destroy the custom": (1 Bl. Comm. 77; Co. Litt. 114b). Not only ought the courts to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present unless such inference is irresistible, but it ought to presume everything that is reasonably possible to preserve in favour of such a right: see *Goodman* v. *Saltash Corpn.* (16). I see no reason why I should not presume that this beach was in substantially the same state in 1186 as now. The inland limit is fixed by geological considerations and the Romano-British burying-place; in the reign of Henry VIII the Castle of Walmer was built as a defence for the coast; it must have been near but safely above high-water limit; and I see no reason from which I can necessarily infer any substantial difference in this piece of beach in 1186.

It was next argued that the variations in the beach shown by the two maps of 1795 and 1844 and the present state of things render it impossible to define with sufficient certainty the land affected by the custom, and, therefore, render the custom bad for uncertainty. But it cannot be necessary to define the limits of land affected by a custom more clearly than those of land comprised in a grant for the same purpose. I think that the same principle must apply, the difference between custom and prescription being only that the right to the former must be claimed by or in respect of a locality, and the right to the latter by a person or corporation, but the rules affecting the subject-matter are in each case the same; and I have no doubt that a grant of land which in fact adjoins the sea would be well defined by reference to high-water mark as one of its boundaries. It is said that it is uncertain whether this means high water as it was in 1186 or high water now, but I have evidence of usage and that the nets have been spread down to high-water mark for the time being. This is quite sufficient. Thus, in *Bennington* v. *Taylor* (17), the dean and chapter prescribed for a double stall et pro fundo sive solo prope et juxta eandem stallam, and the third objection taken was that it was uncertain and so void. But the objection fails "for that shall be ascertained by the common usage of the fair." The argument for the defendants on this point savoured rather of the agri limitati of the Romans (DIGEST 41. 1. 16) rather than of anything known to the English law.

Then it is said that it is unreasonable, because the sea may recede for a mile or more, as at Sandwich, and it is impossible to suppose that any such extent of ground could ever have been intended to be appropriated to such a custom. It is enough for me to say that as the event has not happened for upwards of 700 years I cannot see the unreasonableness. The period for ascertaining whether a custom is reasonable or not is its inception. The point is dealt with by TINDALE, C.J., in *Tyson* v. *Smith* (7) (9 Ad. & El. at p. 423):

> "But it is said that the number of these victuallers may be so large, and the space occupied by each so great as that the whole portion of the common set out for the fair may be taken by them in exclusion of the rest. . . . But it is obvious that this is not an argument against the custom being reasonable in its commencement, or against the prescription of the fair being a reasonable prescription: it is an objection only as to the mode of exercising the right so claimed, whether under the custom or the prescription."

A I say in this case, as LORD CRANWORTH said in *Marquis of Salisbury* v. *Gladstone* (9) (9 H.L.Cas. at p. 702):

> "I find it impossible to say that such a custom as that here alleged might not have resulted from an agreement between the lord and his tenants before the time of living memory."

B But the plaintiffs have raised this further and interesting point—that, inasmuch as both sides agree that these three acres have arisen by small and imperceptible degrees (and they must so agree in order to exclude a claim by the Crown), these added acres are an accretion to the defendant's land and became subject to the same custom to which the land to which they were added was subject. There is no authority exactly in point, but I have come to the conclusion on principle C and on the authority of an analogous case that this contention is well founded. BLACKSTONE COMM., vol. 2, p. 262, states the law to be that,

> "if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For de minimis non curat lex; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration D for such possible charge or loss."

In *A.-G.* v. *Chambers* (18) LORD CHELMSFORD quotes this passage and proceeds (4 De G. & J. at p. 68):

> "I am not quite satisfied that the principle de minimis non curat lex is the correct explanation of the rule on this subject; because, although the additions E may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and if the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by ALDERSON, B., in *Re Hull and Selby Rail. Co.* (19), viz., 'That which cannot be per- F ceived in its progress is taken to be as if it never had existed at all.' And as LORD ABINGER said in the same case:
>
> > 'The principle [as to gradual accretion] is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.'
>
> G It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the seashore."

This reasoning applies with equal force to the persons entitled to exercise rights over a piece of land adjoining the sea. If it is washed away, their rights are H gone. If it increases, their rights ought to extend over the increased area. It is said that it would be absurd to apply this to a case where the sea has receded for a mile or more; but that is not this case. It is sufficient for me to say (following ALDERSON, B.) that this accretion is to be treated as though it had occurred in 1186. If there was now a mile or more of such accretion, it would hardly be possible to find evidence of actual user over more than the fringe near I the sea, and the extent of the custom could be limited by such user; or, even if any such user could be shown, the landowner's right of free enjoyment would only be limited by a reasonable exercise of customary rights, or it would probably be held unreasonable to insist on drying nets over a large tract of land. Further, I have the authority of the analogous case of *Foster* v. *Wright* (20). In that case the river Lune had gradually changed its bed. The plaintiff had a free fishery in the ancient river. The defendant owned lands which originally did not abut on the river, but had, by means of the alteration in the river bed, become the river bank. The question was whether the plaintiff's exclusive right of fishing extended over so

much of the water as flowed over land which was identified as formerly part of the defendant's property, and it was held that it did. LINDLEY, J., said (4 C.P.D. at p. 448):

> "I am wholly unable to see upon what principle a change in the course of a river, so gradual that it cannot be perceived until after the lapse of a long interval of time, can affect the rights of those entitled to use it, whether for fishing or any other purpose; nor is there any authority for holding them to be affected thereby."

LORD COLERIDGE, C.J., held that the plaintiff was entitled to a several fishery, and said (ibid. at p. 449):

> "And such a fishery I think would follow the slow and gradual changes of a river, such as the changes of the Lune in this case."

Further, the opinion of text-writers, dealing with the analogous cases of accretion to copyholds and wastes of manors, are to the same effect. Thus, HALL ON THE SEA SHORE (2nd Edn.) p. 113, concludes that the land which has accreted to the lord as freehold must be subject to the copyhold interest of the tenant of the land to which it has been added, or, if waste, to the local customs, common, etc., prescribed for by the tenants in respect of such waste. MR. PHEAR (RIGHTS OF WATER, p. 43n.) conjectures that

> "the land which gradual accretion gives to adjoining lands assumes their character, i.e., becomes freehold or copyhold, and in the latter case waste or tenanted accordingly."

I hold, therefore, that the land which has been added by accretion takes the character of the land to which it has been added, and is subject to the same customs as affected such land.

The result is that the plaintiffs succeed, and I grant the injunction as asked. The defendant must pay the costs of the action.

The defendant appealed.

Levett, *K.C.*, and *Jenkins*, *K.C.*, for the defendant.
Upjohn, *K.C.*, and *R. J. Parker* for the plaintiffs.

Cur. adv. vult.

Aug. 11, 1905.—The following judgments were read.

VAUGHAN WILLIAMS, L.J.—This is a difficult case. Most cases with regard to validity of custom are difficult of decision. The fact is that reason recoils from the proposition that legal memory goes back to an arbitrary date at the beginning of the reign of Richard I, A.D. 1189, and if one finds proof of uninterrupted modern usage there is a natural inclination to presume the previous existence of the custom right back to 1189, even though the facts may be such as to force upon reason the conclusion that the modern usage could not in fact have been adopted for more than a few generations. Judges, therefore, presume everything possible which would give a custom a legal origin, and find in favour of a manifestly modern custom as being an extension which falls within the reason of so much of the modern usage as may well have existed throughout legal memory.

I think that in the present case it is very difficult in reason to arrive at the conclusion at which FARWELL, J., seems to have arrived—viz., that the drying of nets after cutching or oiling can be treated as a mere expansion, with the changes which take place in the circumstances of mankind, of the ancient custom of drying nets wet with sea water when taken out of the fishing boats on their return to the shore after fishing. Nor do I think that the validity of the latter custom, established by so many dicta in the books and old cases, is in any sense conclusive of the reasonableness or validity of a custom to dry after cutching or

oiling nets in preparation for the user of them in sea fishing. It may be perfectly reasonable in favour of commerce and navigation to invade private property forming part of the beach, because it is so convenient to dry the nets wet and heavy with sea water on the nearest part of the beach suitable for such a purpose, since it is difficult to see how in many parts of the coast where cliffs or other causes make the inland difficult of access sea fishing by nets could be carried on otherwise. But it by no means follows that it is reasonable in favour of commerce and navigation to bring from the land behind the beach nets which have been cutched or oiled at some inland spot and dry them on a part of the beach which is private property. The drying, at all events after oiling, burdens the land with the nets for a much longer period than the drying of the nets after being wetted with sea water does.

But this difficulty arises. If the court treats the drying of the nets after oiling as a usage or custom to be tested as to reasonableness or unreasonableness, or whether or not it is contrary to the public good, or injurious or prejudicial to the many, the court will clearly be dealing with a modern usage arising within living memory. I am not at all sure that the proper inference to draw from the evidence and from the user of the word "cutching" (derived from "cutch," an astringent plant of great astringent power, imported in great quantities from the Malay Archipelago, which, as far as the evidence goes, seems to be still used to prepare and preserve the nets for fishing) is not that the process of cutching did not begin in the eighteenth or nineteenth century. But perhaps the court may assume without evidence that some process of tanning nets before using them for sea-fishing has prevailed ever since the date of legal memory. Of course, if these customs are to be treated otherwise than as the expansion of the old custom, the custom relied on by the plaintiffs could not be supported. But I have persuaded myself that the court may regard the custom (as COZENS-HARDY, L.J., says in his judgment) as a custom for fishermen "to dry nets at all times necessary or proper for the purposes of the trade or business of a fisherman," and the modern usage of drying after cutching or oiling as a development of an ancient custom to do all the drying necessary or proper for the trade or business of a fisherman on the beach, and may so regard the custom, notwithstanding the increase of the burden on the land resulting from the modern user.

As to the contentions of the defendant based on the recession of the sea and usage of a part of the beach, now free of sea, but formerly covered by sea water, not raising a custom in respect of the land gained by the gradual and, as it proceeded, imperceptible recession of the sea, I think those contentions fail entirely, for the reasons given in the judgments of my brothers, which I have had the advantage of reading. But I wish to add this, that I think there is evidence in this case to show that the practice of drying nets has really in time gone by extended to any convenient places on the seashore, and not only to the eleven acres of land in question, although of late years the shingle beach, of which the eleven acres consist, had afforded the most convenient spot for drying after oiling and cutching, and has, therefore, come to be freer of weeds and vegetable growth than other parts where the beach adjacent to Walmer happens to be shingly. Moreover, it seems to me that the right of drying nets must have always been exercised on the shingly ground which happened for the time being to be nearest to the foreshore and yet generally free from overflowing by the sea at high tides. If this view were taken of the evidence the result would be that the drying would, by following the receding sea, always take place on the part of the beach convenient for drying nets next to the sea. This part of the beach, although covered by the sea in times gone by, would, on the principles which the court has recognised in respect of land gained by accretion, be subject to the custom in favour of drying nets, and the area subject to the custom would always be adjacent to the sea. Take the beach which is now nearest to the old Cinque Port of Rye, miles away from the port, though the sea formerly was immediately adjacent; it would be difficult to my mind to avoid the conclusion that the

drying area must in such a case follow the sea. The custom began at the boundary between beach and sea. As the sea imperceptibly retires the law does not recognise any alteration in the land owned, or that there are new boundaries further away from the centre of the close, and, on the same principle, the area of drying would always be adjacent to the boundary for the time being between the beach and the sea. Such a custom would obviously be more reasonable than that which we are supporting. But neither the plaintiffs nor the defendant put forward at the trial or since this view of the custom. On the contrary, when I suggested it during the argument, both sides rejected it. This being so, I do not think it ought to be taken into consideration in this case. The result is that I agree with the rest of the court that this appeal should be dismissed, with costs.

STIRLING, L.J.—In this case the plaintiffs, on behalf of themselves and all other persons carrying on the trade of fishermen in the parish of Walmer, claim a customary right to dry their nets over a piece of ground (called the "beach ground"), which is covered with shingle, and is situate near the sea, and lies between the grounds of a house known as Walmer Place on the north, the grounds of Walmer Castle on the south, a public road called Wellington Road on the west, and the foreshore on the east, and containing at the present time about eleven acres. The evidence of living witnesses shows that for a period extending over seventy years, and by reputation for many years earlier, the inhabitants of Walmer who are fishermen have used so much of this piece of land as was not for the time being covered by the sea for the purpose of drying their nets in the following way. Down to a period of from twenty-five to thirty-five years ago, immediately before the commencement of the mackerel and herring fisheries respectively, the nets intended for use in those fisheries were tanned or cutched and brought to the beach ground and there dried; and, at the close of each of these seasons, the same nets were again brought there and dried before being put away until next required. From twenty-five to thirty-five years ago the practice of tanning or cutching nets was discontinued, and in lieu thereof the nets were oiled, and the oiled nets were taken to the beach grounds and dried there in the same way as the cutched or tanned nets had previously been. As I read the evidence sprat nets were never taken there at all until the introduction of oiling; but from that period the sprat nets, being oiled, had been taken there and dried. This user has extended over the whole eleven acres, except where they were for the time being covered by the sea. It was admitted in this court (and, in my opinion, rightly), that a custom for fishermen to dry nets, which had become wetted by use in fishing, on a particular piece of land was good; but it was said that a custom to dry nets which had not been wetted by the sea, but only in the process of tanning, cutching, or oiling preparatory to use for fishing, was bad; and that, as the evidence showed that the alleged custom extended to such drying no less than to drying at the end of the several fishing seasons, the alleged custom was bad in toto.

The ground on which the custom to dry nets in the strict sense has been upheld is that it is in favour of commerce and navigation: Bacon's Abridgment, vol. 2, p. 566; and see what is said by Lord Tindal, C.J., in *Tyson* v. *Smith* (7) (9 Ad. & El. at p. 421). The tanning, cutching, or oiling of nets belonging to fishermen tends to preserve the nets and make them useful for a longer period, and the subsequent drying of nets seems to me to fall within the reasons thus assigned for the custom. It is laid down by Holt, C.J., in *London City* v. *Vanacker* (21) (12 Mod. Rep. at p. 271) that general customs may be extended to new things which are within the reason of those customs. There is not, in my opinion, evidence from which it ought to be inferred that the practice of tanning or cutching has arisen within the time of legal memory. But it was said that, so far as related to the drying after oiling, the user extended over a period of from twenty-five to thirty-five years only; and, moreover, that this user was more burdensome than the old user for drying after tanning or cutching.

A I think, however, that the law as laid down by LORD ST. LEONARDS in *Dyce* v. *Hay* (12), cited by FARWELL, J., applies, and that those entitled to the benefit of a custom ought not to be deprived of that benefit simply because they take advantage of modern inventions or new operations so long as they do not thereby throw an unreasonable burden on the landowner. The evidence does not convince me that an unreasonable burden has been cast on the owner. The practice has been B in existence for twenty-five years at least without any objection being raised until the land recently passed into the hands of the defendant, although, during the greater part of that time, the property belonged to one who seems to have stood on his rights, and objected to anything which went beyond the custom as stated: see the evidence of the defendant's witness, William Thomas Hoyle.

It is next said that a considerable portion of the "beach ground" consists of C an accretion during the last fifty or sixty years, and that the custom cannot extend to that part. Custom, it is argued, is a local law, which must have existed from time immemorial—that is, from the beginning of the reign of Richard I—and cannot be applicable to land which can be shown to have emerged from the sea in modern times. In *R.* v. *Lord Yarborough* (22) it was established that lands formed by alluvion—that is, gradual and imperceptible deposit on the shore of D the sea—belonged, not to the Crown as owner of the foreshore, but to the owner of the demesne lands of a manor, which were formerly bounded by the sea, as parcel of those demesne lands. Every manor must have existed prior to the Statute of Quia Emptores; but it was not suggested that the operation of the rule was excluded by reason of the accretions having taken place in modern times. The reason of that rule is stated by ALDERSON, B., in *Re Hull and Selby Rail.* E *Co.* (19) (5 M. & W. at p. 333) to be

> "that which cannot be perceived in its progress is taken to be as if it never had existed at all."

This was approved by LORD CHELMSFORD in *A.-G.* v. *Chambers* (18) (4 De G. & J. at p. 68), and has been applied in the present case by FARWELL, J., who held F that this accretion is to be treated as though it had occurred in 1189. It was insisted, however, that the doctrine of accretion is a rule of property law, and has nothing to do with custom, which is truly described as a local law. No authority was cited in support of this contention, and I am unable to agree with it. The local law points out the particular piece of land on which the right is to be exercised; and then the rule of the common law steps in and says that, where G imperceptible accretion has occurred, the piece of land is to be treated as having been as it is from the commencement of legal memory.

Lastly, it was urged that other lands in the neighbourhood of Walmer were subject to the same custom; and that the whole burden was being thrown on the defendant's land. The evidence does not appear to me to show with certainty that there are other lands subject to the custom; but, even if it were H otherwise, all that the defendant would have to complain of would be an excessive use of his land, and this would not deprive the plaintiffs of the right to a reasonable use of the beach. I am, therefore, unable to differ from FARWELL, J., and I think that the appeal ought to be dismissed.

COZENS-HARDY, L.J.—This is an appeal from a judgment of FARWELL, J., I establishing the right of the fishermen of Walmer to dry their nets on some land known as the "beach ground," the property of the defendant. I might content myself with saying that I agree, not only with the judgment, but also with the reasoning upon which that judgment is based. The only exception or qualification I should make is that, after the advice we have received from the officer sent by the Admiralty to assist us, I do not interpret Spence's chart of 1795 in the manner which, upon the expert evidence at the trial, FARWELL, J., adopted. This, however, is not really of importance. The scale is so small that no safe inference can be drawn as to the precise line of high water at the spot in question in

1795. And, even if the sea has been steadily receding from 1795 to the present time, the result will not be affected, as pointed out by FARWELL, J., when dealing with the law of accretion. Having regard, however, to the elaborate arguments addressed to us, and to the great importance of the case, I think it right to state in my own words, and as briefly as may be, why I think the appeal should be dismissed. The right asserted is based upon a custom extending beyond legal memory. Such a custom is often spoken of as a local law.

Counsel for the defendant did not dispute, and in fact admitted, that a custom for the fishermen of a particular locality to dry their nets on the land of a stranger may be supported in law, though there is no actual decision to that effect. But, having regard to the numerous dicta referred to by FARWELL, J., I feel no doubt that his decision on this point was correct. The persons, if any, entitled to the customary right are sufficiently ascertained—viz., the fishermen of Walmer. The real contest has raged over two points—viz., (a) over what land does the customary right extend, and (b) what is the extent of the right pleaded and how far its existence is justified by the evidence.

(a) It is contended that the "local law" can only affect a definite close, which must have been available for the exercise of the customary right in the reign of Richard I, and that the evidence shows that a considerable part of the "beach ground," now eleven acres in extent, was at that time covered by the sea, and, therefore, could not have been used for drying nets. In my opinion, this contention ought not to prevail. It appears certain, from the evidence of geologists, and from the discovery of Roman remains immediately to the west of the "beach ground," that at least the western part of the "beach ground" existed in and long prior to the reign of Richard I in substantially the same condition as at present. Within living memory the sea has gradually receded on this part of the coast, but there is nothing improbable in the suggestion that the reverse process may have gone on since the reign of Richard I, with the result that the line of high water is now practically the same as at that date, in which case the point under discussion would not arise. Assuming, however, that the sea has gradually and continuously receded, I think the land which has been added by accretion to the defendant's land must be subject to the customary right. The principle stated by ALDERSON, B., in *Re Hull and Selby Rail. Co.* (19) (5 M. & W. at p. 333), that

> "that which cannot be perceived in its progress is taken to be as if it never had existed at all"

—a principle which is applied between two private owners, and between the Crown and a private owner—should be applied here. In the view of the law this is the same close as that affected by the local law in the time of Richard I. It is urged that this extension of area renders the custom uncertain and, if the sea should still further recede, unreasonable. But I cannot assent to the argument. It must not be forgotten that the persons claiming under the custom are bound to exercise their rights reasonably and with due regard to the interest of the owner of the soil.

(b) It remains to consider what is the custom pleaded, and how far it is supported by evidence. The custom pleaded is for the fishermen of Walmer at all times necessary or proper for the purposes of the trade or business of a fisherman to dry their nets upon the "beach ground," and for that purpose to spread those nets upon the surface thereof. The evidence proves that, so far as living memory goes, and by reputation prior to living memory, the "beach ground" has been used (i) for drying nets after fishing when wet with sea water, the nets being either taken from boats immediately in front of the "beach ground" or brought in carts from some more convenient landing place; (ii) for drying nets which have been "cutched" in order to render them more fit for use, the nets being brought in carts from the place where the cutching process has been performed, and taken away when dry, so as to be ready for the fishing season. I think it probable that the dicta which recognise the validity of a custom to dry nets had reference only to drying

A nets after they have been used for fishing, and not to drying nets in preparation for fishing, though I do not feel certain of this. But every argument used to support the former seems to me equally valid to support the latter. It is equally "in favour of fishing and navigation." "Cutching" is merely another name for, and is equivalent to, tanning. What are the precise ingredients put into the cutch-pot is nowhere explained. I see no ground for inferring that it is a comparatively B modern process because "cutch" is a material used for tanning and imported from the Malay Archipelago. There is nothing to lead me to doubt that tanning nets in preparation for fishing is an ancient process, and if so it cannot be seriously urged that the fishermen are bound to use only tanning materials known in the reign of Richard I, and that by substituting "cutch"—if in truth they have substituted it—they have lost their right. Or, to put the proposition in another C and perhaps more accurate way, I think the proved usage of cutching nets is sufficient evidence of a custom to dry nets treated with suitable materials in preparation for fishing.

This brings me to the third branch of the usage proved. About thirty or thirty-five years ago it was found desirable to oil herring nets, instead of cutching them. This change was probably due to the use of cotton, instead of flax or D hemp, as the material from which herring nets are made. Since that date cutching has been applied only to mackerel nets. In my view, this falls within the same principle. It is nothing more than the application of a new and improved method of securing the former result. It is consistent with and supported by the older usage. I have not overlooked the argument that oiling imposes a greater burden on the land, as the nets take longer to dry. But, unless I am prepared to E confine the fishermen to the precise methods adopted tempore Richard I, I cannot yield to this argument. The illustration given by FARWELL, J., of the game of cricket, which was justified in *Fitch* v. *Rawling* (3), although cricket was not known in the reign of Richard I, is much in point.

It follows that, in my opinion, the custom as pleaded is sufficiently established by the evidence—viz., a custom to dry nets at all times necessary or proper F (whether before or after the fishing season) for the purposes of the trade or business of a fisherman. If I had not taken the view of the evidence which I have indicated I should have desired time to consider whether s. 2 of the Prescription Act does not apply. FARWELL, J., necessarily held himself bound by *Shuttleworth* v. *Le Fleming* (13) and *Mounsey* v. *Ismay* (14). In those cases the Court of Common Pleas and the Court of Exchequer held that the Prescription G Act applies only to easements strictly so called, where there is a dominant tenement and a servient tenement, and does not apply to a customary right claimed by inhabitants of a particular district, although the word "custom" is found in the section. Those cases are open to review in this court, but I do not think it necessary on the present occasion to express any opinion upon the important point there decided.

H *Appeal dismissed.*

Solicitors: *Mowll & Mowll*, for *Mowll & Mowll*, Dover; *Hare & Co.*, for *F. W. Hardman*, Deal.

[*Reported by* J. ARTHUR PRICE and E. A. SCRATCHLEY, ESQUIRES, *Barristers-at-Law.*]

A

OGDEN *v.* OGDEN

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Sir Gorell Barnes, P., and Kennedy, L.J.), July 26, 27, October 14, November 18, 1907]

[Reported [1908] P. 46; 77 L.J.P. 34; 97 L.T. 827; 24 T.L.R. 94]

B

Conflict of Laws—Marriage—Validity—Solemnisation in England—Husband domiciled abroad—Formalities needed for valid marriage in foreign country not complied with—Parental consent to marriage of minor not obtained.

A marriage that takes place in England between an English person domiciled in England with a foreigner domiciled in a foreign country, which it is not disputed would be held in England to be a valid marriage if celebrated between two inhabitants of this country, is not to be held invalid on the ground that the foreigner was by the statute law of his country subjected to the necessity of complying with certain formalities (e.g., the obtaining of parental consent to the marriage of a minor) in order to be at liberty to enter into the marriage and those conditions have not been fulfilled.

C

D

Conflict of Laws—Marriage—Nullity decree by foreign court—Decree granted on ground of want of formalities—One spouse domiciled in loco fori.

An Englishwoman, domiciled in England, married a domiciled Frenchman, the ceremony being performed in England. The Frenchman was not of full age, and he had not obtained parental consent to the marriage as required by art. 148 of the French Civil Code, nor made the publications prescribed by art. 63. As a result the marriage was subsequently declared null and void by a French court.

E

Held: all that the decree of the French court purported to declare was that the marriage was null according to arts. 148 and 170 of the French Civil Code, which amounted merely to a declaration that the marriage was null and void where French law could prevail, and, therefore, the decree did not affect the validity of the marriage in England.

F

Notes. On the second point decided in this case reference should be made to *Salvesen* (*or Von Lorang*) v. *Austrian Property Administrator*, [1927] All E.R.Rep. 78, which it has been said must be taken to have overruled the present decision on the question of the effect of the French decree of nullity: see per WILLMER, J., in *Chapelle* v. *Chapelle*, [1950] 1 All E.R. at p. 240.

G

Considered: *Chetti* v. *Chetti*, [1908–10] All E.R.Rep. 49; *Ramos* v. *Ramos* (1911), 27 T.L.R. 515; *De Montaigu* v. *De Montaigu*, [1913] P. 154; *Stathatos* v. *Stathatos*, [1913] P. 46; *A.-G. for Alberta* v. *Cook*, [1926] All E.R.Rep. 525; *Salvesen* (*or Von Lorang*) v. *Austrian Property Administrator*, [1927] All E.R.Rep. 78; *Papadopoulos* v. *Papadopoulos*, [1929] All E.R.Rep. 310; *Inverclyde* v. *Inverclyde*, [1931] P. 29; *Chapelle* v. *Chapelle*, [1950] 1 All E.R. 236. Referred to: *Lord Advocate* v. *Jaffrey*, [1920] All E.R.Rep. 242; *Mitford* v. *Mitford and Von Kuhlman*, [1923] All E.R.Rep. 214; *Republica de Guatemala* v. *Nunez*, [1927] 1 K.B. 669; *H.* v. *H.*, [1928] P. 206; *Hutter* v. *Hutter*, [1944] 2 All E.R. 368; *Casey* v. *Casey*, [1949] 2 All E.R. 110; *Wall* v. *Wall*, [1950] P. 112; *Travers* v. *Holley and Holley*, [1953] 2 All E.R. 794; *Dunne* v. *Saban* (*formerly Dunne*), [1954] 3 All E.R. 586; *Mountbatten* v. *Mountbatten*, [1959] 1 All E.R. 99.

H

I

As to the effect on the validity of marriage of foreign law and foreign decrees of nullity, see 7 HALSBURY'S LAWS (3rd Edn.) 88 et seq. For cases see 11 DIGEST (Repl.) 455 et seq.

Cases referred to:

(1) *Re Goodman's Trusts* (1881), 17 Ch.D. 266; 50 L.J.Ch. 425; 44 L.T. 527; 29 W.R. 586, C.A.; 3 Digest (Repl.) 420, *185.*

(2) *Saul* v. *His Creditors* (1827), 5 Martin, N.S. (La.), 569.

(3) *Herbert* v. *Herbert* (1819), 2 Hag. Con. 263; 3 Phillim. 58; 161 E.R. 1257; 11 Digest (Repl.) 462, *958*.

(4) *Scrimshire* v. *Scrimshire* (1752), 2 Hag. Con. 395; 161 E.R. 782; 11 Digest (Repl.) 462, *955*.

(5) *Middleton* v. *Janverin* (1802), 2 Hag. Con. 437; 161 E.R. 797; 11 Digest (Repl.) 462, *957*.

(6) *Warrender* v. *Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli.N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, *250*.

(7) *Brook* v. *Brook* (1861), 9 H.L.Cas. 193; 4 L.T. 93; 25 J.P. 259; 7 Jur.N.S. 422; 9 W.R. 461; 11 E.R. 703, H.L.; 11 Digest (Repl.) 457, *915*.

(8) *Mette* v. *Mette* (1859), 1 Sw. & Tr. 416; 28 L.J.P. & M. 117; 33 L.T.O.S. 139; 164 E.R. 792; sub nom. *In the Goods of Mette*, 7 W.R. 543; 11 Digest (Repl.) 456, *914*.

(9) *Re De Wilton*, *De Wilton* v. *Montefiore*, [1900] 2 Ch. 481; 69 L.J.Ch. 717; 83 L.T. 70; 48 W.R. 645; 16 T.L.R. 507; 44 Sol. Jo. 626; 11 Digest (Repl.) 459, *936*.

(10) *Commonwealth* v. *Lane* (1873), 113 Mass. 458.

(11) *Ponsford* v. *Johnson* (1847), 2 Blatchford's Rep. 51.

(12) *Van Voorhis and Brintnall* (1881), 86 N.Y. 18.

(13) *Moore* v. *Hedgman* (1883), 92 N.Y. 521.

(14) *Scott* v. *A.-G.* (1886), 11 P.D. 128; 55 L.J.P. 57; 56 L.T. 924; 50 J.P. 824; 11 Digest (Repl.) 347, *158*.

(15) *Warter* v. *Warter* (1890), 15 P.D. 152; 59 L.J.P. 87; 63 L.T. 250; 54 J.P. 631; 6 T.L.R. 391; 11 Digest (Repl.) 461, *952*.

(16) *Simonin* v. *Mallac* (1860), 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 2 L.T. 327; 6 Jur.N.S. 561; 164 E.R. 917; 11 Digest (Repl.) 478, *1065*.

(17) *Compton* v. *Bearcroft* (1769), Bull.N.P. 113; 2 Hag. Con. 444, n.; 161 E.R. 799; 11 Digest (Repl.) 463, *967*.

(18) *Steele* v. *Braddell* (1838), Milw. 1; 42 Digest 946, *f*.

(19) *Sottomayor* v. *De Barros* (1877), 2 P.D. 81; 46 L.J.P. 43; 36 L.T. 746; on appeal, 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; 26 W.R. 455, C.A.; subsequent proceedings (1879), 5 P.D. 94; 49 L.J.P. 1; 41 L.T. 281; 27 W.R. 917; 11 Digest (Repl.) 460, 461, *945*, *946*.

(20) *Male* v. *Roberts* (1790), 3 Esp. 163, N.P.; 11 Digest (Repl.) 429, *751*.

(21) *Hay* v. *Northcote*, [1900] 2 Ch. 262; 69 L.J.Ch. 586; 82 L.T. 656; 48 W.R. 615; 16 T.L.R. 418; 11 Digest (Repl.) 465, *991*.

(22) *Medway* v. *Needham* (1819), 16 Mass. 157.

(23) *Stevenson* v. *Gray* (1856), 17 B.Monr. 193.

(24) *Commonwealth* v. *Graham* (1892), 157 Mass. 73.

(25) *Everett* v. *Morrison* (1893), 69 Hun. (N.Y.) 146.

(26) *Sinclair* v. *Sinclair* (1798), 1 Hag. Con. 294; 161 E.R. 557; 11 Digest (Repl.) 485, *1098*.

(27) *Niboyet* v. *Niboyet* (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 27 W.R. 203, C.A.; 11 Digest (Repl.) 469, *1021*.

(28) *Roberts* v. *Brennan*, [1902] P. 143; 71 L.J.P. 74; sub nom. *Brennan* (*otherwise Roberts*) v. *Brennan*, 86 L.T. 599; 50 W.R. 414; 18 T.L.R. 467; 11 Digest (Repl.) 478, *1068*.

(29) *Armitage* v. *A.-G.*, *Gillig* v. *Gillig*, [1906] P. 135; 75 L.J.P. 42; 94 L.T. 614; 22 T.L.R. 306; 11 Digest (Repl.) 483, *1094*.

(30) *Linke* (*otherwise Van Aerde*) v. *Van Aerde* (1894), 10 T.L.R. 426; 11 Digest (Repl.) 478, *1066*.

(31) *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435; 41 L.J.P. & M. 74; 27 L.T. 351; 20 W.R. 891; 11 Digest (Repl.) 468, *1010*.

Also referred to in argument:

Harvey v. *Farnie* (1882), 8 App. Cas. 43; 52 L.J.P. 33; 48 L.T. 273; 47 J.P. 308; 31 W.R. 433, H.L.; 11 Digest (Repl.) 481, *1084*.

Bater v. *Bater*, [1906] P. 209; 75 L.J.P. 60; 94 L.T. 835; 22 T.L.R. 408; 50 Sol. Jo. 389, C.A.; 11 Digest (Repl.) 482, *1087*.

Pemberton v. *Hughes*, [1899] 1 Ch. 781; 68 L.J.Ch. 281; 80 L.T. 369; 47 W.R. 354; 15 T.L.R. 211; 43 Sol. Jo. 365, C.A.; 11 Digest (Repl.) 487, *1115*.

Doglioni v. *Crispin* (1866), L.R. 1 H.L. 301; 35 L.J.P. & M. 129; 15 L.T. 44, H.L.; 11 Digest (Repl.) 396, *516*.

Kent v. *Burgess* (1840), 11 Sim. 361; 10 L.J.Ch. 100; 5 Jur. 166; 59 E.R. 913; 11 Digest (Repl.) 462, *961*.

Hamlyn & Co. v. *Talisker Distillery*, [1894] A.C. 202; 71 L.T. 1; 58 J.P. 540; 10 T.L.R. 479; 6 R. 188, H.L.; 11 Digest (Repl.) 423, *724*.

Le Mesurier v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527, P.C.; 11 Digest (Repl.) 468, *1011*.

Dalrymple v. *Dalrymple* (1811), 2 Hag. Con. 54; 161 E.R. 665; on appeal (1814), 2 Hag. Con. 137, n.; 22 Digest (Repl.) 618, *7112*.

Andrews v. *Ross* (1888), 14 P.D. 15; 58 L.J.P. 14; 59 L.T. 900; 37 W.R. 239; 27 Digest (Repl.) 563, *5155*.

Appeal by the wife, Sarah Helen Ogden, from a decision of Bargrave Deane, J., on a petition by her husband, William Henry Ogden, for a decree of nullity of the marriage on the ground that at the time when he went through the ceremony of marriage with her, then Sarah Helen Philip, her husband, Léon Philip, was alive.

The parties went through a ceremony of marriage on Oct. 29, 1904, at the parish church of St. Saviour, Manchester, the respondent describing herself as Sarah Helen Philip, a widow. The respondent had, previously, been lawfully married on Sept. 14, 1898, to one Léon Philip in her maiden name of Williams, at the registry office of Prestwich, in Lancashire. Léon Philip was then residing in England, and was a domiciled Frenchman. The ages of the parties were stated to be twenty-five and twenty-two respectively; but it turned out that the age of Léon Philip was only nineteen, and shortly afterwards, on discovering what had taken place, his father came to England, and took his son back to France. Proceedings were then taken in France to declare the marriage between Léon Philip and the respondent null and void, and eventually this was done. The respondent, in reply to the petition in the present case, filed the following answers: (i) That her first marriage with Léon Philip was invalid; (ii) that it had been declared invalid by a court of competent jurisdiction—viz., a court of the country in which Léon Philip was domiciled; and (iii) that the judgment of the French court had been declared to be a valid and effectual decree by the English court on July 5, 1904. The petitioner traversed the alleged French domicil of Léon Philip, and denied the jurisdiction of the French court to annul the first marriage of the respondent. He further denied that the validity of the decree of the French court had been pronounced for by the English court. The domicil of Léon Philip was proved to be French to the satisfaction of the court, and it was shown that he was still alive and had re-married in France.

There had been previous proceedings in England concerning the marriage of the respondent with Léon Philip, and as to the declaration of nullity by the French court, which had been pronounced on Nov. 5, 1901. It appeared that on July 21, 1903, she had presented a petition asking for a decree of divorce on the ground of the desertion and adultery of her husband. No ground was suggested in this petition for declaring the marriage with Léon Philip invalid, but the prayer asked for "in the alternative a declaration that the said marriage is already annulled." No formal sentence of nullity was prayed for. The petition was undefended, and came on for hearing in 1904. It was, however, dismissed on the ground of want of jurisdiction, since the court was satisfied that the domicil of the parties was French.

From a shorthand note of the proceedings in 1904, when the former petition was heard, it appeared that Lord St. Helier, P., expressed himself in the course of the hearing to the effect that he would assume that the decree of the French court was right, but he refused to make any decree himself to that effect. Evidence of

French law was given by a member of the French Bar, the following articles of the French Civil Code being referred to:

> "Article 148. The son who has not attained the full age of twenty-five years, the daughter who has not attained the full age of twenty-one years, cannot contract marriage without the consent of their father and mother; in case of disagreement, the consent of the father is sufficient. . . . Article 170. A marriage contracted in a foreign country between natives of France, or between a native of France and a foreigner, shall be valid if celebrated according to the forms used in that country, provided it has been preceded by the publications prescribed in art. 63 under the title of 'Acts of the Civil Power,' and that the Frenchman has not infringed the regulations contained in the preceding chapter."

In giving evidence upon this point, the French expert stated that the object of the publication prescribed by art. 63 was to enable the parents of the husband to object, and that the effect of the French decree in the present case was to annul the marriage on the ground of the want of consent on the part of the father of Léon Philip, who was under the prescribed age when he went through the ceremony with the respondent in 1898.

The petition for the decree of nullity of marriage came on to be heard before BARGRAVE DEANE, J., in November, 1906, and on Dec. 10 his Lordship decided that the first marriage was valid, and that the court had not to consider the effect of the French decree. From that decision the wife appealed.

Sir Edward Clarke, K.C. (and *R. F. Bayford*), for the wife.
R. M. Middleton for the husband.

Cur. adv. vult.

Nov. 18, 1907. **SIR GORELL BARNES, P.,** read the following judgment of the court.—This is an appeal in a case of considerable importance and interest, more especially to persons in this country who have entered into or contemplate entering into matrimonial relations with foreigners.

Two points were made for the wife by her counsel: (i) that her marriage with Léon Philip was not valid, inasmuch as, although the marriage was celebrated according to the forms required by the law of England, it was invalid both in this country and in France, because Léon Philip was, by the law of France, being the law of his country and his domicil, incapable of contracting the marriage; (ii) that the effect of the French decree was to annul the marriage, both in France and in this country. If both or either of these points were established in favour of the wife, the contention on her part which followed as a matter of course was that at the time of the ceremony of marriage between herself and Mr. Ogden she was free to contract a marriage with him, and that, therefore, her marriage with him was valid, and his petition should be dismissed. Evidence was given at the trial of the French law upon which the wife relied. The French Civil Code was put in, and various sections of that code were referred to on the argument of this appeal, to some of which it is necessary to draw attention. By art. 1, s. 3, the law relating to the condition and privileges of persons govern Frenchmen although residing in a foreign country. By title 2, s. 63, two publications with an interval of eight days between them have to be made, containing particulars of the proposed marriage. Title 5 contains (inter alia) provisions from which it would seem that a marriage without the necessary consent or publication is not made by the code void from the outset, but will only be declared void if proceedings for that purpose are taken by the proper parties in proper time, and will be valid unless the declaration is made.

These being the facts and the points raised, counsel for the wife endeavoured to support his first point by urging before the court certain propositions which were wider than that which it is necessary to consider for the purpose of determining the present case. It is not necessary in this case to consider what are the principles

which ought to govern a decision in England upon the question of the validity in this country of a marriage celebrated therein between two foreigners domiciled abroad and incapable by the law of their domicil from marrying each other at all. It is not even necessary for the decision of this case to consider what has been or ought to be decided as to the validity of a marriage entered into in England between two foreigners domiciled abroad where they have come to this country in order to avoid a difficulty with regard to formalities which are required by the law of their domicil for the celebration of a valid marriage in their own country. The simple question for determination in the present case upon the first point is whether or not a marriage taking place in England between an English person domiciled in England with a foreigner temporarily residing in this country, which it was not disputed would be held in England to be a valid marriage if celebrated between two inhabitants of this country, ought to be held invalid on the ground that the foreigner was by the statute law of his country subjected to the necessity of complying with certain formalities in order to be at liberty to enter into the marriage. It is desirable to state this limited proposition very clearly, because, with regard to questions which may be raised as to the validity of marriages in England between persons domiciled abroad, certain cases have been decided (to which reference will be made later on in this judgment) which do not necessarily involve the consideration of the particular point already indicated, or any decision thereupon; and it is desirable, therefore, to avoid the confusion which appears to have arisen sometimes between the consideration of the principles which have been laid down for determining the validity of a marriage where the ceremony alone was in question, and of those which have been considered, in determining whether it was lawful for the parties to intermarry at all.

The argument for the wife in the present case was that, although the marriage between her and Mr. Philip was celebrated according to the forms required by the English law, it was invalid universally because Mr. Philip was a minor in France, and under a disability by the law of France from contracting such marriage without the consent of his father, and without complying with the other formalities required by the law of France. In substance this contention amounted to this—that in regard to entering into a marriage in England with an inhabitant thereof Mr. Philip carried with him into this country an incapacity, which ought to be recognised by the law of England, to enter into matrimonial relationship with such inhabitant without complying with the provisions of the French Code. It was urged that this principle had been recognised in this country, and cases were cited which it was said supported the contention. The cases cited, however, do not support it; and in truth the argument on behalf of the wife appears to be based upon views which have been expressed by foreign jurists, but which have not been adopted in this country, where the English courts have not been very ready to admit a personal law of status and capacity dependent on domicil, and travelling with the person from country to country, although there has been, perhaps, less unwillingness in later years to give effect to the lex domicilii to some extent: see, for instance, *Re Goodman's Trusts* (1).

It may be doubted whether there is much substantial difference of opinion between foreign and English jurists as to the general rule that between persons sui juris the validity of the marriage is to be decided by the law of the place where it is celebrated. There are certain exceptions, as, for instance, when the lex loci celebrationis violates the precepts of religion, or of public morals, as in the case of bigamy, or where the marriages are such as are generally recognised as incestuous. When, however, the competency of the parties to contract marriage is considered, there appears to be a diversity of opinion, not merely between foreign jurists and English jurists, but among the foreign jurists themselves, certain foreign jurists, but not all, maintaining that a person who is in his minority by the law of his native or acquired domicil is to be deemed everywhere in the same state or condition. This appears to be based upon the conception that the laws which have for their object the regulation of the capacity of persons are to be treated as personal laws

and of absolute obligation everywhere when they have once attached upon the person by the law of his domicil. This conception would appear to result from the application of principles derived from sources of law different from those from which the English common law has been derived, and from considerations which have not had the same force in this country as abroad.

STORY, J., however, notices that many exceptions are admitted to exist as to the operation of personal laws, and that the practice of nations by no means justifies the doctrine in the extent to which it is ordinarily laid down by many foreign jurists: STORY ON THE CONFLICT OF LAWS, s. 54. That learned writer discusses this question at great length in the work to which reference has been made, and makes the following general observations in s. 76 on the inconvenience of allowing the law of the domicil to govern contracts made in other countries. He says:

> "How are the inhabitants of any country to ascertain the condition of a stranger dwelling among them as fixed by the law of a foreign country where he was born or had acquired a new domicil? Even courts of justice do not assume to know what the laws of a foreign country are; but require them to be proved. How, then, shall private persons be presumed to have better means of knowledge? On the other hand, it may be said, with great force, that contracts ought to be governed by the law of the country where they are made, as to the competence of the parties to make them, and as to their validity; because the parties may well be presumed to contract with reference to the laws of the place where the contract is made and is to be executed. Such a rule has certainty and simplicity in its application. It ought not, therefore, to be matter of surprise if the country of the parties' birth should hold such a contract valid, or void, according to its own law, and that nevertheless, the country where it is made and to be executed should hold it valid or void, according to its own law. It has been well observed by an eminent judge that 'with respect to any ignorance arising from foreign birth and education, it is an indispensable rule of law, as exercised in all civilised countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts of that country. If he rashly presumes to contract without such knowledge, he must take the inconvenience resulting from such ignorance upon himself, and not attempt to throw them upon the other party who has engaged under a proper knowledge and sense of the obligation which the law would impose upon him by virtue of that engagement.'"

Again, in s. 75, he quotes from a judgment of PORTER, J., in *Saul* v. *His Creditors* (2) (5 Martin, N.S. (La.) at pp. 596 to 598), as follows:

> "Suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country where he resided, and that at the age of twenty-four he came into this State, and entered into contracts, would it be permitted that he should, in our courts and to the demand of one of our citizens, plead as a protection against his engagements the laws of a foreign country, of which the people of Louisiana had no knowledge? And would we tell them that ignorance of foreign laws in relation to a contract made here was to prevent them from enforcing it, though the agreement was binding by those of their own State? Most assuredly we would not."

In s. 90, he observes:

> "The difficulty of applying any other rule as to the capacity and incapacity of the person, in respect to the class of nuptial contracts, will become still more clear by attending to the great extent of the parental power recognised by the Continental nations of Europe, and derived by them from the civil law. Parental restraint upon the marriage of minors exists to a very great extent in Germany, Holland, France, and other civil law countries; to so great an extent

indeed that the marriage of minors without the consent of their parents, or at least of their father, is absolutely void [sed quære, should not the learned author have said voidable, see observations above], and the disability of minority is in these countries carried to a much greater age than it is by the common law. In some of these countries majority is not attained until thirty, and until a very recent period, even in France, the age of majority of males was fixed at twenty-five and of females at twenty-one. It is now fixed at twenty-one in all other cases except for the purpose of contracting marriage, and a marriage cannot even now be contracted in France by a man until twenty-five years of age, and by a woman until twenty-one, without the consent of their parents, or at least of their fathers, if the parents differ in opinion. Yet France has ventured upon the bold doctrine that the marriages of Frenchmen in foreign countries shall not be deemed valid if the parties are not by its own law competent to contract by reason of their being under the parental power. There can be little doubt that foreign countries where such marriages are celebrated will follow their own law and disregard that of France."

It would needlessly lengthen this judgment to set out the passages from foreign jurists bearing upon this subject, and it is not necessary to examine at length those cases or those passages in the above-mentioned work or other commentaries which deal with cases in which a marriage is entirely prohibited by the laws of the domicil of both or either of the parties, and yet it is permitted by the laws of the place of celebration, for we are concerned in this case only with the question of a disability imposed by foreign law upon one of the parties to the marriage in respect only of want of parental consent, and compliance with certain formalities required by such foreign law. There appears to be no case in this country (certainly no case was cited to us in argument on this appeal) in which in such a case as last mentioned the view has been expressed that such a marriage would be held invalid in this country. We know of no principle recognised by English law which would justify the court in coming to the conclusion that such a marriage ought to be held invalid; for, although to a certain extent the lex domicilii is recognised in this country, for instance, in the familiar case where it is held that mobilia sequuntur personam, yet such recognition appears never to have been extended to the case of a matrimonial engagement entered into in this country between an inhabitant of another country and an inhabitant of this country. In such a case, where there are two different systems of law, one may well ask, which is to prevail? Why should it be recognised that a person who comes over to this country and validly enters into a marriage with one of its inhabitants according to English law should be held unable to do so here because of the regulations of a foreign system of jurisprudence which places upon him a personal incapacity to contract unless he complies with formalities required by the foreign law? It may be observed here that the 3rd section of art. 1 of the French Civil Code ordains that the French laws relating to the condition and privileges of persons are to govern Frenchmen although residing in a foreign country, so that it would seem from this provision that the French rule as to competency by reason of minority is not based upon domicil but upon nationality, and, therefore, that, even in the case of a Frenchman domiciled in England celebrating a marriage with a domiciled Englishwoman, the French courts would be at liberty, if the question arose before them, to declare such a marriage null and void on the ground that it was governed by the laws of France, although celebrated in this country; but it could hardly be contended in England, if both persons parties to a marriage were domiciled in this country, that our courts ought to hold such a marriage invalid because one of the parties by the laws of his or her nationality may not have adequate competency to enter into the contract.

It is necessary now to refer to some of the cases which were cited in the course of the argument, though none of them when examined can be considered to support the contention of the wife upon the first question, but before doing so it should be observed that the court has, in a suit for nullity, by s. 22 of the Matrimonial Causes

A Act, 1857 [repealed], to

> "proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief."

Upon the question, however, of validity of marriage under consideration there is no B reason for supposing that there was any difference between the principles and rules applicable to the question in the ecclesiastical courts and in the courts of common law. The first case to refer to is *Herbert* v. *Herbert* (3), where LORD STOWELL in his judgment said (3 Phillim. at pp. 63, 64):

> "It being an established principle that every marriage must be tried according to the law of the country in which it took place; this is according to the C jus gentium: whatever the regulations may be according to which the marriage has been had, if they are what the canonical law of the foreign country supports, the canonical law of this country must enforce it."

The language of this judgment as reported in 2 Hag. Con. at p. 271 is not quite the same, but is substantially to the same effect.

D *Scrimshire* v. *Scrimshire* (4) appears to have been heard in 1752, but the case is reported in 2 Hag. Con. 395, from a manuscript note of SIR EDWARD SIMPSON communicated by DR. SWABEY. The question raised in it was as to the validity of marriages of British subjects contracted abroad. SIR WILLIAM WYNNE in *Middleton* v. *Janverin* (5), states (2 Hag. Con. at p. 446) that he remembered to have heard that the judgment was founded on great deliberation, and that LORD HARD- E WICKE, L.C., was consulted on it. In the course of that judgment SIR EDWARD SIMPSON said (ibid. at pp. 416, 417, 418, 419):

> "From the doctrine laid down in our books—the practice of nations—and the mischief and confusion that would arise to the subjects of every country, from a contrary doctrine, I may infer that it is the consent of all nations, that it is the jus gentium, that the solemnities of the different nations with respect to F marriages should be observed, and that contracts of this kind are to be determined by the laws of the country where they are made. If that principle is not to govern such cases, what is to be the rule, where one party is domiciled, and the other not? The jus gentium is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it; and this court, observing that law in determining upon this case, cannot be said G to determine English rights by the laws of France, but by the law of England, of which the jus gentium is part. All nations allow marriage contracts; they are 'juris gentium,' and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion, that must necessarily arise to the subjects of all nations, with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as H to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries—that is, the law where the contract is made. By observing this law, no inconvenience can arise; but I infinite mischief will ensue if it is not. . . . Suppose two French subjects, not domiciled here, should clandestinely marry, and there should be a sentence for the marriage; undoubtedly the wife, though French, would be entitled to all the rights of a wife by our law. But if no faith should be given to that sentence in France, and the marriage should be declared null because the man was not domiciled; he might take a second wife in France, and that wife would be entitled to legal rights there, and the children would be bastards in one country and legitimate in the other. So that in cases of this kind, the matter of domicil makes no sort of difference in determining them; because the inconvenience to

society and the public in general is the same, whether the parties contracting are domiciled or not."

The terms of art. 1, s. 3, of the French Code show how these principles differ from those upon which it is based. The principle indicated in this judgment appears to have been adopted in the judgment of LORD BROUGHAM in the House of Lords in *Warrender* v. *Warrender* (6).

Brook v. *Brook* (7) was much relied upon by the wife's counsel. That case, however, so far from supporting the contention of the wife, is, when carefully considered, a decision adverse to her. The case raised a similar point to that which had been raised in *Mette* v. *Mette* (8), with two distinctions—first, that the man in the latter case was not a natural born subject of the realm, although domiciled in England and naturalised by Act of Parliament; secondly, that the deceased wife's sister was a native of Frankfort, and until her marriage domiciled there. The facts in *Brook* v. *Brook* (7) are shortly stated in the headnote to the report as follows: A. and B., British subjects, intermarried. B. died, A. and C. (the lawful sister of B.), both being at the time lawfully domiciled British subjects, went abroad, to Denmark, where by the law of that country the marriage of a man with the sister of his deceased wife is valid, and were there duly, according to the laws of Denmark, married, and it was held that under the provisions of 5 & 6 Will. 4, c. 54 [Marriage Act, 1835; repealed], the marriage in Denmark was void. In consequence of the recent Act legalising marriage with a deceased wife's sister [Deceased Wife's Sister's Marriage Act, 1907: see now wider provisions of Marriage Enabling Act, 1960: 40 HALSBURY'S STATUTES (2nd Edn.) 393], these two cases have become unimportant so far as they affected such a marriage, but the grounds upon which they were decided are still applicable to marriages within other degrees of consanguinity or affinity declared void by the Act of 1835, and, therefore, in *Re De Wilton*, *De Wilton* v. *Montefiore* (9), SIR JAMES STIRLING held that a marriage solemnised abroad according to Jewish rites between a niece and her natural uncle, both being domiciled British subjects and adherents of the Jewish faith, was invalid, although it was valid by the law of the place of celebration and by Jewish law. The decisions in those cases did not depend upon the question which is now under consideration, but upon whether or not the marriages, entirely prohibited, at the time, by the law of this country, were to be held valid because the parties thereto had entered into marriage relationship in a country where such marriages were permitted. It would not follow from these decisions that the marriages would have been held invalid in the countries in which they were celebrated.

Brook v. *Brook* (7) was a decision binding in this country, but it may be noticed that it has not met with approval in America, where it was very fully discussed and criticised in a learned judgment by GRAY, C.J., in *Commonwealth* v. *Lane* (10). In that case a man, who had been lawfully married in Massachusetts and whose wife had obtained a divorce from him on the ground of adultery, in which case he was prohibited by the statutes of the State from marrying again without the leave of the court, and who, without having obtained the leave of the court, and being still a resident in Massachusetts, was married to another woman in another State according to its laws, and afterwards cohabited with her in the State of Massachusetts, the first wife being still alive, was indicted for bigamy, but was held Not Guilty without proof that the second wife was resident in the State of Massachusetts and that he and she went into the other State to evade the provisions of the statutes of the State of Massachusetts. This proof was required by s. 6 of Gen. Sts., c. 106, which would seem to have been passed with the express object of preventing such second marriages, if such proof could be given. There are several cases of a similar nature in America, among them *Ponsford* v. *Johnson* (11), *Van Voorhis and Brintnall* (12), and *Moore* v. *Hedgman* (13). It is possible that those cases might have been decided upon principles analogous to those applied in *Scott* v. *A.-G.* (14), distinguished in *Warter* v. *Warter* (15)—viz., that the restriction upon a second marriage was penal in its character, and as such was inoperative out of the juris-

diction under which it was inflicted. But GRAY, C.J., in his judgment appears to have based his decision upon the broad ground of the second marriage being in accordance with the lex loci contractus.

The reason why *Brook* v. *Brook* (7) may be considered to be adverse to the wife in the present case is that the distinction is there drawn between the question of the validity of a marriage absolutely prohibited by the law of the domicil of both parties and the case in which a marriage, valid by the law of the place of celebration if it took place between two inhabitants of that place, is called in question because one of the persons is domiciled abroad, and has not complied with certain forms and obtained certain consents required by the law of the place of his or her domicil. LORD CAMPBELL, L.C., said (9 H.L.Cas. at pp. 207, 208):

> "There can be no doubt of the general rule, that 'a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere.' But while the forms of entering into the contract of marriage are to be regulated by the lex loci contractus, the law of the country in which it is celebrated, the essentials of the contract depend upon the lex domicilii, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicil, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicil, and it is declared void by that law, it is to be regarded as void in the country of domicil, though not contrary to the law of the country in which it was celebrated."

In commenting on *Simonin* v. *Mallac* (16), next hereinafter referred to, LORD CAMPBELL remarks (ibid. at p. 218):

> "The objection to the validity of the marriage in England was merely that the forms prescribed by the Code Napoléon for the celebration of a marriage in France had not been observed. But there was no law of France, where the parties were domiciled, forbidding a conjugal union between them; and if the proper forms of celebration had been observed, this marriage by the law of France would have been unimpeachable. The case [*Simonin* v. *Mallac* (16)], therefore, comes into the same category as *Compton* v. *Bearcroft* (17) and *Steele* v. *Braddell* (18), decided by DR. RADCLIFF. None of these cases can show the validity of a marriage which the law of the domicil of the parties condemns as incestuous, and which could not, by any forms or consents, have been rendered valid in the country in which the parties were domiciled."

It was contended, as this appears, that *Simonin* v. *Mallac* (16) was wrongly decided, and, therefore, it is desirable to refer to it in some detail. It was a suit for a declaration of nullity of marriage. The ceremony of marriage took place on June 21, 1854, between the petitioner and Léon Mallac at the parish church of St. Martin's-in-the-Fields, Middlesex, Léon Mallac being of the age of twenty-nine years, and the petitioner aged twenty-two. They came over to London for the purpose of being married and returned to France the next day. The marriage was not consummated, and the petitioner asked Mallac to marry her again in France, but he refused, and she instituted a suit before the Civil Tribunal of First Instance of the Seine to procure a decree of nullity of the alleged marriage. On Dec. 1, 1854, a decree was made, by default, against the respondent, who did not appear, declaring the marriage null and void on the ground that by the words of art. 170 of the French Code the marriage ought to have been preceded by the publication in France prescribed by law, and that there must not have been any contravention of the provisions of arts. 144 and following of the said code, and that, although the nullity provided for by art. 170 was not absolute, it ought to be pronounced when an omission of formalities had taken place with the formal intention of eluding the law, it being the province of the tribunal to appreciate the circumstances thereof.

and that the marriage was celebrated without the consent of the parents and without having been preceded in France by the publications prescribed by art. 63 of the code, and that the parties were French subjects domiciled in France who had only proceeded to England for the purpose of contracting a marriage in order to evade the prescriptions of French law, and that the marriage had not been consummated. A

Afterwards the petitioner came to reside in England, and petitioned the Court for Divorce and Matrimonial Causes for a decree of nullity of marriage. The petition and citation were served on the respondent at Naples, but he put in no answer, and the case came on before the full court as an undefended case. It was argued by DR. PHILLIMORE, evidently at great length and with great learning. Numerous authorities, both English and foreign, were cited, but the court, composed of SIR CRESSWELL CRESSWELL, CHANNELL, J., and KEATING, J., dismissed the petition. In the course of the judgment, SIR CRESSWELL CRESSWELL (delivering the judgment of the court), in dealing with the second question to be determined—viz., whether the marriage was to be held null and void—said that, so far as the court had been able to ascertain, the question was one, primæ impressionis, that no decision upon the point was cited, and they had not had the benefit of any other diligence save their own in the attempt to discover precedents for their guidance. The case was a stronger case in favour of the petitioner than the present case is in favour of the wife, for both the parties in that case were French subjects and of French domicil. The argument was very much the same as that which was addressed to this court—viz., that the law of the country of the domicil placed on the parties an incapacity to contract marriage without attending to the formalities prescribed, and that such incapacity travelled with them everywhere, and rendered them incapable of making a valid contract in any other country, especially where the intention was to evade the law of their own country. In the course of the judgment it was noticed that according to the evidence the incapacity to contract was not absolute, but conditional only, and that the marriage, having been contracted between a man and a woman of the respective ages of twenty-nine and twenty-two without attending to the formalities prescribed by the code, arts. 151, 152, 153, and 154, might receive a different consideration from one absolutely prohibited by art. 148 between parties respectively under those ages. B C D E F

The court, however, dealt with the case on the broad ground that by the decree of the French court as evidenced by the law of France the marriage was void, and the question considered was whether the marriage was to be judged of here by the law of France or by the law of England. The learned judge said (2 Sw. & Tr. at p. 77): G

> "In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. But it was and is contended that such rule does not extend to contracts of marriage; and that parties are, with reference to them, bound by the law of their domicil. This question, of so much importance in all civilised communities, has been largely discussed by jurists of all nations, but they all apply their observations to controversies arising, not in the countries where the marriage was celebrated, but in other countries where it is brought in dispute, and of which the parties were domiciled subjects. That a marriage, good by the law of the country where solemnised, should be held good in all other countries, and the converse, is strongly maintained as a general rule by nearly all writers on international law. But, according to the same authorities, it is subject to some few exceptions, viz., marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy—e.g., by our Royal Marriage Act." H I

He then refers to the third exemption mentioned by STORY ON CONFLICT OF LAWS, s. 113a, viz.,

> "marriages celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country,"

and continues (ibid. at pp. 77, 78):

> "In several instances, learned judges presiding in our ecclesiastical courts have stated the general rule, without mentioning the exceptions, whence it has sometimes been contended that they meant to controvert their existence. But inasmuch as none of the cases referred to fell within the exceptions above mentioned, it cannot justly be inferred that those learned persons intended their words to bear so extensive a meaning; for they would hardly have repudiated the doctrine of several learned writers, whose works are always received as worthy of great attention, without condescending to advert to it in terms, and assigning some reasons for dissenting from it."

He proceeded further to refer to *Scrimshire* v. *Scrimshire* (4) and *Middleton* v. *Janverin* (5) and the writings of some of the jurists, especially HUBER DE CONFLICTU LEGUM, from which he quotes (ibid. at p. 81) a passage upon which he remarks that HUBER does not suggest the slightest doubt as to the marriages of minors without consent, celebrated in countries whither they had gone for the purpose of evading the laws of the country of domicil, being held good in the country where solemnised; but, with reference to the second class, vindicates the country of the domicil against the charge of violating the laws of nations by refusing to recognise them. He then refers to certain other cases, and thus proceeds (ibid. at pp. 83, 84):

> "The French tribunal in this case appears to have held the marriage null and void, not because it was absolutely prohibited by the law of France, but because the parties contracted it in England with the formal intention of evading the prescriptions of the French law. Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and if its subjects sustain hardships in consequence of those restrictions, their own nation only must bear the blame; but what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? . . . Assume then that a French subject comes to England, and there marries, without consent, a subject of another foreign country by the laws of which such a marriage would be valid, which law is to prevail? To which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not then be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know and to agree to be bound by? Again, assume that one of the parties is English; would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law?"

After pointing out the difficulties which would arise if parties were called upon to prove their ages, the consent of certain relations, or the non-existence of certain relations, or that they have not come to this country to evade the laws of their own, and other difficulties, he concludes thus (ibid. at p. 85):

> "The great importance of having some one certain rule applicable to all cases; the difficulty, not to say impossibility, of having any rule applicable to all cases, save that the law of the country where a marriage is solemnised shall in that country at least decide whether it is valid or invalid; the absence of any judicial decision or dictum, or of even any opposite opinion of any writer of authority on the law of nations, have led us to the conclusion that we ought not to found our judgment in this case on any other rule than the law of England as prevailing amongst English subjects. France may make laws for her own subjects, and impose on them all the consequences, good or evil, that result from those laws; but England also may make laws for the regulation of all matters within her own territory. Either nation may refuse to surrender its own laws to those of the other, and, if either is guilty of any breach of the comitas or jus gentium,

that reproach should attach to the nation whose laws are least calculated to ensure the common benefit and advantage of all."

That case is in accordance with the general views to be found expressed in the English decision, and has met with approval in this court and in the House of Lords, or at least it may be said that where mentioned in those tribunals it has not been dissented from.

The case principally relied on by the wife was *Sottomayor* v. *De Barros* (19), before SIR ROBERT PHILLIMORE, and afterwards on appeal, where the petitioner and respondent, Portuguese subjects and first cousins, came to reside in England in 1858. In 1866 they went through a form of marriage before the registrar of the district of the city of London, and in 1873 they returned to Portugal, and continued to reside there. By the law of Portugal a marriage of Portuguese subjects, being first cousins without dispensation, wheresoever contracted, was invalid. The wife afterwards, while residing with her parents at Lisbon, filed a petition in this country for a declaration of nullity of marriage. The husband appeared, but did not file an answer, and the matter came on unopposed before SIR ROBERT PHILLIMORE, who directed that the papers should be sent to the Queen's Proctor in order that he might argue the questions raised, and the Queen's Proctor thereupon appeared. The questions were argued, and in the result SIR ROBERT PHILLIMORE felt himself bound by prior decisions, and especially that in *Simonin* v. *Mallac* (16), and dismissed the petition. The wife appealed to the Court of Appeal. The judgment of the court, consisting of JAMES, BAGGALLAY, and COTTON, L.JJ., was delivered by COTTON, L.J., and one of the principal arguments addressed to us upon this appeal in the present case was based upon that judgment. The decision of the court below was reversed. The basis of that judgment is to be found in the following passage (3 P.D. at p. 5):

"But it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicil; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised."

This court hearing the present appeal is bound by the decision of the Court of Appeal in *Sottomayor* v. *De Barros* (19). It is not necessary, even if we were at liberty to do so, to consider whether that case was rightly decided, but it is permissible to point out that the commencement of the paragraph above set out could scarcely be considered correct in stating that

"it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil"

for, if so, it would logically seem to follow that that part of the judgment which indicates that the opinion of the court was confined to cases where both the contracting parties were, at the time of their marriage, domiciled in a country the laws of which prohibited their marriage should not have expressed that limitation and

that *Simonin* v. *Mallac* (16) should have been overruled, and yet that case, according to our reading of the judgment, is approved. The probability is that that sentence should be read with the context and be confined to the case present to the minds of the court in relation to marriages which could not be contracted at all by the laws of the country of domicil. Even then it may be questioned whether that sentence is correct, and whether the question of capacity is really raised at all in such a case—that is to say, where both the parties are capable of entering into a marriage, but may not marry each other because such a marriage would be illegal in their own country. That is rather a question of illegality than of capacity, and it may, perhaps, not be unreasonable for one country to refuse to recognise a marriage contracted in it between two persons by the laws of whose domicil a marriage between them is illegal, and yet it may be quite proper and reasonable for a country in which a marriage takes place between persons domiciled in another country to recognise it as a valid marriage when it would be legal in such other country if contracted after compliance with all formalities required in such other country; and, further, to protect its citizens in all cases of marriages where one of the contracting parties is domiciled in the country first referred to—that is to say, where the marriage takes place—and the other is domiciled in a foreign country, and there is a conflict between the laws of the two countries as to the validity of the marriage. The passage in the judgment expressly confining the decision to the case then before the court is as follows (3 P.D. at pp. 6, 7):

> "It was pressed upon us in argument that a decision in favour of the petitioner would lead to many difficulties, if questions should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of the domicil of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign State when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country."

It was upon this passage that, when the case subsequently came before LORD HANNEN, he was able to decide in favour of the marriage being valid, notwithstanding the fact that one of the parties was domiciled in Portugal. The concluding passage in the judgment of the Court of Appeal is as follows (ibid. at p. 7):

> "It only remains to consider the case of *Simonin* v. *Mallac* (16). The objection to the validity of the marriage in that case, which was solemnised in England, was the want of consent of parents required by the law of France, but not under the circumstances by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage; and the decision in *Simonin* v. *Mallac* (16) does not, we think, govern the present case."

That may perhaps be considered only a dictum by the learned lords justices, but it is really a very strong statement that *Simonin* v. *Mallac* (16) is clearly distinguishable from the case before them, and we regard it as an approval of the decision in that case, and, if so, it is an authority adverse to the contention of the wife on the present appeal.

The case, having been thus argued in the Court of Appeal by the Queen's Proctor under the provisions of s. 5 of the Matrimonial Causes Act, 1860 [see now s. 10 of Matrimonial Causes Act, 1950: 29 HALSBURY'S STATUTES (2nd Edn.) 388], was remitted to the Probate Division in order that the question of fact raised by the

Queen's Proctor's plea should be considered. It was then heard before LORD HANNEN, who found, as a fact, that the respondent, the husband, was domiciled in England, but that the domicil of the wife was Portuguese. In the course of his judgment he pointed out how the passage in the judgment of the Court of Appeal expressly confining the decision to the case then before the court left him free to consider whether the marriage of the respondent, who was domiciled in England, with a woman subject by the law of her domicil to a personal incapacity not recognised by English law, must be declared invalid by the tribunals of this country, and he commented (5 P.D. at p. 100) upon the passages in the judgment which formed the basis of the decision, and remarked that it appeared to him to put forward a novel principle for which, up to the present time, there had been no English authority. He then cited *Male* v. *Roberts* (20), in which the contract upon which the defendant was sued was made in Scotland, the defence being that the defendant was an infant, and where LORD ELDON held the defence bad, saying (3 Esp. at p. 164):

> "If the law of Scotland is that such a contract as the present could not be enforced against an infant, that should have been given in evidence. . . . The law of the country where the contract arose must govern the contract."

After referring to *Scrimshire* v. *Scrimshire* (4) and *Simonin* v. *Mallac* (16) and other cases, he held that the marriage between the petitioner and respondent was valid, and dismissed the petition. It appears to have been suggested that the Papal dispensation of which the law of Portugal recognises the validity could not be distinguished in principle from the consent of a parent, but COTTON, L.J., stated in his judgment that it could not, in the opinion of the court, be held that such a dispensation was a matter of form affecting only the sufficiency of the ceremony by which the marriage was effected. MR. FOOTE's remarks upon this question in his book on PRIVATE INTERNATIONAL JURISPRUDENCE (3rd Edn.), p. 367, are much in point:

> "Dispensation with a law is, in principle, a very different thing from compliance with its directions, though in practice the effect of the two may sometimes be similar. In such a case as *Sottomayor* v. *De Barros* (19) the law of Portugal does not say that, when first cousins wish to intermarry, they shall obtain the written consent of the Pope to their doing so. It says they shall not marry at all, and such a prohibition by a domiciliary law is not the less complete, as far as other tribunals are concerned, because the same domiciliary law, under certain circumstances, allows itself to be dispensed with."

The last case in which *Simonin* v. *Mallac* (16) has been referred to was *Hay* v. *Northcote* (21), in which FARWELL, J., followed that case.

In the United States of America the doctrine that the laws of the country or State where a marriage is celebrated will, in general, govern the question of its validity has been very clearly expressed. Several cases on the subject have been mentioned above, and in addition thereto and to the work of STORY, J., reference may be made to *Medway* v. *Needham* (22), which was commented on in *Brook* v. *Brook* (7); *Stevenson* v. *Gray* (23); *Commonwealth* v. *Graham* (24); and *Everett* v. *Morrison* (25); and to MR. BISHOP'S COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, ss. 353–370. In s. 359 he discusses the inconveniences which arise from applying a different rule, and after expressing the opinion that the decision of the Court of Appeal in *Sottomayor* v. *De Barros* (19) is contrary to the old ideas of the supremacy of English law on English soil, he states that:

> "No American court has ever yet permitted any class of foreigners, except Sovereigns and their diplomatic agents and attendants, to be thus exempt from subjection to our laws on American soil."

He proceeds to discuss (ss. 371–389) limitations to the doctrine, which are also referred to in STORY, J.'s work (ss. 89, 113A, et seq.), but do not bear directly upon

the question of minority. He also cites *Commonwealth* v. *Lane* (10) above referred to, and does not consider that the decision in *Brook* v. *Brook* (7) should be followed in America.

After very careful consideration of the present case, we have come to the conclusion that the first point must be decided against the wife, and that the marriage between her and Mr. Philip must be declared valid in England. That leaves for consideration the second question, as to the effect of the French decree. The argument upon this point for the wife was that the decree had an effect similar to that of a decree of dissolution of marriage in a country in which both parties are domiciled, and that there was no distinction between the case of a decree of nullity and a decree of dissolution of marriage in its binding effect. Without doubt it has now been clearly established that the courts of this country, wherever a marriage has been celebrated, recognise a decree of dissolution made by a proper tribunal of the country in which the parties are domiciled as universally binding and putting an end to the marriage, and it is no real exception to this principle that in cases where a wife has been deserted in the country of the domicil by her husband in circumstances entitling her to sue for divorce it has been held that she might sue in the courts of the country of the domicil notwithstanding the fact that the husband has left the country and might possibly have done so with the intention of acquiring a domicil in another country. The decree in such a case is justified, either by considering that the husband cannot be heard to say that he has changed his domicil, or, as some have thought, that the wife must ex necessitate be entitled to treat the country of the previous matrimonial domicil as still being the country of her domicil, and to require its courts to do justice to her, because otherwise it would be impossible for a wife so situated to obtain a decree, as the husband might keep changing his abode from place to place asserting that he had abandoned his original domicil, and any domicil with which it were sought to fix him. But there are differences between suits for dissolution of marriage and those in which a declaration of nullity of marriage is claimed. The question raised in the latter class of suits is whether a valid marriage ever took place at all. Of course, if it took place, the domicil of the wife becomes the domicil of the husband. But, if it did not take place, the mere fact that a ceremony was gone through would not change the domicil of the wife, and she would not, therefore, necessarily have the same domicil as her intended husband. The courts have recognised the distinction in several cases. In *Sinclair* v. *Sinclair* (26) there was a suit for divorce a mensa et thoro brought by the wife against the husband by reason of cruelty and adultery, in which he appeared under protest, alleging in bar of the proceedings that the suit could not be entertained by the court for that the marriage had been celebrated at Paris, and had been since dissolved by a sentence of the court at Brussels on proceedings, instituted by him, for nullity and divorce by reason of the adultery of the wife. It was clear that the Brussels decree was only on the ground of nullity. SIR WILLIAM SCOTT, in giving judgment, said (1 Hag. Con. at p. 297):

> "Something has been said on the doctrine of law, regarding the respect due to foreign judgments; and undoubtedly a sentence of separation, in a proper court, for adultery, would be entitled to credit and attention in this court; but I think the conclusion is carried too far, when it is said, that a sentence of nullity of marriage is necessarily, and universally, binding on other countries. Adultery and its proofs are nearly the same in all countries. The validity of marriage, however, must depend in a great degree on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnised, would carry with it great authority in this country; but I am not prepared to say, that a judgment of a third country, on the validity of a marriage, not within its territories, nor had between subjects of that country, would be universally binding. For instance, the marriage, alleged by the husband, is a French marriage; a French judgment on that marriage would have been of considerable weight; but it does not follow

that the judgment of a court at Brussels, on a marriage in France, would have the same authority, much less on a marriage celebrated here in England."

HIS LORDSHIP, therefore, declared the protest insufficient, and directed the respondent to appear absolutely, and answer the general charges of the wife's suit.

It seems clear, from this judgment, that SIR WILLIAM SCOTT did not consider that a sentence of nullity in Brussels would have been conclusive. Again, in *Simonin* v. *Mallac* (16) the court did not regard the French decree as binding upon them, and dismissed the petition for nullity. In *Niboyet* v. *Niboyet* (27) LORD ESHER, in his judgment (4 P.D. at p. 19) intimates that, in his opinion, the rule as to jurisdiction in divorce does not apply to suits for declaration of nullity of marriage, and LORD ST. HELIER, in *Roberts* v. *Brennan* (28), expressed his view, and decided the case upon the view that residence and not domicil is the test of jurisdiction in nullity cases. A further distinction is to be noticed between the two classes of suits—viz., that our courts regard the courts of the domicil as having in general exclusive jurisdiction in a case of divorce, though the courts of this country will recognise the binding effect of a decree of divorce, obtained in a State where the husband was not domiciled, if the courts of the country or the State of his domicil will recognise the validity of the decree: *Armitage* v. *A.-G.* (29), but it has frequently been held that, although the courts of the domicil of the parties might entertain the question of the validity of their marriage, yet that the courts of the country in which the marriage was celebrated will also entertain a suit to determine the same question: see *Linke* v. *Van Aerde* (30).

It may possibly be that if a suit were brought for nullity on the ground of impotence, and the facts were established in favour of the petitioner, either in the court of the domicil of the parties or in the court of the country in which the marriage was celebrated, it might be reasonable to hold that such a decree ought to be treated as universally binding, but it does not at all follow, where the only matter in dispute is whether a marriage ought to be held valid in the country where it was celebrated, and is challenged on the ground of want of compliance with the formalities required by the laws of another country, that the courts of the former country are to be bound by a decision on the question of the validity of the marriage given in the other country, even though it be the country of the domicil of one of the parties. It certainly would be somewhat startling if this court, having come to the conclusion that the marriage in question between the wife in the present case and Philip was valid in England, should yet hold that the French decision that it was not a valid marriage was binding upon it. The fact is that a conflict of law exists between the laws of the two countries, owing to the difference between the rules of law adopted, and, as we hold, reasonably adopted, in England, and the provisions of the French Code. This is an entirely different case from a case of an application to dissolve a marriage, which begins with proof that a marriage has been validly contracted and celebrated, and the question is whether or not, on account of matters arising subsequently to the marriage, it has been, or can be, validly dissolved by a particular court. Moreover, in the present case it is obvious from the terms of the decree that all that the decree has purported to declare is that the marriage is null according to arts. 148 and 170 of the French Civil Code, which amounts merely to a declaration that the marriage is null and void where French law can prevail. In our opinion, therefore, the second point ought to be determined against the wife.

In arriving at these conclusions we are fully conscious of the hardship on the wife, because the effect of them is to hold that, although Léon Philip is free himself from her in France, she still remains in England his legal wife, and, therefore, not the wife of the petitioner, but we must arrive at the decision of this case by applying general principles which ought to be considered in any case which may arise where a marriage has taken place in this country between an English subject domiciled in England and a foreigner domiciled abroad, and the right remedy to look forward to is a recognition by the agreement of civilised countries of the

principle that the omission of formalities required by the law of one country, but not by the law of the country where a marriage is celebrated, ought not to be allowed to affect the validity of the marriage in the country requiring such formalities. It was stated that some changes have recently been made in French law, but the exact nature and extent of the changes did not appear. The observations made in this judgment are directed to questions arising in connection with the formalities required on entering into a marriage, and are not to be understood as necessarily advocating an interference with any views which may be held in any country as to marriages which are absolutely prohibited by the law of that country.

With regard to the decision dismissing the wife's suit for a divorce, it may be observed that her position after the French decree and after Philip had left her and married again would be intolerable unless some remedy in her favour existed, for by reason of the conflict of laws she would be a wife in England and not a wife in France, and in regard to such an observation it may not unreasonably be suggested that the remedy may be to allow her to obtain a divorce in England. She was not allowed to do so because it was held that the court had no jurisdiction in such a case, as Philip was not domiciled in England, but the real basis for not allowing a divorce suit to be maintained except in the country where the married couple are domiciled is that, in order to prevent difficulties, inconveniences, and scandals which may arise from different decisions in different countries,

> "it is both just and reasonable [in divorce cases] that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws":

per LORD PENZANCE in *Wilson* v. *Wilson* (31) (L.R. 2 P. & D. at p. 442). This of course assumes the existence of a marriage the validity of which is recognised in the country where the suit is brought, and that both persons are domiciled there. If the country of the husband's domicil refuses to recognise the marriage, and, therefore, cannot and will not entertain a suit for divorce against him, the justice and reasonableness of the international rule just mentioned cease to be apparent, and the wife having no right of suit whatever against the husband in his country, and having been left in the country of her original domicil where the marriage was celebrated and is recognised as binding upon both her and him, it would seem reasonable to permit her to sue in the latter country for the dissolution of the tie which is recognised therein, though not in the foreign country, in case she has grounds of suit which would entitle her to a divorce if her husband had been domiciled in her country; in other words, to treat her as having a domicil in her own country which would be sufficient to support a suit. No general rule of law would then really be infringed. The necessities of the case would call for the intervention of the courts of her own country in order to do her justice and release her from a tie recognised in the one country though not in the other. This way of regarding the matter does not seem to have been presented on behalf of the wife to LORD ST. HELIER. From the shorthand notes of the trial before him there appears to have been a very short discussion, and it seems to have been treated as if, the domicil of Philip being French, no claim for a divorce in a suit in this country was possible. It is not necessary to come to a final conclusion on this important point, which was not discussed before us, for it would not help the wife in the present case, as her suit for divorce was dismissed without any appeal being brought from the decision, and as she has subsequently gone through the ceremony of marriage with Mr. Ogden without having been released in this country from her previous tie. In our judgment, therefore, this appeal must be dismissed, but, in the circumstances, without costs.

Appeal dismissed.

Solicitors: *Dixon, Weld & Dixons*; *Chester, Broome & Griffithes*, for *Crofton, Craven & Worthington*, Manchester.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

FROWD *v.* FROWD

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Francis Jeune, P., and Gorell-Barnes, J.), March 1, 1904]

[Reported [1904] P. 177; 73 L.J.P. 60; 90 L.T. 175; 68 J.P. 436]

B

Husband and Wife—Summary proceedings—"Desertion"—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict., c.* 39), *s.* 4.

"Desertion" in s. 4 of the Summary Jurisdiction (Married Women) Act, 1895 [now s. 1 of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960], has the same meaning as in the Matrimonial Causes Act, 1857 [now Matrimonial Causes Act, 1950], and signifies cessation of cohabitation without reasonable cause.

C

Notes. The Summary Jurisdiction (Married Women) Act, 1895, has been repealed. For s. 4 of the 1895 Act see now s. 1 of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960. The Matrimonial Causes Act, 1857, has been repealed. See now the Matrimonial Causes Act, 1950.

Considered: *Herod* v. *Herod*, [1938] 3 All E.R. 722; *Jordan* v. *Jordan*, [1939] All E.R. 29. Referred to: *Bowron* v. *Bowron*, [1925] All E.R.Rep. 148.

D

As to the grant of relief to a spouse in a magistrates' court, see 12 HALSBURY'S LAWS (3rd Edn.) 479 et seq.; and for cases see 27 DIGEST (Repl.) 693 et seq. For the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 1, see 40 HALSBURY'S STATUTES (2nd Edn.) 395, and for the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

E

Cases referred to in argument:

Yeatman v. *Yeatman* (1868), L.R. 1 P. & D. 489; 37 L.J.P. & M. 37; 18 L.T. 415; 16 W.R. 734; 27 Digest (Repl.) 365, *3019*.

Russell v. *Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; 44 W.R. 213; 11 T.L.R. 579; 39 Sol. Jo. 722, C.A.; on appeal, [1897] A.C. 395; 66 L.J.P. 112; 77 L.T. 249; 61 J.P. 771; 13 T.L.R. 516; 41 Sol. Jo. 660, H.L.; 27 Digest (Repl.) 356, *2948*.

F

Oldroyd v. *Oldroyd*, [1896] P. 175; 65 L.J.P. 113; 75 L.T. 281; 12 T.L.R. 442; 27 Digest (Repl.) 289, *2349*.

Wassell v. *Wassell* (1899), 68 L.J.P. 127; 81 L.T. 496, D.C.; 27 Digest (Repl.) 345, *2864*.

G

Appeal by the husband, Herbert Haddon Frowd, from an order of the Eastbourne justices, dated Feb. 1, 1904, by which a separation order was granted to the wife, Rose Fanny Frowd, on the ground of the desertion of her husband. By the order a sum of 15s. per week was awarded to the wife for her maintenance, and she was allowed reasonable access to her child, the custody remaining with the husband.

H

The parties were married on April 28, 1896, and the only child of the marriage was born in 1899. Early in 1902, the wife confessed to having committed adultery with one Dyer on numerous occasions, and Dyer subsequently admitted the offence. On Feb. 14, 1902, the husband forgave his wife, and the parties became reconciled on her undertaking to hold no further communication with Dyer, and on the payment of a sum of £25 by Dyer to the husband. Early in July, 1902, the wife remained out all night, and the husband charged her with having committed adultery with one Wenham. She denied the charge, and for ten days remained under the same roof as her husband; but he treated her with such unkindness and kept her so short of food that she was compelled to leave the house on July 18.

I

Immediately after her departure, she took out a summons against her husband for desertion, but the hearing was adjourned on the understanding that divorce proceedings were pending between the parties. Meanwhile, the husband discovered that his wife had been in constant communication with Dyer, and had written

A a large number of letters of a questionable character to him. She was also alleged to have made an indecent sketch and to have written some amorous verses. These were produced at the hearing of the divorce suit in May, 1903, when the jury found that the wife had not committed adultery with Wenham. After the divorce suit, the wife wrote to her husband asking him to take her back, but he refused absolutely, offering, however, to agree to a separation and to B pay her a sum of 10s. per week, he retaining the custody of the child. This offer was declined by the wife, who took out a summons under the Summary Jurisdiction (Married Women) Act, 1895.

Le Bas for the husband.
J. A. Slater (*E. E. Humphrys* with him) for the wife.

C **SIR FRANCIS JEUNE, P.**—The question in this case turns on the meaning of the word "desertion" used in s. 4 of the Summary Jurisdiction (Married Women) Act, 1895. For the husband it has been urged that the word is used in the same sense and with the same meaning that it has acquired in all the proceedings of this court, while for the wife it has been contended that the word has a separate and distinct meaning. In the cases that have been referred to by counsel for the D husband, the matter has been fully considered, and it has been made quite clear that desertion is not merely a cessation of cohabitation, but a cessation of cohabitation without reasonable cause. This court has always acted on that principle. If a wife brings a suit for restitution of conjugal rights, no order will be made in her favour if she has been guilty of cruelty which does not amount to a matrimonial offence. The conduct of a wife may be such that it E is intolerable for her husband to live with her. If, then, he leaves her, or if they begin to live apart, is there not some reasonable ground for his action? In such a case there is no desertion on the part of the husband. It seems to me absurd to suggest that there is a distinction between the Matrimonial Causes Act, 1857, and the Act of 1895. If there is a reasonable excuse and a husband F leaves his wife there is no desertion. Desertion is a continuing offence. It may commence on a certain date, and afterwards the husband may discover other facts and refuse to take his wife back. He may think that he has reasonable grounds for his refusal, and that, whatever were the original reasons for the separation, his subsequent knowledge of facts will place his conduct in a different light. In the present case, the husband made certain discoveries after July 18, G 1902, and he desired on the hearing of the summons to lay the grounds for his conduct before the magistrates, and to point out to them that he was, in his opinion, fully justified in refusing to live with her. The magistrates declined to hear any evidence on the subject. They thought that, after evidence had been given of the fact of desertion, adultery alone could be set up in answer to the wife's complaint. In that view, I think the magistrates were distinctly wrong. H They ought to have heard the evidence for what it was worth. Even after hearing it they may come to the same conclusion, and hold that the husband has been guilty of desertion. On that I do not express any opinion, for I have not read the letters in question. But that is not the point. What has to be decided is whether the husband had a reasonable cause for leaving his wife, and, without hearing the whole of the evidence tendered, the justices could not arrive at a I proper decision on the matter. The case must be remitted to them to hear the evidence.

GORELL BARNES, J.—I agree. It has been argued for the wife that the husband has no right to refuse to live with his wife, and that he is guilty of desertion if he leaves her or causes her to leave him. If a wife were to beat her husband with a poker, would he not have a reasonable excuse for leaving her? It has been urged that a husband's only excuse is adultery on the part of his wife. That is a wrong idea. Adultery is an excuse when desertion has been

found. But what is desertion? It has the same meaning in the Summary Jurisdiction (Married Women) Act, 1895, as in the Matrimonial Causes Act, 1857, and signifies desertion without reasonable cause. The case must be sent back.

Solicitors: *Ford, Lloyd & Co.*, for *Hillman & Burt*, Eastbourne; *F. W. A. Cushman*, Brighton.

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

COPSEY *v.* COPSEY AND ERNEY

[Probate, Divorce and Admiralty Division (Gorell Barnes, J.), July 29, 1904]
[Reported [1905] P. 94; 74 L.J.P. 40; 91 L.T. 363; 20 T.L.R. 728]

Divorce—Adultery—Revival—Condonation by husband—Desertion by wife—Revival of adultery.

Where a wife commits adultery and is afterwards forgiven and taken back by her husband, but subsequently to the condonation she deserts him, such desertion revives the condoned adultery, and entitles the husband to petition for a dissolution of his marriage.

Binney v. *Binney* (1) (1893), 69 L.T. 498, and *Houghton* v. *Houghton* (2), [1903] P. 150, applied.

Notes. Applied: *Price* v. *Price and Brown*, [1911] P. 201. Referred to: *Cramp* v. *Cramp and Freeman*, [1920] All E.R.Rep. 164; *Ainley* v. *Ainley*, [1945] 1 All E.R. 265; *Beard* v. *Beard*, [1945] 2 All E.R. 306.

As to condonation, see 12 Halsbury's Laws (3rd Edn.) 302 et seq.; and for cases see 27 Digest (Repl.) 406 et seq.

Cases referred to:

(1) *Binney* v. *Binney* (1893), 69 L.T. 498; 27 Digest (Repl.) 420, *3500*.

(2) *Houghton* v. *Houghton*, [1903] P. 150; 72 L.J.P. 31; 89 L.T. 76; 52 W.R. 272; 19 T.L.R. 505; 47 Sol. Jo. 548; 27 Digest (Repl.) 410, *3390*.

Petition by the husband, Harry Copsey, for divorce, on the ground of his wife's adultery with the co-respondent, William Erney, in August, 1901, and also her desertion in September, 1901. The parties were married on Nov. 4, 1888, and there were six children of the marriage. The wife did not defend the petition.

Simmons for the husband.

Cur. adv. vult.

July 29, 1904. **GORELL BARNES, J.**—I am perfectly satisfied that adultery was committed by the wife and co-respondent at Brighton in the month of August, 1901. With full knowledge of what had taken place, the husband took his wife back and forgave her. Nevertheless, a month later, in September, 1901, the wife deserted her husband, and went to live at her mother's house. But no evidence has been given to show that the parties have been together subsequent to that date, nor that the wife and co-respondent have committed adultery since August, 1901. The petition was filed on Feb. 16, 1904, and the question I have to consider is whether *Binney* v. *Binney* (1) and *Houghton* v. *Houghton* (2) apply in the case of a husband who seeks to revive the adultery of his wife, which has been condoned, by reason of her subsequent desertion. After careful consideration, I have come to the conclusion that the same doctrine applies in the case of a husband as in that of a wife, and that there is good ground for holding that,

in the present case, the condoned adultery has been revived by the subsequent desertion. The husband is, therefore, entitled to the relief he seeks. There will be a decree nisi with costs, and the petitioner will have the custody of the children.

Solicitors: *Milner & Bickford.*

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

MITCHELL BROS. *v.* WORKSOP UNION ASSESSMENT COMMITTEE AND OTHERS

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Kennedy and Ridley, JJ.), December 19, 1904]

[Reported 92 L.T. 62; 69 J.P. 53; 21 T.L.R. 156; 3 L.G.R. 44; 1 Konst. Rat. App. 181]

Rates—Rateable occupation—Wooden structures—Structures erected by agreement with owners on land near works for workmen to live in—Structures easily moveable.

The appellants, who were contractors for the construction of a line of railway, desired for the purposes of their business that certain of the men whom they employed should live near the works, and had, by agreement with the owners or occupiers of certain pieces of land, erected on these pieces of land wooden huts or structures. The structures were capable of being removed as occasion required without damage to the ground, and they contained no sanitary arrangements. Four of the structures were each divided into a sleeping-room, where about twenty men slept, a living-room, sleeping-rooms for a caretaker and his family, and a pantry, and a fifth structure was divided and used as offices. The structures had been in their then situation for upwards of a year.

Held: the appellants, having been in exclusive occupation of the land on which the structures were built for a sufficient time, were rateable.

Holywell Union and Halkyn Parish v. *Halkyn Drainage Co.* (1), [1895] A.C. 117, applied.

Notes. Considered: *L.C.C.* v. *Wilkins*, [1955] 2 All E.R. 180; *L.C.C.* v. *Wilkins* (*Valuation Officer*), [1956] 3 All E.R. 38.

As to rateable occupation, see 32 HALSBURY'S LAWS (3rd Edn.) 16 et seq.; and for cases see 38 DIGEST (Repl.) 469 et seq.

Cases referred to:

(1) *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.*, [1895] A.C. 117; 64 L.J.M.C. 113; 71 L.T. 818; 59 J.P. 566; 11 T.L.R. 132; 11 R. 98, H.L.; 38 Digest (Repl.) 470, *7*.

(2) *R.* v. *St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581; 46 L.J.M.C. 243; 25 W.R. 827; sub nom. *Willing* v. *St. Pancras Assessment Committee*, 37 L.T. 126; 41 J.P. 662; Ryde, Rat. App. (1871–85) 188; 38 Digest (Repl.) 469, *5*.

(3) *London and North Western Rail. Co.* v. *Buckmaster* (1874), L.R. 10 Q.B. 70; 44 L.J.M.C. 29; 31 L.T. 835; 39 J.P. 149; 23 W.R. 160; affirmed (1875), L.R. 10 Q.B. 444; 44 L.J.M.C. 180; 33 L.T. 329; 39 J.P. 692; 24 W.R. 16, Ex. Ch.; 38 Digest (Repl.) 500, *166*.

Case Stated by the court of quarter sessions for the West Riding of Yorkshire. A

The appellants appealed to quarter sessions against a rate made on May 11, 1903. The following facts were proved, or, for the purpose of this case, admitted. The appellants were contractors for the construction of a double line of railway, part of which passed through the respondents' district. For the purposes of their business, the appellants deemed it desirable that certain of the men whom they employed should live near the work on which they were engaged, and to this end B the appellants had, by agreement with the owners or occupiers of four pieces of land at Brancliffe Bottoms, Dale, and South Anston respectively, and with the railway company on a fifth piece of land at Cramfit, the property of the railway company, within the boundaries of the railway lines when the same should be completed, all five such pieces of land being within the respondents' district, erected on a portion of each of the pieces of land a hut or structure C of substantially the same nature. The method of construction of the structures was as follows: Into the ground were driven wooden stakes about 5 ft. apart; to these were nailed wooden sills or cross pieces, thus forming a foundation or platform; wooden uprights were nailed to the foundation, and to the uprights boarding was nailed. The fastening of the superstructure to the foundation or platform was of a degree sufficient to keep the superstructure unaffected by wind D or storm. The huts or structures were capable of being readily removed by the appellants during the progress of the works, or on the completion of the works, without damage to the ground, and contained no sanitary arrangements. There was a roof of corrugated iron, and the interiors of the structures were lined with match boarding. The structures were heated by iron stoves with the exception of the structure at South Anston, which had brick chimney breasts. Each of the E structures (except the structure at South Anston) was divided internally into a sleeping-room, where on an average about twenty men slept, a living-room, two sleeping-rooms for a caretaker and his family, and a pantry; a wash-house of similar construction was erected near to each of the structures. The structure at South Anston was similarly divided, but was used as to two rooms as offices for the officials of the railway company (exclusively), as to two other rooms F as offices for the appellants, and as to the remainder for the accommodation of the timekeeper and his family. The structures had been in their present situation for upwards of one year. The respondents had described in the valuation list each of the aforesaid premises under the name of "section" (with the exception of the premises at South Anston, which were described as "section and offices," and in the demand note as "buildings and other hereditaments not being agri- G cultural land"), and had assessed the same at £10 in respect of the gross estimated rental, and at £6 13s. 4d. as the net rateable value. It was admitted by the appellants that, for the purposes of this case, if the premises were rateable in law, they were the persons in occupation of the same. The assessments of the lands on parts of which the structures were erected had not been reduced since the erection of the structures. H

It was contended by the appellants that (i) the premises were not rateable, first, because the structures were chattels; and, secondly, because the premises were merely part of the plant used by the appellants in the construction of the railway, and that in that sense only was the occupation beneficial; (ii) the rate in question should be discharged, because it involved a claim to rate the same land twice over, (a) to the owner or occupier, (b) to the appellants; (iii) by I virtue of s. 133 of the Lands Clauses Consolidation Act, 1845, the liability for the poor rate (particularly as to the huts on the railway ground at Cramfit) was transferred to the railway company; (iv) the huts being of an inflammable character, and entirely devoid of sanitary arrangements, were not "houses" under the Public Health Acts or otherwise, but were chattels only. It was contended by the respondents that the premises were rateable, first, because buildings constructed in the manner set out in this Case were not in law chattels; secondly, because the structures were houses within the meaning of the Poor Relief Act, 1601;

thirdly, because under the description "section," was included the land on which the structures were erected, and, therefore, occupied by the appellants; fourthly, because premises which were otherwise rateable were not any the less rateable merely by reason of their being used in connection with the construction of a railway; and, fifthly, because s. 133 of the Lands Clauses Consolidation Act, 1845, had not the effect contended for by the appellants.

On the facts, the justices were of the opinion that the structures were not "houses". The justices allowed the appeal and discharged the rate, and the respondents now appealed.

T. E. Ellison (*H. W. W. Wilberforce* with him) for the respondents.

C. A. Russell, K.C. (*H. T. Waddy* with him), for the appellants.

LORD ALVERSTONE, C.J.—We have no doubt about this case, and I can only think from what is stated in the Case that quarter sessions had been confused by the number of absolutely unarguable points which appear to have been taken before them. The Case states that, by agreement with the owners or occupiers of four pieces of land, the appellants erected huts or structures of a certain kind, and it goes on to describe the nature of those structures, showing that there was a complete possession for the time being by the appellants of the land on which the structures stood. The structures were erected and remained in that position for more than a year. Therefore, no question arises about the rateable time or period, and it was admitted by the appellants that, if the premises were rateable in law, they were the persons in occupation of the same. There could not have been a much more distinct admission of liability. That being the statement as to their liability, it must have been that the appellants desired to raise the point as to the moveability of the structures or some of the other points, admitting that, if such structures, occupying the land, as they did, for the period stated in the Case, were rateable hereditaments, they were the persons liable to be rated in respect of them.

I do not think that there is now any doubt about the law applicable in such cases. On the one side, if there is no occupation at all, or no exclusive occupation, but a mere licence to use a part of the premises which remained in the occupation of their owner or tenant, as in *R.* v. *St. Pancras Assessment Committee* (2), as to the rateability of advertising hoardings, or as in *London and North Western Rail. Co.* v. *Buckmaster* (3), as to the rateability of stables at Clapham Junction, then there is no rateability. If there is exclusive possession or occupation of land for a sufficient time, then in whatever way it may be described in the agreement, there is rateability. That was the decision of the House of Lords in *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.* (1). In this case, I am utterly unable to understand how, if a man goes on to land and erects a wooden structure on it of this character, he is any the less the occupier because he has the right to pull the structure down or move it on to another piece of land when it pleases him to do so, and, if he has occupied it for a sufficient time, he is rateable. I think the decision of quarter sessions ought to have been that the appellants were rateable in respect of these premises. No question of value arises here. I am now deciding that the appellants were rateable in respect of their occupation of this land, enhanced by the fact that they have put these structures on it, and have used the land for that purpose. I am of opinion that this appeal should be allowed.

KENNEDY, J.—I am of the same opinion.

RIDLEY, J.—I agree.

Appeal allowed.

Solicitors: *Tyrrell, Lewis, Lewis & Broadbent*, for *J. S. & C. A. Whall*, Worksop; *Bell, Brodrick & Gray*, for *Rodgers & Co.*, Sheffield.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

EVANS *v.* EVANS AND BLYTH

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnes, J.), May 2, 11, 1904]

[Reported [1904] P. 274; 73 L.J.P. 87; 91 L.T. 356; 20 T.L.R. 516]

Variation of Settlement—Children—Protection of interests—Child born between decree nisi and decree absolute—Paternity denied by petitioner—Trial of issue—Matrimonial Causes Act, 1859 (22 & 23 *Vict.*, *c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 *Vict.*, *c.* 19), *s.* 3.

On a petition to vary a marriage settlement under s. 5 of the Matrimonial Causes Act, 1859, as extended by s. 3 of the Matrimonial Causes Act, 1878 [now s. 25 of the Matrimonial Causes Act, 1950], after a final decree for dissolution of marriage, the court will, where a child has been born between the date of the decree nisi and the date of the decree absolute, the paternity of which the petitioner denies, direct an issue to be tried for the purpose of ascertaining the status of the child, and will postpone the consideration of the variation of the settlement until after the trial of the issue.

Re Chaplin's Petition (1) (1867), L.R. 1 P. & D. 328, *Pryor* v. *Pryor and Shelford* (2) (1887), 12 P.D. 165, and *Douglas* v. *Douglas and Trevor* (3) (1897), 78 L.T. 88, considered.

Notes. The Matrimonial Causes Act, 1859, s. 5, as extended by the Matrimonial Causes Act, 1878, s. 3, has been repealed. See now s. 25 of the Matrimonial Causes Act, 1950.

Considered: *Colquitt* v. *Colquitt*, [1948] P. 19. Referred to: *Galloway* v. *Galloway*, [1954] 2 All E.R. 143.

As to determining the question of legitimacy, see 3 HALSBURY'S LAWS (3rd Edn.) 98 et seq.; and for cases see 3 DIGEST (Repl.) 415 et seq. For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.

Cases referred to:

(1) *Re Chaplin's Petition* (1867), L.R. 1 P. & D. 328; 36 L.J.P. & M. 49; 16 L.T. 154; 3 Digest (Repl.) 416, *143*.

(2) *Pryor* v. *Pryor and Shelford* (1887), 12 P.D. 165; 56 L.J.P. 77; 57 L.T. 533; 35 W.R. 349; 3 Digest (Repl.) 410, *104*.

(3) *Douglas* v. *Douglas and Trevor* (1897), 78 L.T. 88; 3 Digest (Repl.) 418, *165*.

(4) *Burnaby* v. *Baillie* (1889), 42 Ch.D. 282; 58 L.J.Ch. 842; 61 L.T. 634; 38 W.R. 125; 5 T.L.R. 556; 3 Digest (Repl.) 412, *122*.

(5) *Re Radcliffe, Radcliffe* v. *Bewes*, [1892] 1 Ch. 227; 61 L.J.Ch. 186; 66 L.T. 363; 40 W.R. 323; 36 Sol. Jo. 151, C.A.; 38 Digest (Repl.) 906, *978*.

(6) *A.-G. v. Beech*, [1899] A.C. 53; 68 L.J.Q.B. 130; 79 L.T. 565; 63 J.P. 116; 47 W.R. 257; 15 T.L.R. 85; 43 Sol. Jo. 94, H.L.; 21 Digest 7, *26*.

Also referred to in argument:

Mordaunt v. *Mordaunt* (1870), L.R. 2 P. & D. 109; 39 L.J.P. & M. 57; 23 L.T. 85; 18 W.R. 845; 33 Digest 141, *186*.

Motion on the report of the registrar to vary a marriage settlement.

The parties were married in 1892, and, by an ante-nuptial marriage settlement, executed on Aug. 3, 1892, the husband petitioner settled certain property in trust for himself for life, after his death in trust for the wife respondent for life, and after the death of the survivor in trust for the child or children of the marriage; and in case no child or children should attain a vested interest in trust for the husband absolutely. By the same deed the wife similarly settled certain funds in trust for herself, after her death in trust for the husband, and after the death of the survivor in trust for the child or children of the marriage; and in case no child or children should attain a vested interest in trust for the wife absolutely. The settlement further gave a power of resettlement of a portion of the trust funds to either party

in the event of a second marriage. On Feb. 21, 1903, the husband filed a petition for divorce on the ground of his wife's adultery with the co-respondent, the date of the adultery charged being in November, 1902. At that time, the husband and wife were living apart, and no marital intercourse had taken place between them since the middle of 1900. On June 9, 1903, a decree nisi was pronounced, which was made absolute on Dec. 21, 1903. On July 31, 1903, the wife gave birth to a child, the paternity of which was denied by the husband, and which child was registered as the child of the wife and co-respondent. All the other children of the wife were dead. On Dec. 30, 1903, the husband presented a petition for the variation of his marriage settlement, praying, inter alia, that all the property which he had himself brought into settlement should be reconveyed to himself absolutely. On Feb. 23, 1904, with the concurrence of the husband, the official solicitor was appointed guardian ad litem to the child. When the matter came on for inquiry before the registrar, the husband expressed his willingness to relinquish any interest he had in the trust funds brought into settlement by the wife, and the wife made no opposition to the prayer of the petition. The registrar in his report recommended that all the powers and interests of the wife in the husband's trust funds, and of the husband in the wife's trust funds should be extinguished, but that no order should be made as to the reconveyance of any part of the settled funds, as the child had been born before the decree nisi was made absolute. He further recommended that, having regard to s. 1 of the Legitimacy Declaration Act, 1858 [repealed], the court should make no further order unless the official solicitor, under the circumstances of the case, considered that it was for the interest of the child that a petition of legitimacy should be presented. The husband gave notice of motion to vary the report of the registrar by directing that the court should direct an issue be tried, in such manner as it thought fit, as to the legitimacy of the child, and to postpone the further consideration of the report and the making of any order thereon until such issue was determined.

Barnard and *Murphy* for the husband.
Le Bas for the wife.
Willock for the official solicitor, guardian ad litem to the child.

Cur. adv. vult.

May 11, 1904. **GORELL BARNES, J.**—This was a motion by the petitioner in a divorce suit that the court should direct an issue to be tried whereby the legitimacy of the infant child of the wife should be inquired into and determined, and that the court should postpone the further consideration of the registrar's report on the petition to vary the marriage settlement, which was made at the time of the marriage of the husband and the wife, and the making of any final order thereon until after the trial and determination of that issue.

The facts of the case, so far as they are necessary for the purposes of my judgment, are as follows. The petition for divorce was presented on Feb. 21, 1903, the decree nisi was pronounced on June 9, 1903, and the decree was made absolute on Dec. 21, 1903. According to the report of the registrar, the wife gave birth to a female child on July 31, 1903, between the dates of the decree nisi and the decree absolute, and of this child the husband declares that he is not the father. It appears that there are no other children of the wife living at the present time. The report deals with the ante-nuptial settlement which the husband seeks to vary, and there are certain recommendations of the registrar as to variation. But the husband is desirous of having the whole of the property which he brought into settlement reconveyed to himself, on the ground that the interest of the respondent in such funds is extinguished, and that there is no living legitimate issue of the marriage. The child of the wife, whose legitimacy is questioned, is represented by the official solicitor, and it was suggested that he should be directed to file a petition under the Legitimacy Declaration Act, 1858,

in order that the question of legitimacy might be decided. But the official solicitor objects to that course being taken, because, he says, he cannot satisfy himself and the registrar that it would be in the interest of the child that such an inquiry should be made at the present time. It was then suggested on behalf of the husband that the question at issue ought to be determined now, because, on its determination depends the further question as to how the settlement should be varied.

The matter arises under s. 5 of the Matrimonial Causes Act, 1859, which is as follows:

> "The court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit."

The powers conferred under this section were extended by s. 3 of the Matrimonial Causes Act, 1878, which says that

> "the court may exercise the powers vested in it by the provisions of s. 5 of [the Matrimonial Causes Act, 1859], notwithstanding that there are no children of the marriage."

The substantial point which I have to consider is whether, by some means or other, the court ought, in a case like the present, to determine the question thus put before it, before coming to any final decision as to the variation of the settlement. The objection of the official solicitor to instituting an inquiry into the legitimacy is founded on certain decisions to which reference has been made in the course of the argument. The first case referred to was *Re Chaplin's Petition* (1). Great reliance is placed on this case by the official solicitor, because it is said that this case was not before the court when *Douglas* v. *Douglas and Trevor* (3), which is relied on by counsel for the petitioner, was decided. *Chaplin's Case* (1) was decided after the passing of the Act of 1859, but before the amending Act of 1878 became law, and, when it is carefully considered, I think it will be found to have no real bearing on the present question, because it was not an application made in the course of a divorce case. There, a decree had been pronounced, and afterwards a petition was presented seeking for an alteration in a separation deed; but, before that petition came on for hearing, notice of motion was given on behalf of a brother of the petitioner, by which it was asked that an order might be made appointing a guardian to an infant, in order that proceedings might be taken to obtain a declaration as to the legitimacy of a child of the parties in the case. That case, however, is not a parallel one to the present, for the application was not made by a party to the suit at all, but by an independent person, and it was not made for the purpose of varying a marriage settlement, but because the applicant had an interest in ascertaining whether the child was the heir-at-law and next-of-kin to his brother. The judge was not satisfied that the application was for the benefit of the child, and, therefore, refused to accede to it.

Another case referred to by counsel was *Pryor* v. *Pryor and Shelford* (2). That was a petition by a husband for variation of settlement after a decree dissolving the marriage by reason of adultery of the wife. As in the present instance, a child had been born between the dates of the decree nisi and the decree absolute, and some fourteen months after the respondent had left the petitioner. The court refused to transfer to the parties settled funds freed from the trusts of the settlement, and refused to order an inquiry into the legitimacy of the child. The President said that there was no objection to order that the respective interests of the parties in the settlement should be extinguished, but that he

A would go no further. He put the matter thus (12 P.D. at p. 166):

> "There is the interest of the infant to be considered, and I cannot assent to extinguishing the other trusts. The decree was founded on the petitioner's evidence, which is not admissible to bastardise the child. As to taking evidence of the illegitimacy, I must decline to try the question in this way."

B No suggestion appears to have been made in that case that the issue as to the legitimacy of the child should be tried before the court, and as I read the reported judgment, all that can be said is that the judge declined to refer the matter back to the registrar to settle a question of so much importance. But it does not appear to have been suggested that there was no jurisdiction in this court to determine the question.

C The next authority to which I was referred was *Douglas* v. *Douglas and Trevor* (3). A similar point to that now under consideration was then before the President (Sir F. Jeune), and I see that he concludes with the following remarks (78 L.T. at p. 89):

> "I confess I have rather changed the view I at first entertained, although I
> D still think that this question of legitimacy might possibly be tried upon a petition for variation of marriage settlements. I now incline to the view that the child should in this case present a petition for declaration of legitimacy, and I therefore direct the official solicitor to present such a petition on the child's behalf. The motion for variation of the settlement will stand over in the meantime, and all questions of costs will be reserved, save only that
> E I think the trustees of the settlement ought to have their costs out of the trust fund."

I understand that a petition was afterwards presented, and I am under the impression that the result of the inquiry was stated to me, but, as far as I am aware, there is no report of the proceedings. It will be seen, therefore, that the President there came to the conclusion that an issue might be directed, but he dealt
F with the matter by ordering that the official solicitor should present a petition for declaration of legitimacy. So far as the judgment is concerned, the case does not deal with the method of exercising the powers under s. 5 of the Matrimonial Causes Act, 1859, and does not appear to me to decide the question on any distinct principle. The matter was dealt with in the way indicated in the report of the case, but no reasons were given for following that or any other course, or
G for basing the course there adopted on any considered principle.

It appears to me that a question of this kind must be considered on principle. Very large powers are conferred on this court by s. 5 of the Act of 1859, and, in order that those powers may be properly exercised, it is absolutely necessary that the whole facts of the case should be before the court, so that a proper decision may be arrived at as to what ought to be done. For example, it is quite clear that
H the court must determine whether there are or are not any children of the marriage, and there may be various circumstances under which that question may arise for consideration. If there are no children of the marriage, the court is not fettered, owing to s. 3 of the Act of 1878; but, if there are any children, the court must take their interests into consideration. And it is to be observed that the question to be determined may arise not merely in cases of disputed legitimacy on account of the
I adultery of the mother, but also in cases where it is doubtful whether a child, admittedly legitimate, is still alive, or whether a child is, possibly, the child of either of the parties to the marriage settlement.

What is the position in a case like the present if there is no child of the marriage? The court would extinguish the interest of the wife in the trust funds of the husband, and the effect would be that there would be left in operation the trusts giving the husband a life interest in these funds, and then, in default of children, for him absolutely. What would be the position of the husband after such an order had been made by this court? Having regard to certain decisions, I think

that he would be able to commence proceedings in the Chancery Division to obtain an order that the trustees of the settlement should pay over the trust funds to him, and that he would be able to compel them to do so, seeing that he could give a good legal discharge to the trustees. The principal authority for what I have just stated is *Burnaby* v. *Baillie* (4). In that case, under circumstances somewhat similar to the present, after a decree dissolving his marriage had been pronounced, the husband claimed a declaration that the trustees should treat the funds as if there was no child of the marriage, and NORTH, J., having heard evidence on the question of legitimacy, found it amply and conclusively proved that the two youngest children in question were illegitimate. Although it is true that in that case, having regard to the fact that the reservation in the settlement of a power of revocation to the husband alone was invalid, the learned judge refused to make an order calling on the trustees to hand over the portion of the trust funds claimed by him, yet the case seems to me to be an authority for the proposition that the court will, in a proper case, investigate the question as to the children and deal with the trust funds of the settlement in accordance with the results of the investigation necessary for its decision. Another authority is *Re Radcliffe*, *Radcliffe* v. *Bewes* (5). The headnote of the report is as follows ([1892] 1 Ch. at p. 227):

> "A father, who was tenant for life under his marriage settlement, had power to appoint among his children, and in default of appointment the fund was to go to all the children equally, the shares to be vested at twenty-one or marriage. There were issue of the marriage three sons: one died an infant; the other two attained twenty-one; but one of them died a bachelor and intestate. The father took out administration to the last-mentioned son, and executed a deed releasing his power of appointment, and then took out a summons calling on the trustee of the settlement to transfer one moiety to him. **Held** (i), that the release of the power was valid, and that the father was entitled to the son's reversionary interest as his administrator; (ii), that inasmuch as the father's life interest and the son's reversion were held by the father in different rights, there was no merger, and that so long as the father's interest subsisted the fund ought to remain in the hands of the trustee of the settlement; but (iii) that on the father's executing a surrender of his life interest he was entitled to have one moiety of the fund transferred to him."

As I understand that decision, it amounts to this, that the father had a life interest and also an absolute interest in reversion, and, if he could get both interests vested in himself in the same capacity he would be in a position to obtain the transfer of the whole fund absolutely to himself.

I will only refer to one other case, *A.-G.* v. *Beech* (6). It is quite true that that case arose under a different Act—the Finance Act, 1894, but I find that the decision is based on principles similar to those of the authorities to which I have already referred. The head-note is as follows ([1899] A.C. at p. 53):

> "The tenant for life of settled property with a power of appointment appointed the property to her son subject to her own life interest; by a subsequent deed she surrendered her life interest to the trustees of the settlement 'to the end and intent that such life interest may merge in the interest in remainder of' her son; and died more than twelve months after. **Held,** affirming the decision of the Court of Appeal, [1898] 2 Q.B. 147, that the property did not pass on the death of the tenant for life to the remainderman within the meaning of the Finance Act, 1894, s. 1, or s. 2 (1) (b), and that estate duty was not payable by the remainderman under that Act."

On examining the judgments, it will be seen that the reasoning, especially in the judgment of LORD DAVEY, is based on the consideration of whether the two interests—first, a life interest, and then an interest in remainder—merged so as

A to become one absolute ownership. LORD DAVEY says ([1899] A.C. at pp. 60, 61):

> "It is a complete fallacy, in my opinion, to say that Mr. Beech . . . was, after he took a surrender of his mother's life interest, the owner of two separate interests. He was the absolute owner of the property, and one cannot be more than the absolute owner of the property. There is no single test of ownership
> B that can be applied to his position at that date which shows that he was in any degree other than the absolute owner of the property. If he was the absolute owner of the property before Mrs. Beech's death, he remained absolute owner of the property afterwards, and there was no passing of the estate—that is, no change of ownership by reason of Mrs. Beech's death."

Applying the principles to be found in these authorities to the present case,
C it seems to me that, if the wife's interest is taken away and no order or declaration made on the petition to vary the registrar's report as to what is to be done with the trust property comprised in the settlement, the result will be that the husband will be driven into the Chancery Division, with precisely the same result as would have been attained if the matter were to be determined in this court, and that unnecessary expense will be incurred. If the question of legitimacy
D can be determined in the Chancery Division, there is no reason why it should not be determined here; and, moreover, its determination is actually necessary to enable this court to exercise the powers conferred on it as far as the variation of marriage settlements are concerned. No prejudice can arise from the fact that the result of an inquiry here might deprive the child of any interest it might have, because the matter will be dealt with in a manner precisely similar
E to that which would be followed in the Chancery Division. I, therefore, accede to the present application of the husband, and direct an issue to be tried here for the purpose of ascertaining and determining the legitimacy of this child. The husband will be the plaintiff, the trustees of the settlement, the mother and the child will be the defendants. The exact form and terms of the issues to be tried will be settled by counsel, and, if these cannot be agreed on, the matter may
F come before me in chambers. But I should think that it would be raised by the plaintiff affirming, and the defendants respectively denying, that the plaintiff is not the father of the child born of the wife on July 31, 1903. Of course, the wife and the trustees are not compelled to fight this issue. I am of opinion that they should be joined as defendants, as they are entitled to be joined on the inquiry. The husband, as plaintiff, must provide for the costs of the official
G solicitor as guardian ad litem of the child. By directing this issue, I am also acceding to the latter part of the present application, that the making of the final order on the report of the registrar to vary the marriage settlement be postponed until after the result of the trial of the issue is ascertained.

Solicitors: *Beal & Payne*, for *E. Bedford*, Newhaven; *Young, Jackson, Beard & King*; *The Official Solicitor.*
H

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

A

NATIONAL PHONOGRAPH CO., LTD. *v.* EDISON-BELL CONSOLIDATED PHONOGRAPH CO., LTD.

[COURT OF APPEAL (November 25, 26, 27, December 18, 1907]

[Reported [1908] 1 Ch. 335; 77 L.J.Ch. 218; 98 L.T. 291; 24 T.L.R. 201]

B

Tort—Contract—Procurement of breach—Actionable wrong—Fraud on party in breach—No intention to damage other party to contract.

The plaintiffs, manufacturers, sold goods to wholesale dealers on the terms of an agreement by which the dealer undertook not to re-sell except at fixed discounts, nor to any dealer who had not signed a retail dealer's agreement in the terms prescribed by the plaintiffs, nor to any dealer on the plaintiffs' suspended list. The defendants, a company engaged in the same business as the plaintiffs, were aware that they were on the suspended list, and, wishing to obtain some of the plaintiffs' goods, they procured two of their servants to approach a wholesale dealer who had entered into the afore-mentioned agreement with the plaintiffs, to sign retail agreements in false names, and to pay the prices prescribed in the wholesale dealer's agreement with the plaintiffs, and so secure the desired delivery of the goods. In an action by the plaintiffs against the defendants for an injunction and damages,

C

D

Held: although the case was not one of conspiracy and no intention on the part of the defendants to defraud or otherwise damage the plaintiffs had been proved, and although the wholesale dealer, having acted innocently throughout, was not liable for a breach of his agreement with the plaintiffs, the defendants, in procuring by intentional misrepresentations a breach of the wholesale dealer's contractual duty to the plaintiffs, had committed an actionable wrong towards the plaintiffs who were, therefore, entitled to an injunction to restrain such conduct in future, and, on proof of damage, to an inquiry as to damages.

E

Notes. Considered: *G.W.K.* v. *Dunlop Rubber Co.* (1926), 42 T.L.R. 376. Referred to: *British Cash and Parcels Conveyors* v. *Lamson Store Service Co.*, [1908–10] All E.R.Rep. 146; *Stott* v. *Gamble*, [1916–17] All E.R.Rep. 724; *Pratt* v. *British Medical Association*, [1918–19] All E.R.Rep. 104; *Valentine* v. *Hyde*, [1919] 2 Ch. 129; *De Jetley Marks* v. *Greenwood*, [1936] 1 All E.R. 863; *D. C. Thomson & Co.* v. *Deakin*, [1952] 2 All E.R. 361.

F

As to the tort of interfering with the contractual relations of others, see 37 HALSBURY'S LAWS (3rd Edn.) 124–127; and for cases see 42 DIGEST 986–990.

G

Cases referred to:

(1) *Allen* v. *Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 42 Digest 972, *35*.

(2) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 42 Digest 971, *30*.

H

(3) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441, H.L.; 42 Digest 989, *180*.

(4) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, *169*.

(5) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; 37 W.R. 756; 5 T.L.R. 658; 6 Asp.M.L.C. 455, C.A.; affirmed, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 42 Digest 986, *157*.

I

(6) *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q.B. 147; 65 L.J.Q.B. 262; 74 L.T. 83; 60 J.P. 52; 12 T.L.R. 19, C.A.; 42 Digest 988, *178*.

(7) *Bowen* v. *Hall* (1881), 6 Q.B.D. 333; 50 L.J.Q.B. 305; 44 L.T. 75; 45 J.P. 373; 29 W.R. 367, C.A.; 42 Digest 988, *174*.

(8) *Temperton* v. *Russell*, [1893] 1 Q.B. 715; 62 L.J.Q.B. 412; 69 L.T. 78; 57 J.P. 676; 41 W.R. 565; 9 T.L.R. 393; 37 Sol. Jo. 423; 4 R. 376, C.A.; 42 Digest 987, *170.*

Also referred to in argument:

Ratcliffe v. *Evans*, [1892] 2 Q.B. 524; 61 L.J.Q.B. 535; 66 L.T. 794; 56 J.P. 837; 40 W.R. 578; 8 T.L.R. 597; 36 Sol. Jo. 539, C.A.; 17 Digest (Repl.) 77, *17.*

Riding v. *Smith* (1876), 1 Ex.D. 91; 45 L.J.Q.B. 281; 34 L.T. 500; 24 W.R. 487; 32 Digest 171, *2094.*

McGruther v. *Pitcher*, [1904] 2 Ch. 306; 73 L.J.Ch. 653; 91 L.T. 678; 53 W.R. 138; 20 T.L.R. 652; 48 Sol. Jo. 639, C.A.; 39 Digest 526, *1407.*

Appeal from a decision of JOYCE, J.

The plaintiff company, the National Phonograph Co., Ltd., dealers in phonographic goods, brought this action to restrain the defendant company, the Edison-Bell Consolidated Phonographic Co., Ltd., who were dealers in the same class of goods, from inciting or procuring any persons to enter under false names into agreements with the plaintiff company for the purchase of their goods at trade discount rates, and from procuring or inciting any person who had entered into wholesale or retail dealers' agreements with the plaintiff company from selling to the defendant company the goods of the plaintiff company to the damage of the plaintiff company and in breach of the terms of the agreements. The plaintiff company sold their goods to wholesale and retail dealers at trade discount prices on the terms of certain agreements. The wholesale dealer's, or, as it was termed, the factor's, agreement, provided that the dealer was not to re-sell except at fixed discounts, nor to any dealer who had not signed a retail dealer's agreement, nor to any dealer on the plaintiff company's suspended list. The retail dealer's agreement provided that the dealer would not re-sell at less than current list prices, nor to dealers on the plaintiff company's suspended list. The defendant company had been placed on the plaintiff company's suspended list for trade reasons. Two servants of the defendant company, Wm. Leach and E. P. Hughes, by signing retail dealers' agreements in false names, obtained the plaintiffs' goods from several wholesale dealers with the plaintiffs' company, among others Simpson & Co., who had signed a factor's agreement. A Mr. Ell, a retail dealer who had signed a retail dealer's agreement at the instance of Simpson & Co., in consequence of an interview with one Presland, a servant of the defendant company, supplied them with some of the plaintiff company's goods at trade discount prices. Ell knew the goods were for the defendant company. JOYCE, J., held that the action was not maintainable against the defendant company, in respect of the transaction with Mr. Ell nor in respect of those through Leach and Hughes and gave judgment for the defendant company. The plaintiff company appealed.

Cripps, *K.C.*, *Walter*, *K.C.*, and *Compston* for the plaintiffs.

Hughes, *K.C.*, and *J. W. Wood* for the defendants.

Cur. adv. vult.

Dec. 18, 1907. The following judgments were delivered.

LORD ALVERSTONE, C.J.—In this case I have had the advantage of reading the judgments which have been prepared by my brothers BUCKLEY and KENNEDY, and I desire to add nothing to the statement of the law embodied in the judgment of BUCKLEY, L.J. But, having regard to the view expressed by my brother JOYCE, and as I am differing from him on one part of the judgment, I think I ought to state briefly the reasons which have prevented me from being able to concur in that judgment.

It is, in my opinion, clearly established that an illegal act causing injury to a person, or to his rights of property, is an actionable wrong and affords ground for an action on the case. The part of the judgment of my brother JOYCE from which

I differ is that in which he thinks that the plaintiffs have not established a cause of action in respect of the transactions between the defendants and the factors. For that purpose, all that I need read is the condition in what is called the factor's agreement—I should call them "wholesale agents," but "factors" is the word that has been used, and I adopt it.

> "Factors must not sell or supply, or place on commission either directly or indirectly, phonographs [of the plaintiffs' manufacture], or parts thereof, records, or blanks to any dealer who has not signed the agreement required by the National Phonograph Co., Ltd., governing and controlling the sale of same, nor to dealers who are on our suspended list."

It was suggested in argument that this restriction imposed by the plaintiffs upon the factors was open to some objection. I am unable to appreciate upon what ground any such objection can be founded. The defendants were competitors in trade with the plaintiffs—I think it may not unfairly be said the principal competitors of the plaintiffs. The sale of phonographs carries with it, to a very large extent, the sale of records for use on the instruments, and I can see no reason why the plaintiffs are not entitled to say: We will take all legitimate means in our power to prevent our instruments being sold by our competitors, as we know that, if they are in a position to sell our instruments, they will, to a large extent, interfere with the sale of the records which are to be used with such instruments. One does not want to enter into any controversial matter between these parties more than is necessary. The defendant firm had undoubtedly the right to call themselves "Edison Bell," and to call their instruments "Edison Bell." That had been the subject of a previous dispute, and was finally settled by a consent order and bargain between the parties, and it was not disputed that the plaintiffs were the persons who were able to import into this country what was suggested to be the last development or improved phonograph, and, therefore, inasmuch as it was obviously desirable to be able to sell these phonographs, and inasmuch as it is common ground that the sale of the phonographs does carry with it a considerable business in records, I cannot see any objection to a company saying: I will not, if I can help it, let my machine be at the disposal of my rivals in the trade.

The factors having purchased goods upon the terms, as I have already said, that they should not be sold to the defendants—because there is no doubt that the defendants' name was on the suspended list and that they knew it—the defendants, by fraud, induced the factors to sell instruments to them. These competitors in trade knew that they could not get these goods by going to the plaintiffs' agents openly. They wanted them for the purposes of competition, and they adopted fraudulent means to get them. It seems to me that, if such fraudulent action has caused injury to the plaintiffs' trade, or is likely to cause injury to the plaintiffs' trade, an injunction ought to be granted to put a stop to such a practice, and, if damage is proved, there ought to be an inquiry as to damages. I certainly come to the conclusion that such conduct, when we know that the possession of the phonograph does largely affect the trade in the records to be used, is likely to cause damage, and I think there is sufficient evidence that it has, in fact, caused damage. Therefore, I think there should be an injunction to restrain the defendants from, by fraudulent and improper means, inducing the factors to break that term of their agreement with the plaintiffs.

With regard to the retail dealers, I entirely concur with the judgment of my brother Joyce, but I had better state why. I doubt very much whether there was a contract between the retail dealers and the plaintiffs. I will not say that, under some circumstances, the wholesale factors may not be the agents of the plaintiffs to make a contract with the retail dealers, but I do not think that was established in this case. I think I should require a good deal more evidence as to the terms and circumstances of the contract before I came to the conclusion that there was a contract between the plaintiffs and the retail dealers, as distinguished from the contract between the factors and the retail dealers. Secondly, in my opinion,

another main objection to the plaintiffs succeeding in this part of the case is that the defendants did not use any fraudulent means to obtain the instruments from the retail dealers. The retail dealers knew perfectly well that they were selling to the defendants, and, further, with regard to the transaction with Mr. Ell there is no evidence that that particular transaction caused any damage to the plaintiffs. I am, therefore, of opinion that the decision of JOYCE, J., should be varied by granting an injunction in respect of the conduct of the defendants with respect to the factors, and that it should be affirmed in so far as it attempted to base a cause of action on the transaction with the retail dealers.

BUCKLEY, L.J., read the following judgment: The respondents have addressed to the court an argument to the effect that the defendants, the Edison Bell Co., were not on the suspended list in the sense in which those words are employed in the factors' agreements. In my opinion, there is nothing in the point. The defendants were on that list, and they knew that they were and used deceit because they were on the list. The relevant facts are that by contracts subsisting between the plaintiffs and the factors the latter were contractually bound to the former not to sell to the defendants, and that the defendants, by deceit, induced the factors to sell to the defendants contrary to the duty which the factors contractually owed to the plaintiffs. The question to be determined is whether it is an actionable wrong that the defendants have, by deceit, induced the factor, who had contracted with the plaintiffs, to act contrary to the duty which he contractually owed to the plaintiffs.

The law bearing upon the matter has been exhaustively considered in three recent cases in the House of Lords—namely, *Allen* v. *Flood* (1), *Quinn* v. *Leathem* (2), and the *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (3). In the speeches of the learned Lords in these cases, the earlier authorities from *Lumley* v. *Gye* (4) onwards have been exhaustively examined and discussed. No useful purpose could be answered by attempting to travel through the cases again. I take the law which I have to apply from two passages which I will read. In *Allen* v. *Flood* (1) LORD WATSON says ([1898] A.C. at p. 96):

> "There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces the other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (4), the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party."

In *Quinn* v. *Leathem* (2) LORD MACNAGHTEN says ([1901] A.C. at p. 510):

> "Speaking for myself, I have no hesitation in saying that I think the decision [in *Lumley* v. *Gye* (4)] was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

The defendants in the present case sought to argue that the principles found in the cases to which I have referred are confined to cases of conspiracy. The argument, I think, is not well founded. The judgments are not based on the existence of a conspiracy. LORD LINDLEY, in *Quinn* v. *Leathem* (2) says (ibid. at p. 537):

> "One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would

> have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action."

The defendants further argued that an action will not lie unless the defendants' act was intended to damage the plaintiffs. Assuming, contrary as I think to the fact, that it could be maintained in this case that the act of these defendants was not intended to damage these plaintiffs, the proposition is not, I think, one which can be maintained. I find LORD HALSBURY, in the *South Wales Miners' Case* (3), saying that if the miners were sincere in the belief that their employers would benefit by their collieries being interrupted that was no sort of excuse for breaking a contract when the co-contractor refuses to allow the breach.

I proceed, then, to apply the words of LORD WATSON and LORD MACNAGHTEN to the facts of this case. These defendants knowingly, and for their own ends, induced the factors to sell to them contrary to the duty which the factor owed to the plaintiffs. The factor was deceived, and, for that reason, an action for breach of contract may not lie against him. He acted innocently, and did not voluntarily commit any breach of his contract. In my judgment, this does not differentiate the present case in the defendants' favour from the first proposition found in LORD WATSON's words. The defendant is in no better case because the wrong to the plaintiff, which, in fact, was done, was, by reason of the defendant's deceit, done innocently so far as the factor was concerned. Again, if this is not well-founded, then, in my judgment, LORD WATSON's second proposition at any rate applies. Assuming that the act induced was within the right of the factor in the sense that he, being innocent, did no wrong, and was, therefore, not wrongful so far as the factor was concerned, yet it was to the detriment of a third party—namely, the plaintiffs. In that case, says LORD WATSON, the inducer, that is, the defendants, may be held liable if they can be shown to have procured their object by the use of illegal means and directed against the plaintiffs. The deceit which the defendants practised brings them, I think, exactly within these words. Let me now take LORD MACNAGHTEN's words. The act which the defendants did was, I think, a violation of a legal right of the plaintiffs, because it interfered with the contractual relations subsisting between the plaintiffs and the factors, and there was no sufficient justification for such interference. But there is another ground upon which the same conclusion may be based, and that is interference with the rights of property. The business of the plaintiff company was property. The sale of phonographic machines induced the purchase, by the purchasers of such machines, of accessories to be used with them, the principal subject-matter being records, whose sale produced a profit much larger than that made on the machine itself. The purchase by the defendants of the 700 or other number of machines which they, in fact, bought might affect the subsequent sale by the plaintiffs of the records, and thus affect the plaintiffs' property in their business. LORD BOWEN, in *Mogul Steamship Co.* v. *McGregor* (5), said (23 Q.B.D. at p. 614):

> "No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it."

In *Exchange Telegraph Co.* v. *Gregory & Co.* (6) an action was held to be maintainable which thus affected property. It is the third case put in RIGBY, L.J.'s judgment ([1896] 1 Q.B. at p. 156)—that is to say,

> "an attack made on the right or interest of persons in the business which they carry on."

In such case, he says, the fact of damage is the thing which brings the defendant into relation with the plaintiff. Upon these grounds I think that it was an actionable wrong that the defendants, by deceit, induced the factors to act contrary to the duty which they contractually owed to the plaintiffs, and that this action will lie.

A The case of the retail dealers, to which the learned judge directed the principal part of his judgment, stands in a different position. The case proved is that of the purchase from Ell. I need not stay to consider whether the plaintiffs can make out an agreement between the plaintiffs and Ell, the retail dealer, upon the footing that Simpson & Co., the factors, were the plaintiffs' agents to obtain the signature by Ell of the agreement expressed to be made with the plaintiffs. That question has B not been thoroughly argued. Assuming that such an agreement could be made out, it remains that the defendants in the case of Ell practised no deceit. Ell was told that the goods were for the defendants, and thought that they were entitled to have them. He did it to oblige the Edison-Bell Co., and handed on the goods at the price which he paid for them, making no profit. I say no more about the case of the retail dealers. As regards the factors, I think there was an actionable wrong. It C seems to me that it would be right to grant an inquiry as to damages and an injunction to restrain the defendant company, their servants, and agents from inducing any person or firm who has entered into factors' agreements with the plaintiff company to deal with the defendant company in goods of the plaintiff company by representing or leading to the belief that the purchaser is not the defendant company. The appeal should be allowed and an order made in the D above terms.

KENNEDY, L.J., read the following judgment:—In this case the plaintiffs' claim for damages and an injunction is based upon two distinct sets of circumstances. The plaintiffs deal in phonographs and phonographic goods. These they sell to wholesale traders, whom they call factors, and they in their turn re-sell to E retail dealers. The plaintiffs act upon a system of restrictive and exclusive trading. They exact from the factors who purchase from them an agreement not to sell to retail dealers except for certain discounts which the plaintiffs prescribe; not to sell to any retail dealers who will not sign an agreement form to which I will presently refer; and not to sell to any person whose name is in a list which they describe as "our suspended list," and which is a list in which the plaintiffs include F the name of any person whom they choose in this way to proscribe. If a factor fails to observe any of these or certain further stipulations of the agreement, he may be at once cut off from any further supply of goods and be placed on the suspended list. The retail dealer's agreement, which he must sign and give to the factor before he can buy from the factor, purports to bind the retail dealer not to sell to anyone at a discount or at less than current list prices, or to any dealer who is on G the plaintiffs' suspended list. If a retail dealer fails to observe any of the stipulations, he may be placed by the plaintiffs on their suspended list, and so be cut off from any further supply of goods.

The justification alleged by the plaintiffs for this exclusive system consists, as alleged by them, in the maintenance of prices and the encouragement to hold large stocks of the plaintiffs' wares, which the assurance of this is said to afford to factors H and dealers. The exclusion which insertion in the plaintiffs' list declares is intended by the plaintiffs to act, first, in the case of factors and dealers, as a deterrent against transgression of any of the stipulations of their respective agreements which the plaintiffs wish to enforce; and, secondly, as a hindrance to competing firms, who sell either their own make of phonographs and phonographic accessories, or similar kinds of goods which have been manufactured by firms—of I whom there are several—other than the plaintiffs, and from whom, if they were able also to sell the plaintiffs' phonographs, the purchaser of a phonograph would very likely also buy the records (inasmuch as all the records are constructed for use in connection with any phonograph) which the competing firms supply at a lower price (1s., as against 1s. 6d.) than the plaintiffs. The plaintiffs allege that experience indicates that a buyer is likely to get his records from the firm from whom he has bought his phonograph, and, therefore, a buyer who purchases from the defendants, or from any other of the plaintiffs' competitors, one of the plaintiffs' phonographs will probably not go to one of the dealers to whom they supply them

to buy the more expensive records of the plaintiffs' make, but will buy the cheaper records produced by the defendants or by the other firms. The buyer of a phonograph may buy for his own instrument a hundred or two hundred, or even more records. The defendant company, towards whom the plaintiffs evidently entertain no very friendly feeling, are sellers as well as manufacturers of phonographs and phonographic accessories, and wanted to procure and be able to supply customers with goods of the plaintiffs. The plaintiffs desire to prevent the defendant company from having this trade, and to that end they have placed the name of the defendant company in the suspended list. The defendant company have sought (I take the words from the finding of JOYCE, J.),

> "to frustrate to some extent the design of the plaintiffs to embarrass them in their business."

The question, which JOYCE, J., has answered in the negative, is whether or not the defendant company has committed an actionable wrong in the execution of their attempts.

The first claim of the plaintiffs arises under the following circumstances. In the latter part of 1904 the defendants sent one of their employees, Presland by name, to a Mr. Ell, who carried on business as a dealer in phonographic materials in the city of London. In July, 1903, on the occasion of a purchase from Simpson & Co., factors, of some of the plaintiffs' goods, Ell had signed a document in the terms of the retail dealer's agreement. Presland saw Ell in reference to obtaining some of the plaintiffs' phonographs for the defendant company, and Ell arranged to get, and did get, for the defendant company, from Simpson & Co. twenty-five machines, purchasing himself and paying Simpson & Co. for the machines at the price at which Simpson & Co. were authorised by the factors' agreement to sell the machines, and receiving the money from the defendants in order to enable him to make the payment to Simpson & Co. Ell made no profit out of the transaction. Ell apparently thought that the defendant company was entitled to have the machines, and he acted without any advantage to himself, and simply to oblige the defendant company. The plaintiffs in respect of this transaction claimed damages and an injunction, alleging that the defendants committed an actionable wrong towards them by procuring and inciting Ell to break his retail dealer's agreement, first, by selling to the defendants, or procuring from Simpson & Co. for the defendants, these twenty-five phonographs at a price less than the retail price specified in the retail dealer's agreement; and, secondly, by selling to the defendant company, although the defendant company was on the suspended list.

We now come to the plaintiffs' second and separate head of claim. The defendant company, by two servants or agents named Hughes and Leach, bought from certain factors who had in stock goods of the plaintiffs' manufacture and had signed the factors' agreement a certain number (I think about nineteen in all) of the plaintiffs' machines and tried to obtain more in the same way. Hughes and Leach bought at "agreement" prices—that is, at prices approved by the plaintiffs. But, in order to effect the purchases, Hughes and Leach in each case untruly represented themselves as independent dealers, and when they bought the goods and signed the retail dealer's agreement form gave to the factors fictitious names and fictitious addresses, so that the factors did not know that they were selling to the defendant company, or to servants of the defendant company, or to any person on the plaintiffs' suspended list. There can be no doubt that this method of purchase was authorised by the defendants. That Hughes and Leach and the defendant company which employed them did what was morally wrong is patent. They induced the factors to sell these goods to them by an untrue representation, not indeed in order to defraud either the factors or plaintiffs in any pecuniary respect, for they paid the price which the plaintiffs had authorised the factors to accept, but it must be assumed that, if the factors had known that they were selling to persons who were agents of a firm on the plaintiffs' suspended list, they would not have sold to Hughes or Leach any of the machines which had been obtained from the plaintiffs.

A The plaintiffs claim that they are entitled to damages from the defendants as having in this transaction incited or procured the factors to sell the machines to the defendant company in violation of the agreement entered into by the factors with the plaintiffs.

The learned judge has given judgment for the defendants in regard to both of the transactions. In regard to the first, which I will call the Ell transaction, he has B held, first, that there was no contract existing between the plaintiffs and Ell upon which the plaintiffs could have successfully sued Ell; secondly, that the plaintiffs failed to prove that the defendant company or Presland directly procured or incited Ell to violate the contract, if any existed; thirdly, that, if any contract existed between the plaintiffs and Ell, it did not create a contractual relation between them within the meaning of LORD MACNAGHTEN'S judgment in *Quinn* v. *Leathem* (2); C and, fourthly, that the plaintiffs had failed to prove the real and actual damage which was essential to their case. I agree with JOYCE, J., as to the first of these grounds; as to the second, which is one of fact, I should be slow to differ from the learned judge, who himself heard the witnesses give their testimony. If either of these conclusions is correct the plaintiffs' claim on this part of their case fails, and it is unnecessary for the purposes of this appeal to consider the third and fourth D grounds on which the learned judge has also decided adversely to the plaintiffs. I reserve, till I deal with the Leach and Hughes case, any consideration of the question of damage. But, as the question of contractual relation involves a legal point of much general importance, and as, with sincere respect, I am not disposed to concur in the view which JOYCE, J., has expressed, I do not think that, whilst agreeing for other reasons with the result of his judgment on this branch of the E case, I ought to pass over the point altogether without comment.

The learned judge holds that a valid contract by A. with B. not to do a particular act or acts—for instance, not to purchase goods from, or sell goods to, C.—does not constitute a contractual relation, in the sense in which LORD MACNAGHTEN must be understood to have used that phrase in *Quinn* v. *Leathem* (2), and in substance, as I understand his judgment, that an action at the suit of B. against one who pro- F cured or incited A. to break his contract to do the particular act or acts could not properly be based upon any principles which are laid down in such cases as *Lumley* v. *Gye* (4), *Quinn* v. *Leathem* (2), *South Wales Miners' Federation* v. *Glamorgan Coal Co., Ltd.* (3). I agree that in these cases, as well as in *Bowen* v. *Hall* (7) and *Temperton* v. *Russell* (8), the contractual relation, which the parties sued in those cases were held to have unlawfully interrupted, involved something more than an G obligation to abstain from doing a particular act or acts. In each case there subsisted between the contracting parties, by virtue of the contract, that which, for want of a better phrase, I think might be described as a more or less continuous course of dealing, as, for example, personal service, though the case is not confined to personal service, of which without justification the party sued had successfully tried to procure the rupture. I agree with the defendants' counsel that the decision H of the Court of Appeal in *Exchange Telegraph Co.* v. *Gregory & Co.* (6), cited by the plaintiffs, does not throw light upon this part of the case when carefully looked at. That decision, as is correctly stated at the close of the headnote in the LAW REPORTS, simply was that the plaintiffs in that case had a right of property at common law and were entitled to an injunction to restrain the defendant from infringing that right. Indeed, in the following passages in his judgment I RIGBY, L.J., suggested that there is some limitation ([1896] 1 Q.B. at p. 157):

> "It is not . . . every procuring of a breach of contract that will give a right of action."

I am not aware of any case in which the line or nature of the limitation has been defined. But, if it had been necessary, which it is not, to decide the point, I do not see how, in view of the decisions of the House of Lords to which I have just referred, and of the language used by LORD WATSON in *Allen* v. *Flood* (1), LORD LINDLEY in *Quinn* v. *Leathem* (2), and LORD MACNAGHTEN in the same case, I could

concur with JOYCE, J., if he has held that in no circumstances could the intentional procurement of a breach of contract not to do a particular act constitute in law an actionable wrong. A

The case made out by the plaintiffs in regard to the Hughes and Leach transactions appears to me to differ, in important respects, from the Ell transaction. By intentional misrepresentations the defendant company, through their agents or servants, procured from the factors goods of the plaintiffs' manufacture which the factors would not have parted with if they had known that the persons with whom they were dealing were agents or servants of a firm included in the suspended list. There has been, in a sense, a sale contrary to the terms and the intention of the factors' agreement. Then comes the question: Did such a transaction constitute, on the part of the factors, in each case an actionable violation of their contract with the plaintiffs, which I assume to be valid in point of law? I do not think it did. The factors did not know or have reason to suppose that they were selling to the defendants; on the contrary, they were intentionally misled by Hughes and Leach into the belief that they were selling to independent retail dealers, who had their own places of business and were in no way connected with the defendants. The names given by Hughes and Leach were not names on the suspended list. It seems to me that a sale honestly made by a factor under these circumstances ought not, according to the proper interpretation of the agreement, to be held to be a sale to a person on the suspended list, and, as such, constituting a breach of the agreement. B C D

The defendants' counsel contended that, if this be so—if the plaintiffs could not successfully sue the factors for damages or justly place them on the suspended list—the plaintiffs' case at once fails, because (they argue) the defendants' stratagem, however reprehensible, did not produce a violation by the factors of the contracts with the plaintiffs. I think that this is too narrow a view. I am certainly disposed to hold that if A. who knows that B., the producer of an article, has stipulated in selling it to C., the factor, that he should not re-sell it to A., procures by an intentional misrepresentation to C. a sale to himself, he has committed towards B. an actionable wrong (provided that B. can prove he has been thereby damaged) although, in the particular circumstances, B. may have no cause of action against C. in respect of the transaction. I agree with the defendants' counsel that *Exchange Telegraph Co.* v. *Gregory & Co.* (6) is not an authority for such a proposition, for in that case the subscriber who improperly supplied the defendant with the information in which the plaintiffs had the proprietary rights must have known that he was violating his contract with the plaintiffs in so doing. There is no suggestion in the case, as reported, that he did not. But, I think, a sufficient declaration of the soundness of the view which I have expressed appears in a passage in the judgment of BOWEN, L.J., in *Mogul Steamship Co.* v. *McGregor* (5), to which my attention has been drawn (23 Q.B.D. at p. 614): E F G

> "No man, whether trader or not, can justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it." H

And in *Allen* v. *Flood* (1) LORD WATSON remarks ([1898] A.C. at p. 96): I

> "When the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it yet may be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (4), the inducer may be held liable, if he can be shown to have procured his object by the use of illegal means directed against that third party."

While, however, I so far venture to differ from JOYCE, J., who has held in his judgment that the facts in reference to this part of the case would not support any action by the plaintiffs against the defendant company upon the ground of un-

A justifiable interference by the defendant company with the contractual relation between the plaintiffs and anyone else, still his judgment on this part of the case will stand if we ought to concur with his finding as to the absence of evidence of damage with which his judgment concludes. It is indisputable, I think, that damage is the gist of actions such as the present; that, in order to succeed and make a good case for either damages or an injunction, damage must be proved—not, B indeed, damage in detail or special damage in the narrow sense of that epithet, but actual damage; damage, that is to say, which has been, or, where an injunction is sought against the continuance or the repetition of the act complained of, which will be, the natural consequence of the act complained of. In the present case the learned judge, on this point, has found as follows:

C "Further and at all events the plaintiffs would not succeed in any such action without showing that they had sustained real damage by what Hughes and Leach did, and that has not been proved."

The plaintiffs did not and could not allege direct pecuniary damage, but they put their damage thus: First, injury to their business because it is more probable that, if the machines had not been sold to the defendants and had been sold by the factors D to retail dealers bound by the retail dealers' agreement, the retail dealers would have bought from the factors, and the ultimate buyers from the retail dealers would have bought from the retail dealers the records of the plaintiffs' manufacture, and, as the defendants got the machines, the records purchased would have been other than records of the plaintiffs; secondly, injury to the plaintiffs' business owing to persons thinking that they could purchase the plaintiffs' machines from the de- E fendant company, and ultimately, at the defendant company's place of business, being induced to buy Edison-Bell machines; and, thirdly, injury to the plaintiffs' business because, if retail dealers saw machines of the plaintiffs' make in the windows of the defendant company, and heard or knew that the defendant company was on the plaintiffs' suspended list, they would infer that the plaintiffs were incapable of maintaining their agreements, and, therefore, would not stock the F plaintiffs' goods.

I have felt considerable doubt as to the sufficiency of this proof of damage. The judgment of the Court of Appeal in *Exchange Telegraph Co.* v. *Gregory & Co.* (6) was cited by the plaintiffs' counsel. But all that that case decided is that where the infringement of a right of property at common law has been proved, the damage need not be proved in detail. It is enough if the facts proved show that actual and G substantial damage is the natural result. The second and third of the plaintiffs' heads of damage appear to me to be too uncertain and remote to be considered. In regard to the first head—the effect upon the sale of the plaintiffs' records—I have come to the conclusion that there is sufficient substance in it to justify an injunction, and, if they ask for it, an inquiry as to damages, although I cannot help thinking that there will be considerable difficulty in establishing any particular H figures of loss. But, certainly, the plaintiffs' witnesses, Mr. Marks and Mr. Lemoin, have given some evidence as to the value of the maintenance of the plaintiffs' exclusive system in regard to their machines as affecting the sale of records, and some evidence that there has been a falling off in their sale of records since the time when, as they suggest, the defendants have interfered with that system by such devices as the defendant company has to admit in the cases of I Hughes and Leach, and so obtained, if the defendants are to be believed, several hundreds of the plaintiffs' machines. One ought not, I think, to leave out of sight, in fairness to the plaintiffs in judging of the weight of their evidence upon this question of damage, the inference which may fairly be drawn from the fact that the defendants, a firm of some standing, should have cared so much—presumably for reasons of resulting profit to themselves—to get hold of the plaintiffs' machines that they condescended to a system of deception in order to attain this object. No evidence, it must be remembered, was offered by the defendant company at the trial to answer the evidence given by the plaintiffs as to damage. Upon the whole,

while I think, upon the point of damages, the case is near the line, and I differ reluctantly from the learned judge who has tried the case and heard the witnesses on a question of fact, I concur with the LORD CHIEF JUSTICE and BUCKLEY, L.J., that, in respect of the Hughes and Leach transaction, the plaintiffs have proved their right to relief.

Appeal allowed in part.

Solicitors: *Ward, Perks & Mackay*; *Faithfull & Owen.*

[*Reported by* C. F. DUNCAN, ESQ., *Barrister-at-Law.*]

HALL *v.* LEES

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Mathew, L.JJ.), July 14, 15, 1904]

[Reported [1904] 2 K.B. 602; 73 L.J.K.B. 819; 91 L.T. 20; 53 W.R. 17; 20 T.L.R. 678; 48 Sol. Jo. 638]

Master and Servant—Liability of master for act of servant—"Service"—Nurse supplied to patient by nursing association—Patient injured by negligence of nurse—Liability of association.

A philanthropic association engaged and paid qualified nurses and sent them out to nurse patients, a charge being made in the case of patients who could afford to pay. The association had printed rules and regulations which provided that the work of the nurses should be supervised by a superintendent appointed by the association to whom they were responsible, but also that a nurse should not absent herself from duty without the permission of the patient's friends and that she should follow the instructions of the patient's doctor implicitly. When a nurse was sent to a patient a printed form was sent with her on which details of her conduct were "to be filled in by employer". The association sent nurses to the plaintiffs, who were husband and wife, to nurse the wife during and after an operation. She was burnt by a hot-water bottle which had been negligently applied by one of the nurses. In an action for damages brought by the plaintiffs against the association,

Held: on the true construction of the contract, the association did not undertake to nurse the patient, but only to supply a competent and skilled nurse, which in the present case they had done, and, therefore the relationship of master and servant did not exist between the nurse and the association so as to make the association liable for the nurse's negligence, and the action failed.

Notes. Distinguished: *Norris* v. *Wolseley Tool and Motor Cab Co.* (1907), 52 Sol. Jo. 116. Considered: *Cox* v. *Coulson*, [1916] 2 K.B. 177; *Fisher* v. *Oldham Corpn.*, [1930] All E.R.Rep. 96; *Lindsey County Council* v. *Marshall*, [1936] 2 All E.R. 1076. Referred to: *Hillyer* v. *St. Bartholomew's Hospital*, [1909] 2 K.B. 820; *Wilmerson* v. *Lynn and Hamburg Steamship Co.* (1913), 109 L.T. 53; *Strangeways-Lesmere* v. *Clayton*, [1936] 1 All E.R. 484; *Wardell* v. *Kent County Council*, [1938] 3 All E.R. 473; *Gold* v. *Essex County Council*, [1942] 2 All E.R. 237.

As to employment of other person's servants, see 25 HALSBURY'S LAWS (3rd Edn.) 501 et seq.; and for cases see 34 DIGEST 22 et seq.

A Case referred to:

(1) *Murray* v. *Currie* (1870), L.R. 6 C.P. 24; 40 L.J.C.P. 26; 23 L.T. 557; 19 W.R. 104; 3 Mar.L.C. 497; 34 Digest 25, *44*.

Also referred to in argument:

Donovan v. *Laing*, *Wharton and Down Construction Syndicate*, [1893] 1 Q.B. 629; 63 L.J.Q.B. 25; 68 L.T. 512; 57 J.P. 583; 41 W.R. 455; 9 T.L.R. 313; 37 Sol. Jo. 324; 4 R. 317, C.A.; 34 Digest 26, *49*

B

The Halley (1868), L.R. 2 P.C. 193; sub nom. *Liverpool, Brazil and River Plate Steam Navigation Co., Ltd.* v. *Benham, The Halley*, 5 Moo.P.C.C.N.S. 262; 37 L.J.Adm. 33; 18 L.T. 879; 16 W.R. 998; 3 Mar.L.C. 131; 16 E.R. 514, P.C.; 34 Digest 137, *1064*.

Rourke v. *White Moss Colliery Co.* (1877), 2 C.P.D. 205; 46 L.J.Q.B. 283; 36 L.T. 49; 41 J.P. 580; 25 W.R. 263, C.A.; 34 Digest 25, *46*.

C

Mersey Docks and Harbour Board v. *Cameron, Jones* v. *Mersey Docks and Harbour Board* (1865), 11 H.L.Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur.N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 42 Digest 745, *1706*.

D **Application** by the defendants for judgment or for a new trial in an action tried by JELF, J., with a jury at Manchester.

The plaintiffs, husband and wife, brought this action to recover damages for personal injury caused to the wife by the negligence of the defendants' servant. The defendants were the members of the House Committee of the Oldham Nursing Association, a philanthropic institution voluntarily established for the purpose E of supplying trained nurses to persons in need of them within the district of Oldham. The nurses were selected by the association, and were paid regular salaries by the association. Nurses were supplied by the association to persons who could afford to pay for them and also to persons who could not afford to pay. In March, 1902, the female plaintiff was about to undergo a severe operation, and the doctor who was attending her applied to the association for two nurses F to nurse her. He applied for one particular nurse, whom he knew, but was unable to obtain her services. Two nurses were sent by the association, and they nursed the female plaintiff during and after the operation. While the female plaintiff was unconscious after the operation, one of the nurses applied to her a hot-water bottle which was too hot, and she was thereby burnt and seriously injured. This action was brought to recover damages in respect of that injury. G The defendants denied that the nurse was the servant of the association while nursing the patient.

The rules and regulations of the association, so far as is material, provided as follows:

2. Object.—To supply aid and instruction in skilled nursing, by nurses located in Oldham, in accordance with the rules and regulations.... 5. H Officers and House Committee.—The officers shall consist of president, treasurer, and secretary or secretaries. The house committee shall consist of the officers, with seven ladies and three gentlemen, one of whom shall be a doctor. 6. Superintendent.—To be appointed by the house committee, one month's notice for the termination of the appointment to be given on either side. Duties: (a) To receive all applications for nursing service, and promptly I attend to the same. (c) To pay all money received for nursing to the treasurer. (h) To control the work of the domestic servants. (i) To superintend the work of the nurses, and to devote what time she can to nursing duties. 7. Nurses.—(a) Nurses shall be supplied to attend infectious cases. (b) Maternity nursing shall be undertaken. (c) A proportion of nurses shall be reserved for non-infectious, medical, and surgical cases only. (d) Appointment and discharge.—Nurses to be appointed or discharged by the house committee in consultation with the superintendent. Nurses shall be recommended for appointment by the superintendent to the house committee; for the termination of such

appointment one month's notice shall be given on either side. Any nurse who infringes the rules or is guilty of misconduct is liable to dismissal by the superintendent without notice. (e) Qualifications.—Each nurse shall have had at least two years' training in a general hospital. (f) Leave of absence.—Each nurse shall have three weeks' holiday in the year, the time to be fixed by the superintendent, who also shall, in circumstances of urgency, grant to a nurse leave of absence from duty for any time not exceeding three days. Except when actively employed, or when the consent of the superintendent has been obtained, nurses must not be out of the home after 8 p.m. (h) Responsible to superintendent.—Each nurse shall be responsible to the superintendent, to whom she shall at once refer in a case of doubt and difficulty, and shall conform to her instructions in all matters pertaining to work and conduct, and shall give to her a daily account of work done, and pay each day to the superintendent any money received for nursing. 8. Regulations as to Nurses when on duty.—(c) Each nurse, when engaged in weekly nursing, shall be allowed eight hours' sleep and two hours' leisure daily; when on duty she shall wear the uniform provided for her. (d) When a nurse is engaged in continuous nursing and sleeps at the home, she shall be allowed ten hours out of the patient's house, the time being arranged to suit the doctor attending. (e) When at a case the nurse shall not absent herself from duty without permission from the patient's friends. (f) She shall be responsible for the personal cleanliness of the patients under her charge, and shall enforce due attention to the ventilation of the sick-room. She shall also urge the giving of nourishment and medicine as directed, and impress upon the ordinary attendants the importance of strict compliance with the orders of the medical attendant. (g) No medicine shall be prescribed to a patient by the nurse. (h) Nurses shall not be allowed to receive presents of any kind from the patients or their friends. (j) Only such cases shall be undertaken as are attended by a medical man, whose instructions the nurse must implicitly follow. . . . 10. Charges.—(k) Payments for nursing should be made to the superintendent at the time of application; if this is not done, then to the nurse when her visits are made. (m) Washing to be charged 2s. 6d. per week, which sum, as well as travelling expenses, should be paid to the nurse.

When the nurses were sent to the plaintiffs, according to the usual practice of the association a printed form was sent with each nurse properly filled up. The printed form, as filled up, was as follows.

"Oldham Nursing Association.—Nurses, with full hospital training, supplied for medical, surgical, massage, maternity, mental, and infectious cases.

"Lees Nurses' Home, Union Street West, Oldham, Feb. 7, 1902.—At the request of Dr. Robertson I send herewith Nurse . . . to attend the case of Mrs. Hall. The charge for her services will be at the rate of £1 11s. 6d. per week.—M. T. Nicholson, Lady Superintendent.

"In infectious cases a guarantee fee of 15s. is charged in addition to the nursing fees. Washing 2s. 6d. per week, which with the travelling expenses, should be paid to the nurse. All inquiries and applications are to be made direct to the lady superintendent. Not less than twenty-four hours' notice of the return of a nurse must be given to the lady superintendent. The limit of continuous attendance on a case is eight weeks, which the lady superintendent is empowered to prolong in special circumstances. The committee, however, reserve to the lady superintendent the right to withdraw the nurse at any time. Anyone having cause of dissatisfaction with the general management of the association should communicate with the honorary secretaries. Should exception be taken to the conduct or efficiency of a nurse, it must be at once reported to the lady superintendent. For the successful working of the association it is absolutely needful that the committee and the lady superintendent should have an accurate knowledge of the conduct, capacity, and

other qualifications of their nurses. It is therefore requested that the annexed form be filled up correctly and sent direct to the lady superintendent. The lady superintendent is instructed in cases of continuous nursing to send an account up to the last day of each calendar month, prompt settlement of which is requested by the committee.

"The nurse is sent subject to the following regulations:—1. She shall have eight hours' rest in bed and two hours' leisure daily. She shall not absent herself without permission, but should be encouraged to take a sufficient amount of outdoor exercise. 2. In infectious cases, after the furniture has been removed from the sick room, she shall herself attend to the cleaning of it in addition to her other duties. 3. No wines or spirits may be given to the nurse except at the request of the medical attendant. 4. She is provided with the uniform of the association, which she shall wear when on duty. 5. She is not allowed to accept presents from patients or their friends. 6. She is enjoined to hold sacred any knowledge she obtains of the private affairs of the family, and to adapt herself to the usages of the household."

The "annexed form" was as follows.

"Discharge and Confidential Report.—To be returned twenty-four hours before the termination of the nurse's services.—The services of Nurse . . . , who has been in attendance since . . . , not being required after . . . , she has been notified that she may leave on that day. Her travelling and other expenses have been handed to her, and the sum of £ . . . , being the remuneration due for her services, is inclosed herewith. To be Filled in by Medical Attendant.—Efficiency as a nurse . . . . To be Filled in by Employer.—Care and kindness in attendance on patient . . . . General conduct . . . .—Signature. . . .—Address. . . ."

The action was tried before JELF, J., with a jury, and the learned judge left two questions to the jury. (i) Was the injury to Mrs. Hall caused by negligence on the part of the nurses or either of them?—Answer: Yes. (ii) Did the association undertake to nurse Mrs. Hall through the agency of the two nurses as their servants, or only to procure for her the services of two nurses?—Answer: The association undertook to nurse through the agency of the nurses as their servants. The jury assessed the damages at £300, and judgment was given for the plaintiffs for that amount. The defendants appealed, asking for judgment or for a new trial.

Montague Lush, K.C., T. F. Byrne and *Arthur Page* for the defendants.
Pickford, K.C., and *W. Ambrose Jones* for the plaintiffs.

SIR RICHARD HENN COLLINS, M.R.—This case is one of considerable public importance and interest, because it belongs to a class of cases which are of very common occurrence. The defendants are the members of the committee of an association which from philanthropic motives has organised a system for supplying skilled nurses to attend upon cases of sickness, and especially where operations are necessary, both in cases of persons who can pay for their services and of persons who cannot pay. The nurses are chosen by the association, who pay them a salary, and the nurses are thus kept always at the disposal of the association so that they can whenever required supply trained nurses. In the present case the male plaintiff required a nurse to attend upon his wife, who had to undergo an operation. Accordingly an application was made by his doctor to the association to supply two nurses The nurses were supplied by the association and the operation was performed. Immediately after the operation one of these nurses carelessly applied to the patient a hot-water bottle which was much too hot, and thereby the patient was severely burnt. She was insensible at the time, and therefore did not know that she was being burnt. This action has been brought, in respect of that injury, against the members of the committee of the association.

The question is whether the association, by supplying the nurse, became responsible to the plaintiffs for the injury caused by the negligence of the nurse. That is a perfectly simple question depending upon the contract made between the parties. If the association undertook to nurse the patient, then they are liable for the negligence of the nurse whom they sent. If, on the other hand, the association only contracted to supply a competent nurse to the patient, and they used ordinary care and skill in selecting the nurse whom they supplied, then they are not responsible for her negligence. Therefore the question in this case is whether, under the special circumstances of this case and under the rules and regulations of the association, the association did undertake to nurse the patient or only to supply a nurse. The regulations are all in print, and there is no evidence of there being any other verbal regulations. The case was tried before JELF J., with a jury, and the learned judge left the proper question to the jury. That question was, "Did the association undertake to nurse Mrs. Hall through the agency of the two nurses as their servants?" To that question the jury answered, "Yes." We have now to consider whether that verdict can be supported upon the evidence.

It seems to me that the question was not one of fact for the jury at all, but was a question of law to be determined upon a consideration of the written documents which show what were the relations between the parties. It is, in my opinion, clear that the association undertake to supply nurses whose qualifications they had taken due care and skill to ascertain. The association would, I think, be liable if they did not use due care in selecting and providing nurses. The regulations of the association provide for the relations between the nurses and the association. [HIS LORDSHIP read the material regulations and continued:] Looking at those rules and regulations, what do they show? It is said on behalf of the plaintiffs that from some of these regulations it is to be deduced that the relation of master and servant continued to exist between the nurse and the association when the nurse went out to nurse the patient. In my opinion that was not so, but the regulations were only directed to secure the efficiency of the nurses. The relation of the nurse to the patient is defined by some of the rules; for instance, she is to be under the command of the doctor who attends upon the patient, and she is to give implicit obedience to the doctor. If a patient wants a nurse to be sent by the association, in strictness the patient ought to fill up and send a form of application. In this case the nurse was asked for verbally by the doctor on behalf of the patient. With the nurse there was sent a printed form which is very important to show what was the true relation of the parties. That form is headed "Oldham Nursing Association," and proceeds:

> "At the request of . . . I send herewith Nurse . . . to attend the case of . . . The charge for her services will be at the rate of £ . . . per week. . . . For the successful working of the association it is absolutely needful that the committee and the lady superintendent should have an accurate knowledge of the conduct, capacity, and other qualifications of their nurses. It is therefore requested that the annexed form be filled up correctly and sent direct to the lady superintendent."

The annexed form was a form to be filled up with particulars of the nurse's services and with a report by the "medical attendant" and by the "employer." That seems to say that the association says that the patient is the "employer" of the nurse. In these circumstances, what is the obligation undertaken by the association? Is it an obligation to nurse the patient, or is it only an obligation to provide skilled nurses? It seems to me that there can be no doubt that the bargain made by the association is to provide a nurse, and, as far as care can do so, to provide a skilled and competent nurse. The association has not undertaken to nurse the patient; they have not undertaken to send a nurse to do for them that which they have undertaken to do, because they have never undertaken to nurse the patient.

I do not think that it is necessary to refer to any of the authorities which have been cited, but I will read a few words from the judgment of Willes, J., in *Murray* v. *Currie* (1). He there said (L.R. 6 C.P. at pp. 26, 27):

> "The stevedores, however, are not the servants of the owner of the ship; but they are persons having a special employment, with entire control over the men employed in the work of loading and unloading. They are altogether independent of the master or owner. In one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants. They are not put in his place to do an act which he intended to do for himself."

Unless the association undertook to do the nursing, the nurse was not sent to the patient to do work which they had undertaken to do themselves. I will also read a passage from the judgment of Brett, J., in the same case. He said (ibid. at p. 28):

> "I apprehend it to be a true principle of law that, if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor."

So, in this case, the connection of master and servant did not exist between the nurse and the association for the purpose of making the association liable for the negligence of the nurse. Therefore the defendants are not liable for the negligence of the nurse, and this appeal must be allowed and judgment be entered for the defendants.

STIRLING, L.J.—I am entirely of the same opinion. The question, as the Master of the Rolls has stated, is what was really the contract between the plaintiff and the association. Did the association contract to nurse the patient, or did they only contract to supply a properly qualified nurse for the patient? I think that the right answer to that question is that the association did not contract to nurse the patient, but only to supply a properly qualified nurse. Upon that point the important document is the form sent by the association in answer to the application for a nurse. We have that document before us. It is headed: "Oldham Nursing Association. Nurses, with full hospital training, supplied for medical, surgical, massage, maternity, mental, and infectious cases"; and it goes on to state that at the request of . . . a nurse is sent to attend the case of. . . . Appended there is a form headed: "Discharge and Confidential Report. To be returned twenty-four hours before the termination of the nurse's services"; and that form contains spaces to be filled up by the "medical attendant" and by the "employer." That, upon the face of it, seems to me primâ facie to be a contract with the patient, described as the "employer", for the employment of a nurse whom the association is to supply, that is, a contract to supply a nurse who is to be in the employment of the patient. On behalf of the plaintiffs it has been strongly urged that the regulations of the association show that the nurse remained the servant of the association. It seems to me, however, that those regulations are part of the contract between the nurse and the association, and are not part of the contract between the patient and the association. It seems to me that it was not intended, when a contract was made for the supplying of a nurse, that the regulations were to interfere with the discharge of her duty between the nurse and the employer. It was never intended, in my opinion, by rule 7 (*b*) that the superintendent should do anything inconsistent with the obedience of the nurse to the doctor's orders. I come, therefore, to the conclusion that this appeal ought to be allowed and judgment entered for the defendants.

MATHEW, L.J.—I am of the same opinion. It has been argued on behalf of the plaintiffs that the terms of the contract with the association are to be found in the rules and regulations of the association. In my opinion that is

not so. They were not provided for any such purpose. This is, I think, a perfectly simple case of everyday occurrence. A person is ill and about to undergo an operation. The doctor in attendance is asked to find a nurse, and he applies for a nurse to this institution. It seems to me that the moment the nurse reaches the house of the patient she becomes the servant of the patient. That is in entire harmony with these rules and regulations. The patient could object to the nurse who was sent and refuse to accept her services. I agree that this appeal must succeed.

Appeal allowed.

Solicitors: *Field, Roscoe & Co.*, for *G. S. Claydon*, Oldham; *Jaques & Co.*, for *John Armstrong*, Oldham.

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

FROST *v.* AYLESBURY DAIRY CO.

[Court of Appeal (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), February 24, 1905]

[Reported [1905] 1 K.B. 608; 74 L.J.K.B. 386; 92 L.T. 527; 53 W.R. 354; 21 T.L.R. 300; 49 Sol. Jo. 312]

Sale of Goods—Implied condition of fitness—Latent defect—Typhoid germs in milk—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 14.

The Sale of Goods Act, 1893, s. 14(1), provides: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply . . . there is an implied condition that the goods shall be reasonably fit for such purpose." The defendants, who were sellers of milk, supplied the plaintiff with a daily supply of milk for his household. In the account book provided by them for the plaintiff there were printed statements as to the many elaborate precautions taken by them to secure the purity of their milk. The plaintiff's wife died of typhoid fever contracted from the milk supplied by the defendants. In an action for damages for breach of the implied condition of fitness for consumption as food,

Held: as the defendants had taken great care to print in their account book laudatory comments on their skill and special knowledge in the matter of milk, there was evidence that the plaintiffs had relied on that skill, and as there was no doubt of the purpose for which the milk was required, the defendants were in breach of the implied condition in s. 14 (1) of the Sale of Goods Act, 1893, that the milk should be reasonably fit for that purpose, notwithstanding the fact that the defect was latent and could not have been found by casual inspection.

Notes. Considered: *Jackson* v. *Watson*, [1909] 2 K.B. 193; *Square* v. *Model Farm Dairies (Bournemouth), Ltd.*, [1939] 1 All E.R. 259; *Wilson* v. *Ricket, Cockerell & Co.*, [1954] 1 All E.R. 868. Referred to: *Manchester Lines, Ltd.* v. *Rea, Ltd.*, [1922] All E.R.Rep. 605; *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co.*, [1933] 2 K.B. 141.

A As to implied terms as to quality or fitness, see 34 HALSBURY'S LAWS (3rd Edn.) 51 et seq.; and for cases see 39 DIGEST 440 et seq. For the Sale of Goods Act, 1893, s. 14, see 22 HALSBURY'S STATUTES (2nd Edn.) 993–994.

Cases referred to:

(1) *Randall* v. *Newson* (1877), 2 Q.B.D. 102; 46 L.J.Q.B. 259; 36 L.T. 164; 25 W.R. 313, C.A.; 39 Digest 440, *694*.

B (2) *Preist* v. *Last*, [1903] 2 K.B. 148; 72 L.J.K.B. 657; 89 L.T. 33; 51 W.R. 678; 19 T.L.R. 527; 47 Sol. Jo. 566, C.A.; 39 Digest 444, *727*.

Also referred to in argument:

Wren v. *Holt*, [1903] 1 K.B. 610; 72 L.J.K.B. 340; 88 L.T. 282; 67 J.P. 191; 51 W.R. 435; sub nom. *Holt* v. *Wren*, 19 T.L.R. 292, C.A.; 39 Digest 450, C *782*.

Wallis v. *Russell*, [1902] 2 I.R. 585; 39 Digest 444, *c*.

Application by the defendants for judgment or a new trial on appeal from the verdict and judgment at the trial before GRANTHAM, J., with a jury.

The plaintiff brought this action to recover from the defendants damages for breach of warranty on the sale of milk bought by the plaintiff from the defendants. D The defendants carried on business as sellers of milk, and for some time prior to July, 1903, they had regularly supplied the plaintiff with a daily supply of milk for the use of himself and his family. The defendants provided a pass-book for the plaintiff, in which an account was kept of the milk supplied to him and of the payments made by him. In that pass-book, which was interleaved with blotting-paper, there were printed on the pages of blotting-paper many statements E as to the elaborate precautions taken by the defendants to ensure the purity of the milk supplied by them, describing the medical inspection, the analysis, the bacteriological examination, and the veterinary inspection which were provided for. In July, 1903, the plaintiff's wife contracted typhoid fever, from which she subsequently died. The plaintiff alleged that the infection was communicated to her by the milk supplied by the defendants, and he brought this action to recover F damages in respect of the expenses to which he had been put by her illness and death.

The action was tried before GRANTHAM, J., with a jury. The jury found that the typhoid fever was caused by the milk supplied by the defendants, and returned a verdict for the plaintiff. Judgment was accordingly entered for the plaintiff. The defendants appealed, asking for judgment or for a new trial upon the ground G that (i) the verdict was against the weight of evidence; and (ii) misdirection.

Macmorran, K.C., and *W. W. Mackenzie* for the defendants.
Duke, K.C., and *Holman Gregory* for the plaintiff.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal by the defendants H from the verdict of a jury under the direction of GRANTHAM, J., at the trial, who found for plaintiff. The action was brought by the plaintiff for damages sustained by the loss of his wife, caused, as he says, by typhoid fever, of which the infection was caught from milk supplied by the defendants to his wife. The jury found that the cause of the typhoid fever was the milk supplied by the defendants, and they found that, under the circumstances, the defendants were liable to the plaintiff I for the damages he sustained. The appeal is brought by the defendants. They say that the learned judge misdirected the jury, and they also say that the verdict of the jury was against the weight of evidence.

The first point taken, and the one most pressed upon us, is whether, in point of law, on the facts as ascertained, there can be any liability on the defendants even if it be admitted that the milk sold by the defendants was the actual cause of the typhoid fever which was the cause of the lady's death. It has been contended very strenuously that on those facts there was no actionable wrong done by the defendants. Upon that the main point is whether the circumstances under

which this milk was bought from the defendants brings the case within a well-known principle of common law which has now been crystallised into a statutory enactment—namely, s. 14 (1) of the Sale of Goods Act, 1893. The words of the subsection are these: [His Lordship read the subsection and continued:] I will deal with the case under that subsection. I do not think that it is necessary to refer to another alternative subsection, under which it is said this case might be brought. It is said here that it is true that this milk was bought by the plaintiff from the defendants, but that it was not bought under such circumstances as to show that the buyer—that is, the plaintiff—relied on the seller's skill or judgment. It cannot be denied that the goods are of a description which it is in the course of the sellers' business to supply. The point taken on behalf of the defendants is that it does not appear that these goods were bought "so as to show that the buyer relies on the seller's skill or judgment."

Let us take it by steps. We have not had elaborate evidence as to the inception of the relation of buyer and seller between these parties because, as a matter of fact, people do not, when they want a milk supply, enter into an elaborate negotiation with the vendor of the milk. We begin the discussion here with a practice already established of the plaintiff's family dealing with the defendants. The result of that was that the milk supply for the household consumption was procured from the defendants. That, of course, involves a contract, and a contract for the supply of food to be consumed—that is, milk. What are the circumstances under which that contract was made? As to the purpose for which the goods were required, I do not suppose that anybody in his senses would question for a moment that the purpose for which the milk was bought by the family was for consumption as an article of food. It would have been absurd to call evidence on that point, because it is assumed by every person that the milk supply of a household is for the purpose of human consumption—there can be no doubt about that. I think that it did not require any evidence to prove that first essential point—namely, the particular purpose for which the goods were required. I think we may assume fairly that the jury, without any special direction on the matter, were able to arrive, and must have arrived, at the conclusion that this milk was bought for the purpose of being consumed by the family as food.

With reference to the particular circumstances showing that the buyer relied on the seller's skill or judgment, if any seller ever did inform the mind of his buyer in the most elaborate and particular manner of his particular and special care and skill as a vendor, held out to the buyer as a special inducement to deal with that particular vendor, the Aylesbury Dairy Co. have done so. Here is their book, interlarded so that by no accident may the buyer pass over their laudatory comments upon their skill and diligence and special knowledge in the matter of milk. There is, first of all, a pink page on which they print, "Milk in relation to tuberculosis and other diseases"; then on to the next page, "Medical inspection," describing all the precautions taken in every form; and then on other interpolated pink pages are printed, "Milk analysis" and information as to how the analyses are taken, "Bacteriological examinations," "Veterinary inspection," and how the cows and herds are inspected and dealt with. Then come statements as to the staff of analytical chemists, veterinary surgeons, and medical officers, and so on. The buyer cannot escape from being permeated with a sense of their extraordinary capacity for securing him against any possible mischief if he buys his milk from them. Under those circumstances milk was sold, not as a thing requiring elaborate description to find out what it is or what its functions are or for what purpose it is probably going to be used, not a thing general or ambiguous in itself requiring special information as to its possible use, but milk for the supply of the family, tendered by parties who have ornamented their book with all those extraordinary certificates. Under what circumstances can any buyer be said to buy in such a way as to show that he relies on the seller's skill and judgment unless it was in this case?

A The point mainly pressed upon us for the defendants was this. It was contended that a buyer could not be said to rely on the skill and judgment of a seller when that seller, given any amount of skill and judgment, could not find out the fault. That was the argument. That means this, that a seller cannot, even by selling for a particular purpose known to him, become liable for latent defects unless he goes further and makes a special contract. That argument has been pressed not B for the first time. It was employed before this Act was passed, when the law stood without an Act of Parliament consolidating and crystallising it. But the law seems to me to be just the same now under the statute as it was in the old days of common law. That particular point has been specifically dealt with in a case of the very greatest authority in the Court of Appeal, *Randall* v. *Newson* (1), where the considered judgment of the court, consisting of KELLY, C.B., MELLISH, C BRETT, and AMPHLETT, L.JJ., was delivered by BRETT, L.J., and he deals with this very point. The question was whether the sale, made under such circumstances, that is to say, where a buyer points out the particular purpose for which he wants a thing, and it is sold under those circumstances, does or does not include a warranty against defects that could not be discovered by reasonable care and skill. BRETT, L.J., said (2 Q.B.D. at p. 105):

D

> "Is it an absolute warranty [it was a carriage pole in that case] that the pole shall be reasonably fit for the purpose, or is it only partially to that effect, limited to defects which might be discovered by care and skill?"

That really is the defendants' point. This is what BRETT, L.J., said about it, after elaborately going through the authorities up to that point (ibid. at p. 109):

E

> "If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained F if the contract were accurately drawn out. And if that be the governing principle there is no place in it for the suggested limitation."

The suggested limitation is limitation to such defects as could be discovered by reasonable care and skill BRETT, L.J., continued (ibid.):

> "If the article or commodity offered or delivered does not in fact answer the G description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable. And accordingly there is no suggestion of any such limitation in any of the judgments in cases relating to contracts of purchase and sale."

That appears to me to be a conclusive authority on that part of the case.

I may refer shortly to what was referred to in the judgment of this court in H *Preist* v. *Last* (2), that a good deal of difficulty and some confusion arises where the consideration has arisen whether the article is sold for a particular purpose or not. When the article is one capable of being used for an indefinite number of purposes some difficulty does arise as to what passed at the time of the contract so as to point to one specific purpose out of a possible many. But in the case of an article which, as very often happens, in its own description carries with it I a limitation to a particular purpose, all that field of discussion as to what possible purpose it might have been intended for under the circumstances is cut out of the discussion, and we are relieved from any difficulty in the matter. In this case we begin with a purchase of milk, and when we get to that we have excluded the nine hundred and ninety-nine other things to which a particular commodity might be applied, because the commodity in itself carries with it a special limitation to the purposes of food. Of course, it is quite obvious that the obligation of the seller of food must stand in a different position from that of the seller of an article which may or may not be, according to the special circumstances of the

case, used for a particular object. All the difficulty has gone when once we get, A
in the description of the article itself, the nature of it. That principle was applied
in *Preist* v. *Last* (2). There the article was described in the very name of the
article itself, "a hot water bottle," to be used for the purpose of a hot water
bottle. That was the principle on which the case was decided. That same
principle applies to this case also. It is made perfectly clear that this milk was
sold for a special purpose, and was sold by persons who claimed and received B
the confidence for which they asked in these advertisements as to their special
skill and knowledge. Therefore, it seems to me quite clear there is no legal
difficulty whatever in upholding this verdict.

Now we come to the question of fact. Of course, what I have been saying about
the law assumes that the consequences complained of followed from the consump-
tion of the milk. Was there, or was there not, evidence sufficient to justify the C
jury in coming to that conclusion? It seems to me that there was abundant
evidence.

Counsel for the defendants suggests that the learned judge misdirected the
jury, and that therefore the trial must be taken to be unsatisfactory. It is now
a well-established rule, established by law, that even if a judge does misdirect a
jury, yet, if having all the facts explained to us, we are clearly of opinion that the D
misdirection, if there was one, was not such as to really have affected the trial,
or have rendered it the least probable that the result would be any different if the
direction were complete and the case were tried again. Under those circum-
stances we should not be justified in sending the case down for a new trial.
Counsel for the defendants complained, and I think with justice, although I do
not think it really has much bearing upon the result of this case, that the learned E
judge made some remarks about the Aylesbury Dairy Co. which really have no
relation to the actual point in discussion in this case. I must say, with the
greatest possible respect for the learned judge, that I think it was unfortunate
he did make those observations. We have had the summing-up read to us and
a great part of the evidence, and it does not seem to me there is a shadow of
foundation for making any imputation whatever upon the Aylesbury Dairy Co. in F
respect of any misrepresentation made by them in bearing the name "Aylesbury
Dairy Co." I think those observations of the learned judge were unfortunate,
but when I come to deal with the question in this case it does not seem to me
that they could have had any real effect upon the view which the jury took upon
the actual facts of the case. The fact of the learned judge deprecating the user
of the name "Aylesbury Dairy" by this company had nothing really to do with G
the bringing about of the jury's verdict in this matter.

Then the defendants questioned to some extent the learned judge's ruling as to
the law. The learned judge did say specifically that where a person sells an
article of food he must be taken to warrant that it is fit for food. I do not know
that, as a broad proposition, I should quarrel with that myself at all. The com-
plaint is not so much that that is wrong, as that it is not a specific direction as to H
the special points of the section with which we are dealing. It might have been
desirable that the learned judge should have addressed himself in more detail to
that section. But what has that to do with what we have here to decide? Unless
we felt sure that the absence of special direction as to that section could have had
some material effect on this verdict we ought not to interfere. When we come
to analyse the circumstances under which this sale was made the facts stare us I
in the face. The jury did not want their attention directed to the circumstances
under which one bought and the other sold; and the purposes for which they
bought and sold were really clear without discussion. They cannot be disputed.
All the salient facts upon which the law imposes a liability in the case of a contract
of sale were out of dispute. There really was not any inference of fact to be drawn
from them. They speak for themselves. It would have been a waste of time to
invite a special finding of the jury upon the matter, and it seems to me we should
be wrong, having those facts clear and undisputed before us so far as the legal

matter is concerned, if we quarrelled with or tried to refine upon the actual direction which the learned judge has given upon that point of law. Therefore, with the greatest possible deference and respect for the learned judge, I think that his direction is capable of improvement in point of law if it were a matter upon which the issue really depended. I think that in this case we should be applying a pedantic standard, if by reason of any technical inaccuracies in his direction we were to send this case down again for a new trial, and in my judgment therefore this appeal fails.

MATHEW, L.J.—I am of the same opinion. The construction of s. 14 appears to me with reference to this case to be entirely clear. The provisions are:

> "Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required . . ."

That is the first part of the section. What is the meaning of that? It is said here for the plaintiff that the particular purpose for which the goods were required was conveyed by implication. The milk here was to be used in the ordinary way for the purpose of consumption, and was supplied for that purpose, and it is impossible to entertain a moment's doubt that the purpose for which the purchase was made was by implication clearly conveyed to the seller. The section goes on:

> "Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment . . ."

Skill is quite sufficient for this purpose. In the ordinary course milk is supplied without an inspection. It is delivered by the seller to the buyer's house, so that there is no suggestion that any judgment can be exercised by the buyer in respect of that which is delivered. Was there evidence that the buyer reasonably relied on the skill of the sellers? Every effort has been made on the part of the sellers to give assurance to the buyer that their skill can be relied upon. Every precaution has been taken, which could reasonably be taken, to secure that the article delivered should be free from adulteration and contamination. Under those circumstances, it seems to me that the terms of the section are applicable to this case, and that disposes of the point of law in favour of the plaintiff.

I do not propose to go through what my Lord has already dwelt upon, except to say that I entirely agree with him for the reasons he has given. But I do wish to add to my agreement with him that I regret the expressions used in the course of the summing-up which were calculated to injure the reputation and position of the Aylesbury Dairy Co. There is no reason whatever to doubt upon this evidence that the Aylesbury Dairy Co. had done what they had always undertaken to do—that is, imposed conditions upon the farmer from whom the milk was obtained, which it was to be hoped he would observe, and in respect of which he would be responsible if he did not observe them. But everybody knows that where there is a large amount of milk, and the milk is drawn from different parts of the country, it is quite impossible for the vendor to secure that the instructions he has given to, and the conditions he has made with, the farmer will be observed. I regret, for the same reason, that the use of the word "Aylesbury" is complained of by the learned judge. With the greatest deference to him, I fail entirely to accept his view of the matter, and I desire to express my view that I do not agree in the application which has been made of it. This has been a great misfortune to the Aylesbury Co., but I am bound to say they have come well out of the inquiry.

COZENS-HARDY, L.J.—I am of the same opinion, and I do not desire to add anything to what has been said by the Master of the Rolls and MATHEW, L.J.

Appeal dismissed.

Solicitors: *Harries, Wilkinson & Raikes*; *Skipper & Tucker.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

A

POOLE *v.* NATIONAL BANK OF CHINA, LTD.

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord Robertson and Lord Atkinson), February 28, March 4, May 28, 1907]

[Reported [1907] A.C. 229; 76 L.J.Ch. 458; 96 L.T. 889; 23 T.L.R. 567; 51 Sol. Jo. 513; 14 Mans. 218] B

Company—Capital—Reduction—Reduction without proof that capital lost or not represented by assets—Need for reduction to be fair among shareholders and potential shareholders.

The power of reducing capital conferred on companies limited by shares is perfectly general, and the court has jurisdiction to entertain a petition for a reduction without proof that the capital which the company proposes to cancel is lost or not represented by available assets. The jurisdiction exists whenever the company seeking reduction has duly passed a special resolution to that effect, and the court should consent to such reduction if fair and equitable as between the different classes of shareholders and not detrimental to the interests of those members of the public who might be induced to become shareholders of the company. C D

British and American Trustee and Finance Corpn. v. *Couper* (1), [1894] A.C. 399 followed.

Re Anglo-French Exploration Co. (2), [1902] 2 Ch. 845 considered.

Notes. Provisions for the reduction of capital of a company are now contained in the Companies Act, 1948, ss. 66 et seq. (3 HALSBURY'S STATUTES (2nd Edn.) 515 et seq.) E

Applied: *Re Jewish Colonial Trust (Juedische Colonialbank)*, [1908] 2 Ch. 287; *Re Meux's Brewery Co., Ltd. and Reduced*, [1918–19] All E.R.Rep. 1192; *Ex parte Westburn Sugar Refineries, Ltd.*, [1951] All E.R. 881. Referred to: *Re De La Rue*, [1911] 2 Ch. 361; *Caldwell* v. *Caldwell*, [1916] W.N. 70; *Carruth* v. *Imperial Chemical Industries, Ltd.*, [1937] All E.R. 422. F

As to confirmation by the court of reduction of capital of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 156 et seq.; and for cases see 9 DIGEST (Repl.) 150 et seq.

Cases referred to:

(1) *British and American Trustee and Finance Corpn.* v. *Couper*, [1894] A.C. 399; 63 L.J.Ch. 425; 70 L.T. 882; 42 W.R. 652; 10 T.L.R. 415; 1 Mans. 256; 6 R. 146, H.L.; 9 Digest (Repl.) 151, *883*. G

(2) *Re Anglo-French Exploration Co.*, [1902] 2 Ch. 845; 71 L.J.Ch. 800; 51 W.R. 8; 18 T.L.R. 750; 46 Sol. Jo. 700; 9 Mans. 432; 9 Digest (Repl.) 157, *912*.

(3) *Re Barrow Hæmatite Steel Co.*, [1900] 2 Ch. 846; 69 L.J.Ch. 869; 83 L.T. 397; 16 T.L.R. 569; affirmed, [1901] 2 Ch. 746; 71 L.J.Ch. 15; 85 L.T. 493; 50 W.R. 71; 18 T.L.R. 9; 46 Sol. Jo. 28; 9 Mans. 35, C.A.; 9 Digest (Repl.) 170, *1038*. H

Also referred to in argument:

Re Hoare & Co., Ltd. and Reduced, [1904] 2 Ch. 208; 73 L.J.Ch. 601; 91 L.T. 115; 20 T.L.R. 581; 53 W.R. 51; 48 Sol. Jo. 559; 11 Mans. 307, C.A.; 9 Digest (Repl.) 156, *908*.

Bannatyne v. *Direct Spanish Telegraph Co.* (1886), 34 Ch.D. 287; 56 L.J.Ch. 107; 55 L.T. 716; 35 W.R. 125; 3 T.L.R. 104, C.A.; 9 Digest (Repl.) 151, *886*. I

Re Floating Dock of St. Thomas, [1895] 1 Ch. 691; 64 L.J.Ch. 361; 43 W.R. 344; 39 Sol. Jo. 284; 13 R. 491; 9 Digest (Repl.) 149, *873*.

Re London and New York Investment Corpn., [1895] 2 Ch. 860; 64 L.J.Ch. 729; 73 L.T. 280; 44 W.R. 137; 2 Mans. 541; 13 R. 749; 9 Digest (Repl.) 156, *911*.

Appeal from an order of the Court of Appeal (VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.), affirming a decision of FARWELL, J., granting the prayer of the

petition of the respondent company to obtain confirmation of a special resolution reducing its capital from £1,000,000 divided into 750 shares of £1 each (founders' shares) and 99,925 shares of £10 each (ordinary shares) to £699,475 divided into 99,925 shares of £7 each. Such reduction was to be effected by writing off the whole amount paid or credited as paid on each of the 750 shares of £1 each and cancelling those shares, and by writing off £3 per share, part of the sum of £8 per share, which had been paid or credited as paid on the 40,453 shares of £10 each which had been issued, and by reducing each of the 99,925 shares of £10 each to a share of £7. The appellants were together holders of forty-four founders' shares of the company and opposed the petition.

The company was incorporated in 1891 as a company limited by shares under the Companies Acts, 1862 to 1890, by the registration of a memorandum, accompanied by articles of association. The objects for which the company was established were

> "to establish and carry on the business of commercial trading and commission agents and of bankers and financial agents in the United Kingdom of Great Britain and Ireland, China, Japan, Borneo, the Empire of India, the British colonies, and other British dependencies in the East, America, and the Philippine Islands, and elsewhere, as might from time to time be determined, and other ancillary objects contained in the memorandum of association."

The company's funds, with the exception of the Chinese Government gold bonds, hereinafter mentioned, were represented by dollars. The value of the dollar had for some years previous to 1902 been falling, and on the hearing of the petition FARWELL, J., was of opinion that he might fairly take the value of the dollar at 1s. 8d. as likely to be permanent, but the appellants contended that such was not the true result of the evidence, nor in accordance with fact. The company stated its financial position at Dec. 31, 1903, and alleged that the retention of a reserve fund of at least £11,674 was necessary to support the credit of the company as a bank and to meet contingencies. The appellants did not admit that such retention was necessary, and stated that in any case the founders' share capital could not be written off until the whole of the reserve fund had been exhausted. By a special resolution of the company duly passed and confirmed at extraordinary general meetings held on Sept. 3 and Sept. 24, 1904, this proposal was accepted. A resolution was passed to the same effect at a separate meeting of the holders of the ordinary shares held on Sept. 3, 1904. No meeting of the holders of the founders' shares of the company was held pursuant to art. 17 of the articles of association. The reduction proposed to be effected did not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital.

Eve, K.C., *Jenkins*, K.C., and *Whinney* for the appellants.
Upjohn, K.C., and *A. R. Kirby* for the company.

Their Lordships took time for consideration.

May 28, 1907. The following opinions were read.

LORD LOREBURN, L.C.—In this appeal your Lordships are asked to refuse your sanction to a resolution for the reduction of its capital which has been passed by the National Bank of China. The appellants represent a very small proportion of the holders of founders' shares. But if this resolution is in fact unfair, even a few opponents will prevail. The only question is whether it is unfair, for the contention that it contravenes a bargain contained in the memorandum and articles of association cannot be made good; and it is no part of the business of a court of justice to determine the wisdom of a course adopted by a company in the management of its own affairs. I can see nothing that ought to induce your Lordships to interfere with the conclusion arrived at by FARWELL, J., and by the Court of Appeal, and I am the more inclined to agree with them by the consideration that the appellants made no specific proposal in either of the courts

below, though they maintained here that the scheme for reduction might have been so modified as to preserve their interest without thwarting the policy of the company. The conduct of an opposing minority is not without its significance in considering such questions as are now before the House. Nor is it an indifferent matter from the same point of view that the appellants deferred their appeal to this House to the very last day, while the resolution sanctioned by the court was in full operation, and shares presumably changing hands on the footing of its validity. Apart, however, from these latter considerations, I think that this appeal should be dismissed.

LORD MACNAGHTEN.—I quite agree with my noble and learned friend on the Woolsack that this appeal must be dismissed. I venture to add a few observations, because there seems to be a growing tendency to narrow and restrict the power of reducing capital conferred by the Companies Act, 1867, on companies limited by shares. That tendency is apparent, I think, in the judgment of the Court of Appeal in the present case, and particularly in the addition with which that court has made to the order pronounced by FARWELL, J. The power conferred by the Act of 1867 is perfectly general. Any restriction upon it not authorised by the Act of 1867 or the Act of 1877 is calculated, I think, to lead to inconvenience and expense, and to hamper and embarrass companies in the conduct of their domestic affairs.

The subject of a reduction of capital was very fully considered by this House in 1894 in *British and American Trustee and Finance Corpn.* v. *Couper* (1). In that case LORD HERSCHELL, L.C., after referring to the Acts of 1867 and 1877, said ([1894] A.C. at p. 403):

> "It will be observed that neither of these statutes prescribes the manner in which the reduction of capital is to be effected. Nor is there any limitation of the power of the court to confirm the reduction, except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured."

Later on, in dealing with the case before the House, he says (ibid. at p. 406):

> "The interests of creditors are not involved, and I think that it was the policy of the legislature to intrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and, if so, how it should be carried into effect."

By way of caution he adds this observation (ibid.):

> "There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinised by the court, and that no such scheme ought to be confirmed unless the court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the court has no power to sanction it."

LORD WATSON takes the same view. His words are these (ibid. at p. 408):

> "Apart from the interest of creditors, the question whether each member shall have his share proportionately reduced, or whether some members shall retain their shares unreduced, the shares of others being extinguished upon their receiving a just equivalent, is a purely domestic matter; and it might be greatly for the advantage of the company that the latter alternative should be adopted."

Speaking for myself, I see no reason to alter or modify what I said in that case. I said (ibid. at pp. 411, 412):

> "Creditors are protected by express provisions. Their consent must be procured or their claims must be satisfied. The public, the shareholder, and every

A class of shareholders individually and collectively, are protected by the necessary publicity of the proceedings and by the discretion which is intrusted to the court. Until confirmed by the court the proposed reduction is not to take effect, though all the creditors have been satisfied. When it is confirmed the memorandum is to be altered in the prescribed manner, and the company, as it were, makes a new departure. With these safeguards, which certainly are B not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reduction may set free."

Such being the views expressed in this House, without any dissent or qualification, I was surprised to hear it argued by the learned counsel for the appellants C that the court has no jurisdiction to entertain a petition for the reduction of capital, unless it be proved that the capital which the company proposes to cancel is lost or unrepresented by available assets. No doubt some countenance for that proposition may be found, even in cases which have occurred since the decision of this House in *British and American Trustee and Finance Corpn.* v. *Couper* (1). In *Barrow Hæmatite Steel Co.* (3), where the scheme proposed was obviously D unfair to the preference shareholders and the petition was very properly dismissed, there are some expressions in the judgment of the learned judge who decided the case which, taken apart from the context, may seem to appear to support that contention. The decision of BUCKLEY, J., in *Re Anglo-French Exploration Co.* (2) goes even further. His language, if correctly reported, seems to imply that because the Act of 1877 specifies certain cases and declares that the power conferred by E the Act of 1867 "includes" those specified, it is to be inferred that in all other cases the jurisdiction of the court is excluded. If that is the meaning of what the learned judge said, with all respect I am unable to agree with his view. The condition that gives jurisdiction is not proof of loss of capital or proof that capital is unrepresented by available assets, or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has F duly passed a special resolution to that effect. In the present case creditors are not concerned at all. The reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. The only questions, therefore, to be considered are these: (i) Ought the court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the G company; and (ii) is the reduction fair and equitable as between the different classes of shareholders?

The directors gave the shareholders the fullest information as to the reasons for the reduction and the causes which led them to propose it. All this is explained in the petition. It has not been suggested that the proposed reduction is open to any objection on public grounds. The question, therefore, must be this: Is it H fair as between different classes of shareholders? The only objection put forward is made on the part of an insignificant number of holders of founders' shares. There are two individuals who hold five founders' shares each, and there is a public company holding thirty-four founders' shares. The directors, in their circular to the shareholders, stated that these shares were of no commercial value. That is not denied. It is proposed to pay the dissentient shareholders I the par value of their shares out of profits, and to extinguish the founders' shares because their continued existence would render it difficult, if not impossible, for the company to raise further capital. The dissentient shareholders do not demand, and never have demanded, better pecuniary terms, but they insist on retaining their holdings, which in all reasonable probability can never bring any profit to them, and may be detrimental to the company. I think that FARWELL, J., was quite right in disregarding their opposition. The learned judges of the Court of Appeal did not dissent from his view, but there was some expression of doubt and hesitation.

There were two other points raised before the Court of Appeal which the court evidently thought of some importance. Although the order of FARWELL, J., was affirmed, the learned judges of the Court of Appeal do not seem to have been quite satisfied that the reduction proposed was in all respects proper, because they doubted whether it was exactly commensurate with the loss actually proved. Is that material in such a case as this, when the interests of the public are not concerned? So far as loss is actually proved the case is one of those cases specially mentioned in the Act of 1877. So far as the reduction goes beyond the actual loss it is within the general power conferred by the Act of 1867. I can see no objection to it if it is a prudent and businesslike measure, not unfair to any shareholder and not detrimental to the public.

There was another point which the Court of Appeal took into consideration, rather unnecessarily as I venture to think. The company had established a fund out of surplus profits which they called "profit reserve fund." Part of it the company had resolved to use for the purpose of making good loss of capital. The rest, some £11,000, they proposed to retain. The petition states that the retention of a reserve fund of at least the amount proposed to be retained was necessary to support the credit of the company as a bank. I must say that I should have thought that some reserve was an obvious necessity. It was, of course, quite proper for the petitioners to state all the circumstances of the case frankly and fully, but still this was a purely domestic matter altogether outside the province of the court. The Court of Appeal was not quite satisfied about the propriety of retaining in hand any part of the reserve fund. But the proposal was allowed to pass on the company giving an undertaking, which is embodied in the order, that no part of the sum retained out of the profit reserve fund should be applied otherwise than for capital purposes. As the company offered this undertaking I do not propose to your Lordships that it should be omitted, though I do not quite understand what the undertaking means or how long it is intended to last. But I must say, speaking for myself, that I do not think that this addition to the order ought to be treated as a precedent in any other case. With these observations I concur in the motion which has been proposed. The appeal must be dismissed with costs.

LORD ROBERTSON and **LORD ATKINSON** concurred.

Appeal dismissed.

Solicitors: *Slaughter & May*; *Paines, Blyth & Huxtable.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

OPPENHEIMER *v.* FRAZER AND WYATT

[Court of Appeal (Sir Gorell Barnes, P., Fletcher Moulton and Kennedy, L.JJ.), March 21, 22, 23, 25, 1907]

[Reported [1907] 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 3; 23 T.L.R. 410; 51 Sol. Jo. 373; 12 Com. Cas. 147, 280]

Agent—Mercantile agent—Goods entrusted to mercantile agent for sale—Re-sale—Good faith of "person taking under the disposition"—Burden of proof—Sale to partnership—One partner acting in bad faith—Invalidation of sale—"Consent" of owner to agent's possession—Goods obtained by agent by larceny by a trick—Factors Act, 1889 (52 & 53 *Vict.*, *c.* 45), *s.* 2 (1).

By the Factors Act, 1889 (1 Halsbury's Statutes (2nd Edn.) 29), s. 2 (1):

"Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same: provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

One S. obtained from the plaintiff, a diamond merchant, a quantity of diamonds, saying that he had customers for the stones. He did not, however, offer the diamonds to those customers, but handed them to the defendant B. who took them to the defendants F. & W., a firm of diamond merchants, asking them to buy the diamonds on joint account with him. To this F. & W. agreed, and in their books debited B. with half the purchase price, later crediting him with half the profit on the sale of the stones. In an action in which the plaintiff claimed the return of the diamonds and damages for their detention the jury found that S. obtained the diamonds from the plaintiff by larceny by a trick, that B. did not act in good faith, but that F. & W. did so act.

Held: there was evidence to support the findings of the jury; the proviso to s. 2 (1) of the Factors Act, 1889, cast on the party seeking to take advantage of the section the burden of proving that he had acted in good faith; the defendants B., and F. & W., who were "the persons taking under the disposition" within the proviso, were partners in the transaction, or, if not partners in the strict sense of the term, co-adventurers, and, therefore, B. having acted in bad faith, it could not be said that the partners or co-adventurers had acted in good faith, and so F. & W. were not entitled to the protection afforded by s. 2 (1) and the plaintiff was entitled to judgment in the action.

Per Curiam: "Consent of the owner" within the meaning of s. 2 (1) meant what the law recognised as consent, and if goods were obtained by a mercantile agent by larceny by a trick they were not in his possession "with the consent of the owner" so as to render valid any disposition of the goods made by him.

Notes. Considered: *Whitehorn Bros.* v. *Davison*, [1908–10] All E.R.Rep. 885; *Mehta* v. *Sutton* (1913), 108 L.T. 214; *Folkes* v. *King*, [1922] All E.R.Rep. 658; *Lake* v. *Simmons*, [1926] 2 K.B. 51; *Buller & Co.* v. *T. J. Brooks, Ltd.*, [1930] All E.R.Rep. 534; *London Jewellers* v. *Attenborough*, [1934] All E.R.Rep. 270; *Du Jardin* v. *Beadman Bros., Ltd.*, [1952] 2 All E.R. 160. Referred to: *Oppenheimer* v. *Attenborough*, [1908] 1 K.B. 221; *Heap* v. *Motorists' Advisory Agency*, [1922] All E.R.Rep. 251; *Lowther* v. *Harris*, [1926] All E.R.Rep. 352; *Staffs Motor Guarantee, Ltd.* v. *British Wagon Co.*, [1934] All E.R.Rep. 322; *Pearson* v. *Rose and Young, Ltd.*, [1950] 2 All E.R. 1027.

As to mercantile agents, see 1 HALSBURY'S LAWS (3rd Edn.) 151, 161 note, 214, 215; and for cases see 1 DIGEST (Repl.) 327, 362–365, 383 et seq., 494.

Cases referred to:

(1) *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q.B. 643; 68 L.J.Q.B. 515; 80 L.T. 269; 47 W.R. 422; 15 T.L.R. 247; 43 Sol. Jo. 331; 8 Asp.M.L.C. 517; 4 Com. Cas. 168, C.A.; 39 Digest 519, *1352*.

(2) *Baines* v. *Swainson* (1863), 4 B. & S. 270; 2 New Rep. 357; 32 L.J.Q.B. 281; 8 L.T. 536; 11 W.R. 945; 122 E.R. 460; 1 Digest (Repl.) 383, *493*.

(3) *Sheppard* (*Shephard*) v. *Union Bank of London* (1862), 7 H. & N. 661; 31 L.J.Ex. 154; 5 L.T. 757; 8 Jur.N.S. 265; 10 W.R. 299; 158 E.R. 635; 1 Digest (Repl.) 312, *19*.

(4) *Cole* v. *North Western Bank* (1875), L.R. 10 C.P. 354; 44 L.J.C.P. 233; 32 L.T. 733, Ex. Ch.; 1 Digest (Repl.) 385, *501*.

(5) *R.* v. *Buckmaster* (1887), 20 Q.B.D. 182; 57 L.J.M.C. 25; 57 L.T. 720; 52 J.P. 358; 36 W.R. 701; 4 T.L.R. 149; 16 Cox, C.C. 339, C.C.R.; 15 Digest (Repl.) 1037, *10,195*.

(6) *London Financial Association* v. *Kelk* (1884), 26 Ch.D. 107; 53 L.J.Ch. 1025; 50 L.T. 492; 36 Digest (Repl.) 436, *97*.

Also referred to in argument:

Reid v. *Hollinshead* (1825), 4 B. & C. 867; 7 Dow. & Ry.K.B. 444; 107 E.R. 1281; 36 Digest (Repl.) 431, *62*.

Kingsford v. *Merry* (1856), 1 H. & N. 503; 26 L.J.Ex. 83; 28 L.T.O.S. 236; 3 Jur.N.S. 68; 5 W.R. 151; 156 E.R. 1299, Ex. Ch.; 37 Digest 18, *146*.

Hardman v. *Booth* (1863), 1 H. & C. 803; 1 New Rep. 240; 32 L.J.Ex. 105; 7 L.T. 638; 9 Jur.N.S. 81; 11 W.R. 239; 158 E.R. 1107; 36 Digest (Repl.) 446, *179*.

Meyer v. *Sharpe* (1813), 5 Taunt. 74; 128 E.R. 614; 36 Digest (Repl.) 440, *122*.

R. v. *Harvey* (1787), 1 Leach, 467; 2 East, P.C. 669; 15 Digest (Repl.) 1045, *10, 291*.

R. v. *Parkes* (1794), 2 Leach, 614; 2 East, P.C. 671; 15 Digest (Repl.) 1045, 10, *291*.

R. v. *Adams* (1812), Russ. & R. 225, C.C.R.; 15 Digest (Repl.) 1045, *10,285*.

R. v. *Nicholson, Jones and Chappel* (1794), 2 East, P.C. 669; 2 Leach, 610; 15 Digest (Repl.) 1046, *10,307*.

Application by the plaintiff for judgment or a new trial in an action tried before CHANNELL, J., with a jury and cross-application by the defendant Broadhurst.

Sir Robert Finlay, K.C., Rawlinson, K.C., Harry Dobb and *E. Dunkels* for the plaintiff.

Hamilton, K.C., and *Norman Craig* for defendants, Frazer and Wyatt.

Colam and *Moresby* for defendant, Broadhurst.

Cur. adv. vult.

Mar. 25, 1907. The following judgments were read.

SIR GORELL BARNES, P.—There are two motions in this case. One is by the plaintiff, by way of appeal from the judgment of CHANNELL, J., after the trial before him with a jury, asking for judgment against Messrs. Frazer and Wyatt, or for a new trial. There is no cross-motion by Messrs. Frazer and Wyatt, but it is said that under the rules no cross-motion is strictly necessary, and, even if it were, we thought that the matter, so far as it required a cross-motion, should be treated as if a motion had been made if such were required. The other motion is by Broadhurst (a co-defendant with Messrs. Frazer and Wyatt), against whom judgment was given, asking for a new trial or for judgment. The action was originally brought against Frazer and Wyatt only, but by an order of Nov. 23, 1906, Broadhurst was added as a defendant.

The facts which it is necessary to state are not lengthy. The plaintiff brought his action to recover from the defendants five parcels of diamonds, or damages for their detention, and the defendants, to state it shortly, relied upon the provisions of the Factors Act, 1889. The plaintiff was a diamond merchant, and (to use a neutral term) handed these five parcels of diamonds to one Schwabacher, a diamond broker, who stated that he had customers for them, mentioning the names of two well-known firms of diamond brokers. Schwabacher does not appear to have offered the diamonds to either of these firms, but he handed them to Broadhurst, who thereupon took them to the defendants, Frazer and Wyatt, who were diamond merchants. I am going to state the evidence shortly in a moment, but it appears that Broadhurst explained to them that he came from Schwabacher, asked them to purchase the diamonds, and said that, if they would do so, he wished to purchase on joint account with them. Frazer and Wyatt agreed to do this, and paid by cheques in favour of Schwabacher, who rendered invoices. They appear to have debited Broadhurst in their books with half the purchase money, and credited him with half the profits when the diamonds were sold. That is a sufficient outline of the facts to enable one to appreciate the findings of the jury. The findings of the jury were that Schwabacher obtained the goods by larceny by a trick, that Frazer and Wyatt acted in good faith, and that Broadhurst did not act in good faith. CHANNELL, J., upon further consideration adjudged that the plaintiff do recover against the defendant Broadhurst £3,467 19s. 10d. and costs, and that judgment be entered for the defendants Frazer and Wyatt, with costs of their defence.

To appreciate the points which have been argued before us, I think that it is necessary to state, not at any great length, but with a little accuracy, what took place between the plaintiff and Schwabacher, and between Schwabacher and Broadhurst, and also, so far as is material, between Broadhurst and Frazer and Wyatt. The plaintiff said:

> "Schwabacher told me he had certain buyers, and he mentioned the name of Pinto Leite and Nephew, who were shippers to South America, and Edward Keller, who was a diamond merchant. These firms were both well-known brokers, very wealthy firms. He told me he wanted the diamonds for these two firms, and if I would have the proper goods these firms would buy exclusively from me, and buy in large quantities. Q: Pinto Leite and Edward Keller?—A.: Yes. Q. Are those names well known in the trade?—A.: Very well known. Q.: And stand well?—A.: Yes. Q.: Very high?—A.: Yes."

Then comes a very important question:

> "Q.: Did you after that from time to time let him have parcels of diamonds to deal with?—A.: Yes."

Further on the plaintiff says:

> "Whenever he (Schwabacher) received diamonds, he received instructions to show them to these people alone, and no one else. He either came back reporting a sale or, in many instances, he came back with an offer, going through the farce of bringing a seal—that is, the parcel sealed up, with the lesser price written on it." Q.: As you told us, Schwabacher from time to time reported as to some parcels that he had under seal in that way?—A.: Yes. Q.: Is it or is it not usual to give a commission note to the brokers when you give out the diamonds, stating the price?—A.: It is usually done and I always do it. Q.: Was there anything in Schwabacher's mode of dealing with you that led you to think he was dealing in any other than the ordinary way of dealing with himself?—A.: Nothing whatever. I had absolutely no reason for mistrusting him. Q.: During the period I have mentioned I think your transactions with Schwabacher ran into a considerable sum?—A.: Yes, my books will show that they ran to between £30,000 and £40,000."

In reply to a question whether on Oct. 11 certain circumstances came to his knowledge as to Schwabacher's dealing with these goods, the plaintiff answered "Yes." A

That substantially shows sufficiently for my purpose how Schwabacher came to have the goods. He appears to have had a commission note which passed between him and the plaintiff, and afterwards there was an invoice purporting to show what he had sold the goods for, although I think, if I remember rightly, it contains no mention of the name of the person to whom he had sold the goods. I now come to the evidence of the defendant Broadhurst. B

"Q.: Will you tell us what happened between you and Schwabacher when he gave you the parcel [i.e., the first parcel in question]?—A.: He told me these goods were part of those which he had under loan and bought in cheap times and he asked me if I was prepared to buy them, which I was not, on my own account, and I said if he would give them to me I would show them to some clients of mine and see what I could do. I took them round to Frazer and Wyatt and suggested that we should buy them on joint account, that I could afford to take half of them, but not the whole. They said, Yes, they would be quite willing to do it with me. They made an offer for the goods which I submitted to Schwabacher, and which he refused. Q.: Just tell us what you did say.—A.: That these were part of some goods that he had under loan and he sent them to me to buy. I told him I could not take them myself; my judgment was not sufficient to take them on my own account, but I would try to sell them to clients of mine or get them to go in shares with me. Q.: I am asking you what you told Frazer and Wyatt?—A.: That is what I told them. Q.: Was anything said about cash?—A.: Yes, Schwabacher said he would have to have cash for the goods." C D E

Further on he said that he bought these five parcels of goods, on all the transactions, on joint account with Frazer and Wyatt, and he was asked why it was that with the exception of the entry on Oct. 10, none of the others appears debited to Schwabacher in any way. Mr. Frazer's evidence as to how he dealt with Broadhurst is as follows. F

"Q.: About Sept. 28 did Mr. Broadhurst call upon you with a parcel of diamonds?—A.: Yes. Q.: And was that the parcel which you ultimately bought from Schwabacher?—A.: Yes. Q.: This was the first transaction you had with Schwabacher?—A.: Yes. Q.: On what terms were the diamonds offered to you?—A.: Mr. Broadhurst asked me to buy them on joint account with him. Q.: Was anything said about cash or credit terms?—A.: Yes, they were to be bought for cash. Q.: Did you make inquiries of him about the diamonds?—A.: Yes. I asked him from whom he received them, and he told me they came from Mr. Simon Schwabacher. I asked him if he personally knew the standing of Mr. Simon Schwabacher, and he said, yes, he had known him for years and that he was a perfectly honest straightforward man. Q.: Was anything said about the price at which they were on offer?—A.: Yes, they were to be bought cheaply because Mr. Simon Schwabacher had raised money on these, I believe, and certain other parcels and he wanted to clear off the loan and realise the difference in price." G H

Further on he says that the second offer was accepted. Then: I

"Q.: Did you get a receipted invoice sent to you from Schwabacher for £461 8s. 2d., and did your firm of Frazer and Wyatt pay for them on Sept. 28 with your cheque and get a receipt on the invoice?—A.: That is so. Q.: Is that the invoice? [handing same to witness]—A.: Yes, that is it. Q.: You said Mr. Broadhurst asked you to do this business on joint account? —A.: Yes. Q.: Did you agree?—A.: We did. Q.: Having paid for the diamonds with your own cheque, what is the next step with regard to Broadhurst?—A.: I debited Broadhurst with half the amount I paid to Schwabacher

A on account of his half share in the transaction. Q.: You debited him with half of the cheque you had paid?—A.: Yes. Q.: Did you dispose of these stones eventually?—A.: Mr. Broadhurst bought our half share back. Q.: He bought you out?—A.: He bought us out. Q.: They were handed over to him, and he was debited with the other half?—A.: Yes."

B The evidence goes on to show that the same course was pursued with regard to the other parcels of diamonds.

That being the position of things, the defendants would have been liable to the plaintiff at common law, but if they could bring themselves within the provisions of the Factors Act, 1889, they might perhaps get a good title to the goods. The section of the Act which the defendants relied upon is s. 2 (1). It has not been C disputed that Schwabacher was a "mercantile agent" within that section, nor has it been disputed that he dealt with the goods "in the ordinary course of business of a mercantile agent." But in support of the plaintiff's application two points were taken. The first was that Schwabacher was not in possession of the diamonds "with the consent of the owner" within the meaning of the subsection. The second was that the finding by the jury that Broadhurst did not act in good faith is a finding D which, upon the evidence, affects the position of Messrs. Frazer and Wyatt in these transactions, although they were found by the jury to have acted in good faith, so as to disentitle them from taking advantage of the provisions of the subsection. Broadhurst says that there was no evidence to support the verdict of the jury on this point, and also that the verdict was against the weight of the evidence.

I propose to deal with the second point first, because, in my view, if this finding E stands, the whole case is disposed of. I confess that I have not been able to follow the conclusion of CHANNELL, J., who said that he thought that Frazer and Wyatt got the legal and beneficial title to half the goods, though Broadhurst's title to the other half he thought was not good. It seems to me to be quite clear upon the evidence that Frazer and Wyatt and Broadhurst were partners in the transactions which related to the five parcels of diamonds in question. That co-partnership was F "the person taking under the disposition" within the meaning of the subsection. As Frazer and Wyatt were partners with Broadhurst, they must in this matter stand or fall with him. His want of good faith was a matter which affected them as partners with him in the joint transaction, and, therefore, although the finding of the jury that they personally acted in good faith may be quite right, yet the finding that their partner did not act in good faith in this transaction appears to me to G operate in a way which defeats the right of Messrs. Frazer and Wyatt to assert that they acted in good faith within the meaning of the subsection.

It follows that the next point to consider is whether or not the verdict as to Broadhurst not acting in good faith ought to stand. Referring for a moment to the subsection, I think it is clear that the proviso casts upon the person who seeks to take advantage of the statute the burden of bringing himself within it. It is obvious H that that must be so when one starts with the view that, according to the common law, the defendants could have no title to these goods. It is to be noticed that the proviso has two parts: first, the person taking under the disposition must act in good faith, and, secondly, he must not at the time of the disposition have notice that the person making the disposition has not authority to make the same. A person who seeks to avail himself of the provisions of this subsection has, therefore, I a considerable burden put on him. I do not propose to go in detail through all the evidence, but I may say that I have read it with the greatest possible care, because the matter is of considerable importance to the person whose conduct is in question, and bearing in mind the difficulty of the defendant in discharging the onus that is on him of showing that he acted in good faith. [His Lordship dealt with the evidence.] The conclusion that I have come to—I need not say not without considerable care and anxiety—is that this was purely a question of fact for the jury, and I cannot say that there was no evidence to warrant them in finding the verdict which they did.

That being so, all the discussion which took place in court as to the effect of the finding as to larceny by trick, is to my mind, unnecessary to consider. But in case our decision should be challenged, I think it would be better to say how the matter strikes me. The finding was that Schwabacher obtained the goods by larceny by a trick. The plaintiff says that that finding negatives consent by the owner of the goods. The defendants say that there may be a consent to the possession, within the subsection, even though there was a larceny. I confess that I feel great difficulty, after considering the last words addressed by CHANNELL, J., to the jury, in deciding whether the verdict can be interpreted in any other way than by saying that the jury found that the diamonds were stolen—leaving out all questions of trickery—by an ordinary common law larceny. In the old definitions of larceny it was said that the taking of the goods must be invito domino, or "without the consent of the owner." If that is the meaning of the finding it is exceedingly difficult to see how it could be said that there was any "consent" of the plaintiff; and, if so, there ought to be a new trial on this point. But CHANNELL, J., may have been right in the view which he took of the meaning of the verdict, and, broadly speaking, I agree with his judgment upon this part of the case, if the finding is not to be read strictly in the way I should read it. I think his view was that the offence was either larceny by a bailee or obtaining goods by false pretences because the goods were originally placed by the plaintiff in the hands of Schwabacher. It is unnecessary, in my opinion, to enter into a long investigation of the numerous cases cited to us as to the exact meaning of larceny by a trick. The cases are conflicting. Some of them were decided at a time when larceny was a capital offence, and when there was probably some tendency not to convict, but to keep the facts just outside a capital offence. There have been cases since that time when there was not that reason for so acting, and in which to prevent the prisoner from escaping punishment he has been found guilty upon facts about which there might be some differences of opinion. There is undoubtedly a considerable conflict about it. But I do not think it necessary to go into that. For the reasons that I have already given in connection with the finding that Broadhurst acted in bad faith, I think that judgment must go against all the defendants. The plaintiff's appeal must be allowed, and the cross-appeal by Broadhurst dismissed.

FLETCHER MOULTON, L.J.—This is an action for the conversion by the defendants of certain diamonds belonging to the plaintiff. The facts of the case, to which I shall not refer in detail, make it abundantly clear that at common law there would be no defence to the action, and in fact no contention to the contrary has ever been put forward by the defendants. The defence is that the defendants are entitled to the protection of s. 2 of the Factors Act, 1889, which protects a person who in good faith has taken goods from a mercantile agent who is in possession of those goods with the consent of the owner.

In my opinion, the defence has broken down on two points. In the first place, the goods were not, according to the verdict of the jury, in the possession of the mercantile agent with the consent of the owner; and in the second place, by the verdict of the jury, the person taking the goods did not act in good faith and without notice. For convenience I will take the latter of those two points first, because the president of the court has done so in his judgment. Section 2 of the Factors Act, 1889, gives protection to the person purchasing the goods under the disposition provided that he acts in good faith and has not at the time of the disposition notice that the person making the disposition has not authority to make the same. In applying those provisions to the circumstances of the present case, one has, first, to ask who is here "the person taking under the disposition"? In my opinion, it is incontestable here that the person taking under the disposition was the co-adventureship consisting of Messrs. Frazer and Wyatt and Mr. Broadhurst. In this co-adventure, in which Messrs. Frazer and Wyatt took a one-half share—Mr. Broadhurst taking the other half—they were as much partners with him as

A they were partners with each other in their ordinary business. If two people purchase together jointly in the way that the defendants did here, and one of them acts in bad faith, it cannot be said that the co-adventurers have acted in good faith. Notice to one is notice to both. That is, in my opinion, so clear that I shall not dwell upon it. The only question in this part of the case that requires examination is whether the jury were entitled to find a verdict that Mr. Broadhurst did not act B in good faith. [HIS LORDSHIP referred to the evidence, and came to the conclusion that the jury had abundant ground for finding that Mr. Broadhurst did not act in good faith.]

As the case is an important one, involving an important point of law, I feel bound to deal also with the other question that has been raised here, which turns on the words in the earlier part of s. 2 (1)

C

> "where a mercantile agent has, with the consent of the owner, been in possession of goods."

The question is: Was Schwabacher in possession of these diamonds "with the consent of the owner"? The Court of Appeal has in a considered judgment dealt with this point in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (1), and I D cannot more clearly express my view of the intention of the legislature in enacting the provisions of this section of the Factors Act, 1889, than by reading a passage from the judgment of COLLINS, L.J., in that case. He said ([1899] 1 Q.B. at p. 658):

> "The Factors Act, 1889, which is thus referred to, and as to part of it in E terms again enacted, in the Sale of Goods Act, is the last of a series of statutes whereby the legislature has gradually enlarged the powers of persons in the actual possession of goods or documents of title, but without property therein, to pass the property in the goods to bona fide purchasers. Possession of, not property in, the thing disposed of is the cardinal fact. From the point of view of the bona fide purchaser the ostensible authority based on the fact of pos- F session is the same whether there is property in the thing, or authority to deal with it, in the person in possession at the time of the disposition or not. But the legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods, or documents, or otherwise got possession of them without the consent of the owner."

G That seems to me to be a most judicial appreciation of the effect of the section. The legislature has given very wide, but not absolute, protection to the man who purchases from a person who is in the position of a mercantile agent, and I confess that I do not feel moved very much by counsel dwelling upon the importance of upholding or giving a wide interpretation to the Factors Act, because the operation of selling or pledging goods by a person in the position of a mercantile agent is of H such great importance in the business of the country that I do not think that the court in construing an Act of this kind has the right to lean either way. It is the legislature that has to decide how wide the protection is to be and where the protection is to stop. It tells us in the language of the section what its decision is, and we have only loyally to administer that decision. The legislature stops short I at the point where the goods are in possession of the mercantile agent without the consent of the owner. In that case the section gives no protection.

In *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (1) this court had to consider the meaning of that provision, and it decided—if I might put it in one phrase—that "consent" in this section means "consent in the eye of the law," and that anything that negatives consent in the eyes of the court negatives it in connection with s. 2 of the Factors Act, 1889. I do not see how they could have come to any other conclusion. "Consent" means there that which the law recognises as consent. COLLINS, L.J., in his judgment which I have referred to goes on

thus (ibid. at pp. 658, 659): A

"But if a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent, has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent (see *Baines* v. *Swainson* (2); *Sheppard* v. *Union Bank of London* (3), he is able to pass a good title to a bona fide purchaser. However fraudulent the person B in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser. See the distinction between possession obtained by a trick and possession under a contract voidable for fraud noted by BLACKBURN, J., in *Cole* v. *North Western Bank* (4). These C considerations seem to me decisive of the crucial question in this case. By sending the bill of lading and the bill of exchange direct to Pintscher, Steinmann & Co. constituted him bailee of both of them. It seems impossible to say that there was any wrongful taking by Pintscher. There was no trick which would have negatived a bailment."

The lord justice then points out that when you come to a state of things which in D the eye of the law negatives consent, the protection given by s. 2, which depends on consent, ceases. That expresses my own opinion. It has been urged upon us that the passage I have read from the judgment of COLLINS, L.J., was a mere obiter dictum, because the court decided in that case that there was no larceny by a trick, and that the buyer was protected by s. 2. But it seems to me that the dictum was not obiter. It was necessary for the purpose of deciding the case that the court E should interpret s. 2 and that it should delimit accurately the scope of the word "consent," and, therefore, this interpretation of the Act is part of the ratio decidendi. It is an intelligible and consistent interpretation of the words of the section, which the court adopts as the basis of its decision. Of course, nothing was necessary, in one sense, for the decision of the court except to say that the facts of the case did, or did not, bring it within s. 2; but the judgments of courts would be F of but little assistance to their successors if they did not give the reasons why they came to the conclusions which are the only necessary conclusions to come to.

The reasons given in the case I have referred to establish that if the goods are obtained by the mercantile agent by larceny by a trick they are not in his possession "with the consent of the owner" within s. 2. I do not see how the court could come to any other conclusion. A mercantile agent is capable of stealing just as G much as any other man, and if he has stolen goods there is no question that he holds them without the consent of the owner. One of the recognised methods of stealing according to the common law has been singled out from other types of larceny, and has been called "larceny by a trick," but in the eye of the law it is pure larceny. The indictment is exactly the same as for a larceny which has been done secretly. The accused must be found to have taken the goods or he is not H guilty of larceny. The consequence is that the law recognises the existence of a form of larceny in which there is an apparent delivery of possession by the owner which is obtained from him animo furandi, under such circumstances that the law recognises that it does not carry with it the consent of the owner, and, therefore, the goods were really stolen. When the facts come within that description there is in law no consent of the owner of the goods, and the person who gets the goods is I not in possession with the consent of the owner.

Neither of my brethren have any doubt whatever as to that being the law, but there arises here a question which deserves careful consideration—viz., whether the verdict of the jury that Schwabacher obtained these diamonds by larceny by a trick is supported by the evidence. Here we need an accurate definition of what is meant by "larceny by a trick," and I do not think that on this point we are on uncertain ground. The industry of counsel for Broadhurst has brought to our notice many cases, some of them I think imperfectly reported, which show that the infinite

A variety of forms that fraud and deceit take in different circumstances give rise to delicate and difficult questions whether the circumstances of a particular case bring it on one side or the other of a particular line. But there is a case which seems to me well reported and clear, which enables us to draw the line with regard to what constitutes larceny by a trick with sufficient accuracy to take away all doubt in the present case. I refer to *R.* v. *Buckmaster* (5), and especially to the judgment of B MANISTY, J., a very careful judge. He said (20 Q.B.D. at p. 187):

> "On the authorities it is settled law that if the owner of goods or money parts with the possession, and does not intend to pass the property, and there is at the time an intention to steal in the mind of the person who obtains the possession, that is evidence of larceny. Here the prosecutor never intended to C part with the property, and the prisoner had the animus furandi at the time when he received the possession."

I will not enter into the question whether that definition of MANISTY, J., is too narrow. Some of the betting cases lead me to think that, at all events when the article which is stolen is money, the definition is too narrow, and that even an intention on the part of the owner to part with the property may not prevent the D case being truly one of larceny by a trick. But I will take the narrower definition, as to which I can find no doubt expressed—viz., where the owner is induced by a trick arranged by a person animo furandi to part with the possession of the goods, so that the person who gets the goods steals them then and there, that is larceny by a trick.

Here I think that there was evidence on which the jury might properly find all E these essentials, and I think that the issue was placed before them very accurately and carefully by the learned judge who presided at the trial. Of course these cases shade one into another, and the three kindred offences of larceny by a trick, obtaining goods by false pretences, and larceny by a bailee are often almost indistinguishable on the facts of particular cases; but the crucial fact in order to establish larceny by a trick, which is simple larceny, is that there should have been the intention at F the moment, then and there, to steal. The proceedings of Schwabacher appear to me to be a trick which is pure stealing, and I have not the least doubt that the jury felt that Schwabacher had no idea whatever of any bailment or of any accepting of the diamonds for the purpose of using them as a mercantile agent, but that what he did was in his intention at the moment just as pure and absolute stealing as if he had picked up the diamonds from the desk, and put them in his pocket behind the G plaintiff's back. I read the verdict of the jury as being that Schwabacher was guilty of stealing the diamonds, and I think it was a reasonable verdict, and that it ought to stand. Therefore, in my opinion, there was no "consent of the owner" within s. 2; and on both grounds the plaintiff's appeal must be allowed.

H **KENNEDY, L.J.**—I have come to the same conclusion, and taking in order, first, the question of the appeal as against Frazer and Wyatt, it seems to me sufficient to say that they, in my opinion, cannot avoid the consequences of the joint transaction (to use that expression as the fairest) with Broadhurst, by which they came into possession of the property. I will say something presently as to whether they were legal partners, but they were, in the ordinary sense of the word, partners in that transaction. They were co-adventurers; they obtained, jointly, I the possession of the goods under an agreement; and it seems to me that, if the verdict against Broadhurst stands, judgment on that ground must go against Frazer and Wyatt. I have not lost sight of the argument that the transaction between the three defendants is what we are told is called in mercantile usage "a joint account transaction," not a partnership. It is true that there may be joint account transactions which do not amount to partnerships in point of law. For instance, in the well-known case of *London Financial Association* v. *Kelk* (6) it was expressly held by BACON, V.-C., that the entering into an agreement to purchase on joint account between three parties did not constitute a partnership between them. Speaking for

myself, I am inclined to think and I hold that the facts before us constitute what is, even in point of law, a partnership. But it is not necessary to decide that there was a partnership in the strict sense of the term. The relation which existed between these persons under which they got possession of the goods was, in my opinion, such that, if Broadhurst was guilty of bad faith, or if he has not brought himself within the protective terms of s. 2 of the Factors Act, 1889, the other two must be under precisely the same liability towards the plaintiff that Broadhurst is under. It is one transaction, not two. There is a joint transaction between Messrs. Frazer and Wyatt and the man against whom the jury have found their verdict. With regard to that verdict against Broadhurst, I will not discuss the evidence. I think the finding of the jury upon the facts before them was one which reasonable men might fairly come to, and that it cannot be interfered with.

I have very few words to say upon the other point. I do not wish to lay down any proposition of law more positively than is necessary for making my meaning clear. In my view, it is clear that the "consent" in s. 2 of the Factors Act, 1889, must mean that which the law would regard as "consent." I think it is clear that if a person has stolen goods from another he cannot be said to be in possession of the goods with the consent of that person. "Larceny by a trick" is not an expression of law. It is merely a convenient—perhaps this case shows it is an inconvenient—expression used to distinguish a stealing as to which it cannot be shown that the owner was ignorant of the taking from one in which it can be shown that the taking was clandestine. But it is none the less a stealing. The law is well put in POLLOCK AND WRIGHT ON POSSESSION IN THE COMMON LAW, at p. 101:

> "If the receiver, knowing the giver's real intention, intends to obtain the thing in order to convert it to his own use, there is no real consent and no transfer of rightful possession."

With regard to the abstract question with which FLETCHER MOULTON, L.J., has dealt at some length, I would with great respect say this, that I do not think the matter is very clear upon the cases. There is great difficulty sometimes in a criminal court in distinguishing exactly larceny by a trick and obtaining goods by false pretences, or as to the extent to which it may be necessary in all cases to show that there was no intention to pass the property. I think myself that I should respectfully differ from my brother CHANNELL if he thought that there could be any consent by the owner if the goods were obtained from him by larceny by a trick. On the other hand, I think that I should in substance agree with a great deal that he said on this point—namely, that unless the facts show an actual larceny in obtaining the goods no mere fraud in obtaining them or dealing with them as a bailee in a felonious way would prevent the protection of the section being given to those who may deal with the person who has obtained the goods by fraud or by the misappropriation, which is larceny by a bailee. In my opinion, so far as it is necessary to pronounce an opinion with regard to his ruling on the law, I think that if there is what is called "larceny by a trick" (which is larceny at common law, merely describing a particular operation) there was no consent, and therefore, if the evidence justified that finding, there ought to be judgment against the defendants. I think I should have great doubt in saying that such a finding of fact could in this case be justified, but it is not necessary to come to any definite conclusion on that point. There is sufficient evidence in the case, as I agree with my learned brethren, to make the appeal of the plaintiff succeed, and to defeat the cross-appeal by Broadhurst.

Appeal allowed.

Solicitors: *Julius A. White*; *F. Kimber Bull & Duncan*; *Baker, Freeman & Co.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

STOCKDALE *v.* ASCHERBERG

[Court of Appeal (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.), February 8, 1904]

B [Reported [1904] 1 K.B. 447; 73 L.J.K.B. 206; 90 L.T. 111; 68 J.P. 241; 52 W.R. 289; 20 T.L.R. 235; 48 Sol. Jo. 244; 2 L.G.R. 529]

Landlord and Tenant—"Outgoings"—Claim against tenant—Agreement by tenant to pay "all outgoings payable in respect of the premises"—Reconstruction of drains by order of local authority—Lease for short term at low rent—
C *Liability of tenant.*

By an agreement in writing the plaintiff let a house to the defendant for a term of three years, and then from year to year, at a yearly rent of £55, the defendant agreeing to pay "all outgoings of every description for the time being payable in respect of the premises." During the term of three years the plaintiff expended £83 in reconstructing the drainage of the house in compliance with
D a notice from the local authority.

Held: that the defendant was liable to pay the expense of doing this work as an "outgoing" within the meaning of the agreement, although the term was short and the rent small.

Notes. Applied: *Greaves* v. *Whitmarsh, Watson & Co., Ltd.*, [1906] 2 K.B. 340. Distinguished: *Howe* v. *Botwood*, [1911–13] All E.R.Rep. 779; *Henman* v.
E *Berliner*, [1918] 2 K.B. 236. Applied: *Lowther* v. *Clifford*, [1926] All E.R.Rep. 290. Considered: *Smith* v. *Smith*, [1939] All E.R. 312. Referred to: *Syed Omar Bin Shaikh Alkaff* v. *Syed Abdulrahman Bin Shaikh Alkaff*, [1941] 2 All E.R. 346.

As to the effect of a covenant to pay outgoings, see 23 Halsbury's Laws (3rd Edn.) 613–617; and for cases see 31 Digest (Repl.) 332–336.

F Cases referred to in argument:

Foulger v. *Harding*, [1902] 1 K.B. 700; 71 L.J.K.B. 499; 86 L.T. 488; 50 W.R. 417; 18 T.L.R. 422; 46 Sol. Jo. 356, C.A.; 31 Digest (Repl.) 330, *4644*.

Valpy v. *St. Leonard's Wharf Co., Ltd.* (1903), 67 J.P. 402; 1 L.G.R. 305; 31 Digest 331, *4654*.

Re Warriner, Brayshaw v. *Ninnis*, [1903] 2 Ch. 367; 72 L.J.Ch. 701; 88 L.T.
G 766; 67 J.P. 351; 19 T.L.R. 543; 1 L.G.R. 765; 31 Digest (Repl.) 330, *4645*.

Harris v. *Hickman*, [1904] 1 K.B. 13; 73 L.J.K.B. 31; 89 L.T. 722; 68 J.P. 65; 20 T.L.R. 18; 48 Sol. Jo. 69; 2 L.G.R. 1; 31 Digest (Repl.) 331, *4652*.

Batchelor v. *Bigger* (1889), 60 L.T. 416; 31 Digest (Repl.) 332, *4656*.

Appeal of the defendant from a decision of Wright, J., reported [1903] 1 K.B. 873, at the trial of the action without a jury.

H By an agreement in writing, dated Mar. 25, 1902, the plaintiff let to the defendant a house, 68, Brondesbury Villas, Kilburn, for a term of three years, and then from year to year until one of the parties should give to the other three calendar months' notice in writing, at the clear net yearly rent of £55, to be paid on the usual quarter days free from deductions except landlord's property tax. By this agreement the defendant agreed to pay "all taxes, rates, assessments,
J and outgoings of every description for the time being payable in respect of the premises as they become due, landlord's property tax only excepted."

The defendant also agreed to keep and leave the premises, including the fixtures, in as good condition as they were at the date of the agreement, reasonable wear and tear excepted, and to keep the gutters, stack-pipes, water-closets, and cisterns clean, and to keep in repair all sash-lines and internal pipes and taps. On Sept. 4, 1902, a notice was served upon the plaintiff by the Willesden Urban District Council, under the provisions of the Public Health Act. 1875, stating that a nuisance existed on the premises and requiring him to abate it, and for that purpose to take

up and relay throughout the premises the existing drains, which were defective. In compliance with that notice the plaintiff carried out the required work, and thereby incurred expense to the amount of £83. This action was brought to recover that sum of £83 from the defendant under the terms of the tenancy agreement. The action was tried before WRIGHT, J., without a jury, and the learned judge held that the defendant was liable to pay the amount claimed, as an "outgoing," under the terms of the agreement. The defendant appealed.

E. Foa for the defendant.
G. F. Hohler for the plaintiff.

SIR RICHARD HENN COLLINS, M.R.—Whatever sympathy we may feel for a tenant under an agreement like this, who is called upon to pay a sum which in fact he never anticipated that he would be liable to pay, yet the question is whether he is bound by the terms of his contract to accept that liability. It seems to me to be too clear for argument that it is now settled by the authorities that a covenant such as this does cover such a class of expense as this, which is rendered necessary by reason of the order of the local authority to do sanitary works. The order of the local authority in this case was that the owner should take up and relay the drainage throughout the premises. No doubt that was a very drastic order. But the defendant took premises the drainage of which was in point of fact defective, and it is, it seems to me, impossible at the present day to say that it cannot be in the contemplation of the parties to a contract of tenancy that the local authority may at some time during the term insist upon the execution of sanitary works upon the demised premises. We cannot say that this kind of expense was so clearly outside of the contemplation of the parties at the time of the agreement that it would be unreasonable to suppose that it was the intention of the parties that the terms of the agreement should cover such an expense. If a landlord and tenant come to an agreement in clear and express terms whereby the tenant accepts the obligation to pay "outgoings," the tenant will be liable to pay such expenses as this. It seems to me that to hold otherwise would be straining the language of the agreement, and introducing into the consideration an element, which it would be impossible to limit or analyse, as controlling the clear words used by the parties. In my opinion the judgment of the learned judge was correct, and this appeal fails.

ROMER, L.J.—I agree.

MATHEW, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Potter & Heath*; *Sharpe, Parker, Pritchard, Barham & Lawford.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

TREDWAY *v.* MACHIN

[Court of Appeal (Sir Richard Henn Collins, M.R., Stirling and Mathew, L.JJ.), July 29, 1904]

[Reported 91 L.T. 310; 53 W.R. 136; 20 T.L.R. 726; 48 Sol. Jo. 671]

Landlord and Tenant—Repair—Liability of landlord—Need for notice to landlord of want of repair—Injury to third party.

A landlord is not liable for personal injuries caused by the defective condition of the demised premises unless he has agreed to repair the premises and has received express notice of the want of repair.

Notes. The judgments in this case drew no distinction between an action for personal injuries by the tenant and one by the tenant's wife, and it is clear that at common law this action by the tenant's wife against the landlord could not have succeeded even if the landlord had had notice of the want of repair (see *Cavalier* v. *Pope*, [1906] A.C. 428, H.L.). However, by the Occupiers' Liability Act, 1957, s. 4 (1), where premises are occupied by any person under a tenancy which puts on the landlord an obligation to that person for the maintenance or repair of the premises, the landlord owes to all persons who or whose goods may from time to time be lawfully on the premises the "common duty of care," as defined by that Act. Under s. 4 (4), though, for the purposes of that section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises unless his default is such as to be actionable at the suit of the occupier. The decision in *Tredway* v. *Machin* has, therefore, apparently been reinstated, and an action for personal injuries by a tenant's wife against the landlord, if brought now, would only succeed if the landlord is under an obligation for the maintenance or repair of the premises and has had notice of the defect.

Considered: *Melles & Co.* v. *Holme*, [1918–19] All E.R.Rep. 271; *Murphy* v. *Hurly*, [1922] All E.R.Rep. 169. Distinguished: *Griffin* v. *Pillet* (1925), 70 Sol. Jo. 110. Referred to: *Bishop* v. *Consolidated London Properties, Ltd.*, [1933] All E.R.Rep. 963; *McCarrick* v. *Liverpool Corpn.*, [1946] 2 All E.R. 646.

As to a landlord's liability to persons injured on the demised premises, see 23 Halsbury's Laws (3rd Edn.) 572; as to the requirement of notice to landlord of want of repair, see ibid., 587. For cases see 31 Digest (Repl.) 382–384. For the Occupiers' Liability Act, 1957, see 37 Halsbury's Statutes (2nd Edn.) 832–840.

Cases referred to:

(1) *Hugall* v. *M'Lean* (1885), 53 L.T. 94; 33 W.R. 588; 1 T.L.R. 445, C.A.; 31 Digest (Repl.) 346, *4770*.

(2) *Broggi* v. *Robins* (1899), 15 T.L.R. 224, C.A.; 31 Digest (Repl.) 383, *5104*.

Also referred to in argument:

Makin v. *Watkinson* (1870), L.R. 6 Exch. 25; 40 L.J.Ex. 33; 23 L.T. 592; 19 W.R. 286; 31 Digest (Repl.) 346, *4768*.

Lane v. *Cox*, [1897] 1 Q.B. 415; 66 L.J.Q.B. 193; 76 L.T. 135; 45 W.R. 261; 13 T.L.R. 142; 41 Sol. Jo. 142, C.A.; 31 Digest (Repl.) 195, *3261*.

Application of the defendant for judgment or for a new trial on appeal from the verdict and judgment at the trial before Grantham, J., with a jury.

The plaintiff brought this action to recover from the defendant damages for personal injuries sustained by her through the breaking of the balcony of a house belonging to the defendant. In December, 1902, the defendant let the first floor of a house to the plaintiff's husband as weekly tenant, at the weekly rent of 10s., there being no written agreement between the parties. There was a balcony in front of the demised rooms, to which there was access from the rooms. The floor of the balcony was constructed of stone slabs, which were let into the wall, the surface of the slabs being covered with cement. In June, 1903, when the defendant was executing extensive repairs to the house under the supervision of the surveyor

of the superior landlord, his attention was called to some unevenness in the surface of the cement on the floor of the balcony. This was remedied, and all the repairs required by the surveyor were carried out. In August, 1903, while the plaintiff was standing on the balcony, owing to its defective condition one of the slabs broke off near the wall, and the plaintiff fell on to the steps below and was seriously injured. At the trial before GRANTHAM, J., with a jury, some evidence was given that the defendant had agreed with the plaintiff's husband to keep the demised premises in repair; but there was no evidence that any notice had been given to the defendant of the defective condition of the balcony which caused the accident. The jury found a verdict for the plaintiff for £150 damages, stating that they thought that if the landlord had caused all the cement to be removed from the floor of the balcony when the cement was being repaired, the defective condition of the slab would probably have been discovered. The learned judge directed judgment to be entered for the plaintiff for £150. The defendant appealed, asking for judgment or for a new trial.

A. J. Ashton and *W. G. Clay* for the defendant.
Cannot for the plaintiff.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal by the defendant from the verdict and judgment at the trial of an action brought against a landlord by the wife of his tenant. The plaintiff was injured by an accident. The accident happened in this way. The plaintiff's husband was the weekly tenant of the defendant of the first floor of a house; there was a balcony outside the demised rooms; and the plaintiff was injured by the giving way of the balcony while she was standing upon it. The question is whether the defendant is liable in damages in respect of the injury so caused to the plaintiff.

The law on the subject has been repeatedly laid down and stated. The landlord is not liable unless there is a contract by him to keep the premises in repair; and he is not liable even in that case unless he has had express notice of the want of repair. That rule rests upon the principle that the landlord is not the occupier of the premises, and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair. It has, therefore, been held that the naked obligation on the part of the landlord to repair is not broken unless notice has been given to him of the want of repair.

That being the law upon the point, I think that there was some evidence that the obligation to repair had been undertaken by the landlord. But that is not conclusive of the case. The result of the whole of the evidence is that it is clear that no one ever suspected that there was any defect at all in the balcony. Specific repairs were required to be done by the surveyor of the superior landlord, but this matter was not included. No defect in the balcony was in any way indicated. It was conclusively established by the evidence that no one at all had the faintest notion that there was any such defect in the balcony as that which caused it to fall. Therefore, there was no evidence of any notice having been given to the landlord that this defect required to be repaired. There is authority that evidence of means of knowledge on the part of the landlord is not sufficient, but that there must be express notice: *Hugall* v. *M'Lean* (1).

The jury thought that, when the landlord's attention was called to the small defect in the cement floor of the balcony, he ought to have removed all the cement and might then have discovered this defect. But that was, at most, only means of knowledge, which is not sufficient. Upon the undisputed facts of this case there was no evidence of any liability on the part of the landlord, and, therefore, the verdict and judgment must be set aside, and judgment be entered for the defendant.

STIRLING, L.J.—I am of the same opinion. The law applicable to this case is settled by *Broggi* v. *Robins* (2) in this court. In the judgment in that case, delivered by LORD RUSSELL, C.J., it is laid down that there must be, first, an agree-

ment to repair on the part of the landlord; and, secondly, that the landlord must have notice of the want of repair. I will assume that there was in the present case evidence of an agreement by the landlord to repair. The plaintiff, however, fails altogether upon the second point—that is, the showing that the landlord had notice of the want of repair. I think, therefore, that this action fails, and that the appeal must be allowed.

MATHEW, L.J.—I agree. I think that, upon the assumption that there was an agreement to repair on the part of the landlord, the plaintiff has failed to establish any liability on the part of the landlord. In June, 1903, the attention of the landlord was called to a defect in the balcony. What was that defect? It was merely a defect in the surface of the cement, and no one then suggested that there was anything wrong with the balcony structurally. In order to render the landlord liable it is necessary to show that notice was given to him of the want of repair. The jury thought that the landlord might have known of the defect; but that was mere assumption. There was no evidence of any notice to the landlord. I agree that judgment ought to be entered for the defendant.

Appeal allowed.

Solicitors: *Hedges & Davis*; *Judge & Priestley.*

[*Reported by* M. J. WILLIAMS, ESQ., *Barrister-at-Law.*]

Re VAN LAUN. Ex Parte CHATTERTON

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Vaughan Williams and Buckley, L.JJ.), March 15, 16, 1907]

[Reported [1907] 2 K.B. 23; 76 L.J.K.B. 644; 97 L.T. 69; 23 T.L.R. 384; 51 Sol. Jo. 344; 14 Mans. 91]

Bankruptcy—Proof—Particulars—Right of trustee to require—Solicitor's costs—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *Sched.* 2, *r.* 22.

The debtor was indebted to his solicitor for costs incurred in contentious business. Bills had been tendered, and the amount due had been agreed at £3,818. Shortly after this agreement the debtor gave his solicitor a mortgage to secure the £3,818 then due, and further advances or costs up to £6,000. Just before the bankruptcy the amount due for costs was agreed at £6,326, for which amount the solicitor tendered a proof. The trustee in bankruptcy required the solicitor to give the items and dates showing how that amount was made up, and to produce vouchers for all payments, and, on the refusal of the solicitor to do so, rejected the proof.

Held: as between the trustee and the solicitor, the trustee had a right to be satisfied that the proof represented a real debt, and for that purpose he was entitled to the information demanded.

Decision of BIGHAM, J., [1907] 1 K.B. 155, affirmed.

Notes. The Bankruptcy Act, 1883, Sched. II, r. 22, has been repealed. See now the Bankruptcy Act, 1914, Sched. II, r. 23, 2 HALSBURY'S STATUTES (2nd Edn.), 447.

Distinguished: *London and Westminster Bank* v. *Button* (1907), 51 Sol. Jo. 466. Considered: *Re Lupkovics, Ex parte The Trustee* v. *Freville*, [1954] 2 All E.R. 125.

Referred to: *Re Home and Colonial Insurance Co., Ltd.*, [1929] All E.R.Rep. 231; *Re Kay and Lovell Trustee* v. *Moore and Quaife*, [1941] 2 All E.R. 67.

As to proof of debts in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 464 et seq.; and for cases see 4 DIGEST (Repl.) 270 et seq.

Cases referred to in argument:

Re Lennox, Ex parte Lennox (1885), 16 Q.B.D. 315; 55 L.J.Q.B. 45; 54 L.T. 452; 34 W.R. 51; 2 T.L.R. 60; 2 Morr. 271, C.A.; 4 Digest (Repl.) 355, *3231*.

Re Flateau, Ex parte Scotch Whisky Distillers, Ltd. (1888), 22 Q.B.D. 83; 37 W.R. 42; 5 T.L.R. 5, C.A.; 4 Digest (Repl.) 354, *3219*.

Re Lewis, Ex parte Knight (1836), 1 Deac. 408; 2 Mont. & A. 545, Ct. of R.; 4 Digest (Repl.) 363, *3301*.

Scadding v. *Eyles* (1846), 9 Q.B. 858; 15 L.J.Q.B. 364; 7 L.T.O.S. 226; 10 Jur. 945; 115 E.R. 1504; 42 Digest 183, *1954*.

Laycock v. *Pickles* (1863), 4 B. & S. 497; 3 New Rep. 73; 33 L.J.Q.B. 43; 9 L.T. 378; 10 Jur.N.S. 336; 12 W.R. 76; 122 E.R. 546; 12 Digest (Repl.) 653, *5075*.

Turner v. *Willis*, [1905] 1 K.B. 468; 74 L.J.K.B. 365; 92 L.T. 412; 53 W.R. 348; 49 Sol. Jo. 351, D.C.; 42 Digest 137, *1329*.

Brooks v. *Bockett* (1847), 9 Q.B. 847; 16 L.J.Q.B. 178; 8 L.T.O.S. 466; 11 Jur. 284; 115 E.R. 1500; 42 Digest 137, *1327*.

Eicke v. *Nokes* (1829), Mood. & M. 303; 173 E.R. 1168, N.P.; 42 Digest 145, *1441*.

Re West, King and Adams, Ex parte Clough, [1892] 2 Q.B. 102; 61 L.J.Q.B. 639; 67 L.T. 57; 40 W.R. 644, D.C.; 5 Digest (Repl.) 691, *6070*.

Re Allingham (1886), 32 Ch.D. 36; 55 L.J.Ch. 800; 54 L.T. 905; 34 W.R. 619, C.A.; 4 Digest (Repl.) 562, *4958*.

Harris v. *Truman* (1882), 9 Q.B.D. 264; 51 L.J.Q.B. 338; 46 L.T. 844; 30 W.R. 533, C.A.; 5 Digest (Repl.) 684, *6028*.

Re Woods, Ex parte Ditton (1880), 13 Ch.D. 318; 42 L.T. 161; 28 W.R. 402, C.A.; 4 Digest (Repl.) 270, *2464*.

Appeal from a decision of BIGHAM, J., holding that, as between the solicitor of the bankrupt and the trustee in bankruptcy, the trustee had a right to go behind a mortgage executed by the bankrupt and settled accounts and to require the solicitor to give the items and dates showing how the amount of the solicitor's proof was made up and to produce the vouchers.

The facts are stated in the judgment of SIR HERBERT COZENS-HARDY, M.R.

J. A. Hamilton, K.C., and *G. A. Scott* for the creditor.

Hansell for the trustee in bankruptcy.

SIR HERBERT COZENS-HARDY, M.R.—I think this appeal must fail. There can be no reasonable doubt as to the accuracy of the reasons assigned by BIGHAM, J., for this portion of his judgment.

Mr. Chatterton acted as solicitor for the bankrupt, Van Laun, for a considerable period beginning in 1901, and continuing up to his bankruptcy. Large sums passed through Mr. Chatterton's hands. There is one item alone of £14,000, and on the other side of the account there are very large payments represented to have been made by Mr. Chatterton to persons who, for the present purpose, I assume to have been creditors of Mr. Van Laun. A solicitor's cash account was prepared, presented, and signed by Mr. Van Laun "as agreed." There are three other accounts of the same kind, but that one account is quite sufficient for the present purpose. Mr. Van Laun gave to his solicitor—or perhaps it is more accurate to say Mr. Chatterton, the solicitor, took from Mr. Van Laun—a mortgage containing a covenant to pay a sum which was then alleged to be due, and shown to be due, upon the cash account and "all future costs." It contains other provisions of a kind which

A it would be extremely difficult for a solicitor to support as against his client. The deed is a mortgage of property comprised in the schedule, including the greater part of Mr. Van Laun's assets, consisting of very large claims against the British government, the Russian government, director's fees, and almost everything else. Mr. Van Laun was, according to Mr. Chatterton's statement, furnished with certain draft bills of costs before the £6,000 was agreed to; no signed bills of costs, but B what are called draft bills of costs were shown to him. He seems to have been rather a casual sort of person, and said: "I do not want to see these bills of costs; take them back." I am not giving the actual language of the letter, but in substance it was this: "You may keep them because they may turn out to be useful hereafter." Bankruptcy intervened, and Mr. Chatterton brings in a proof for £7,352 11s. The trustee writes two letters asking in a most reasonable way for C particulars. "Tell me how you make out the items of the bills which you charge for costs," one of which had never been delivered, still less paid. Mr. Chatterton refused, and the trustee rejected the proof on grounds which seem to me to be obviously fair, reasonable, and right. He wrote:

> "I reject your claim on the following grounds: That you have failed to furD nish me with the further particulars of your claim as required by my letters to you dated respectively July 10 and 26, 1906, namely, as regards the sum of £6,326 15s. 10d. upon an account stated, by your failure to produce vouchers in support of the various payments alleged to have been made by you between Mar. 16, 1901, and June 30, 1905, and to supply details, with dates and items, of the following amounts included in the said stated account, namely."

E Then there are items of four bills of costs which come in round figures to more than £10,000—I think altogether £11,000. Then it goes on:

> "And by your failure to furnish me with details, with dates and items, making up the sum of £800 for fees for work and money expended as a solicitor for the bankrupt."

F There was an appeal to Bigham, J., on the ground that there was a covenant in the mortgage deed, and that the proof was simply on this covenant; that there was an account stated which would have bound Mr. Van Laun himself, and that, apart from the bankruptcy, all the bills except the last one had in fact been paid by being settled in the account stated; that more than twelve months had expired; and upon the existing materials it was said there were no special circumstances shown.

G In this case, there are special circumstances which must primarily be had regard to. In the first place there was the relation between the parties of solicitor and client, which, of course, is one of the most important fiduciary relations known to our law—a relation which renders it exceedingly difficult for Mr. Chatterton to rely upon the mortgage containing the clauses to which I have referred. Next there is this important proposition—that the position of a trustee in bankruptcy, with H reference to a person who submits himself to the jurisdiction in bankruptcy and comes in to prove, is not the same as, but in many respects very different from, that of the bankrupt himself. I cannot regard the demand by the trustee as being in the least an application by him under the terms of the Solicitors Act requiring delivery and taxation of the bills of cost. That is not at all what the application is. It is simply this—that the trustee says: "You are a person who comes in to I prove a debt. It is my duty to see that this bankrupt's assets are distributed amongst those who are justly, legally, and properly creditors of the estate. In order to enable me to do my duty, I ask you to furnish me with such information as will enable me to do that which I am told to do by r. 22 in the second schedule to the Act—to examine every proof and the grounds of the debt." That is all that the trustee has done here, and when we are asked to hold and asked to say that there is no authority hitherto for going behind a covenant of this kind, I cannot attach importance to that argument, because it is conceded that, if a judgment had been obtained upon the covenant, a long series of authorities show it is

competent and it is the duty of the Court of Bankruptcy to go behind the judgment, to open the judgment and to say: "That is the judgment, but the creditor can only prove for the amount which is justly and truly due upon it." I do not pause to lay importance upon it, but it is very remarkable that in this case a judgment was obtained by Mr. Chatterton against Mr. Van Laun upon this covenant and was afterwards set aside. I cannot believe that what I may call the judgment cases are anything more than illustrations of the principle that the court has a right and a duty to investigate the nature and the grounds of the debt.

It does not follow in the least by what I have said, and by the order which we propose to make in dismissing the appeal, that Mr. Chatterton will not be entitled hereafter to prove for these amounts. All that we now decide is that the trustee is entitled to say: "I will not admit your proof until you have given me reasonable means of satisfying myself as to whether the debt in respect of which you are proving is to any and what extent justifiable and reasonable." The propositions I have put are in effect identical with those which BIGHAM, J., laid down in the passage which I will read, though I have not put them in such terse and good language as BIGHAM, J. He said:

> "The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him. In the present case the trustee desires to satisfy himself that the claims for costs represent a real indebtedness. He can only do this by seeing and examining the bills. When he sees them it may be that he will think them fair and reasonable, and, if so, he will probably admit the proof. But until Mr. Chatterton furnishes him with the means of forming an opinion, I think the trustee cannot do otherwise than reject the proof."

I am of opinion that BIGHAM, J., was right, and that this appeal must be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I entirely concur.

BUCKLEY, L.J.—In this case the trustee rejected the proof upon the ground that Mr. Chatterton had refused, as was the fact, to supply dates and items of the agreed sums for costs mentioned in the account stated. The question is whether that was right or wrong. In my opinion, it was right, and I think it was right for the reasons given by BIGHAM, J., in the sentence which the Master of the Rolls has just read from his judgment. It is well settled that the court can inquire into the consideration for a judgment debt. A courageous argument has been addressed to us that if a debt has not resulted in a judgment it stands upon a more firm basis than if it has. I do not think it is true. Whether the creditor alleges that there has resulted and that he relies upon an account stated, or upon a covenant entered into by the debtor, or a judgment which he has obtained, the principle is exactly the same—that the trustee is not the judgment debtor; he is not the covenantor; he is not the person who has stated the accounts, but he is entitled to say: "It is my business to see that those who rank against this estate are persons who are really creditors of that estate." It is not necessary, if there be a judgment, to show fraud or collusion. It is sufficient, in the language of LORD ESHER, to show miscarriage of justice—that is to say, that for some good reason there ought not to have been a judgment. I think that exactly the same is true of an account stated or of a covenant.

It is true, as a general proposition, that the trustee takes the estate as he finds it, and, if the debtor before the bankruptcy has done acts which bind his assets, the trustee is bound by them. That is a general proposition, but I think that the

A trustee is entitled, whether there be account stated or covenant or judgment, to deal with the matter in the way which I will endeavour to express shortly thus: Suppose there were no account stated, no covenant, or no judgment, and that the creditor brought his action for the amount of the debt, the defendant in the action would be entitled to say to him: "Prove your case; vouch your payments; show me your books; give me such discovery as I, as defendant in the action, am entitled to B before you get judgment in the action," and in that sense he is entitled to say: "I do not say that your claim is fraudulent or collusive, but I will say that it rests with you to prove it. Satisfy me that it is right." Of course, that results in this —that the man must produce his books or vouch his payments, and must, in short, make out his case. I think the trustee is entitled in every case, whether there be an account stated, covenant, or judgment, to say to the creditor who comes into C the bankruptcy to prove: "Very well, you say you are a creditor; make out your case as if there was no account stated, or no covenant, or no judgment. Satisfy me that the amount which you say you are creditor for is right." That, of course, must be done reasonably. The question here is whether the creditor is entitled to say: "I still have my draft bills of costs; I have the means of satisfying you as to my cash accounts and as to the amount for which I have charged you, but D I say you have nothing to do with that, because here is a deed which contains a covenant." It appears to me that is not right. The whole ground of this appeal rests on the state of facts which I have first stated—that the creditor refused to supply dates and items of the agreed sums for costs in the account stated. In my opinion, he was not entitled so to refuse, and, when he did so refuse, the trustee was entitled to reject his proof. For these reasons I think the appeal fails, and E must be dismissed with costs.

Solicitors: *Chatterton & Sons*; *Spyer & Sons.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

F

Re DOVER COALFIELD EXTENSION, LTD.

G [COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), November 7, 1907]

[Reported [1908] 1 Ch. 65; 77 L.J.Ch. 94; 98 L.T. 31; 24 T.L.R. 52; 52 Sol. Jo. 43; 15 Mans. 51]

H *Company—Winding-up—Assets—Company holding shares of another company—Director of company holding shares appointed director of other company—Shares of company transferred to director to provide qualification—Liability of director to account for fees.*

D., a limited company, purchased shares in K., another company. Company K. appointed C., who was a director of company D., one of its own directors. I The directors of company K. were required to hold a certain number of shares as their qualification, and the necessary number of shares belonging to company D. were transferred into the name of C. to provide that qualification. C., as a director of company K., received the fees provided by the articles of association of company K. Company D. being wound-up, the liquidator claimed the sums received by C. for director's fees, as profits for which he was bound to account to company D.

Held: the director's fees received by C. were not profits derived from the use of the qualifying shares, but were payments for services rendered as a director

under a bargain between company K. and C., and, therefore, C. was entitled to retain the sums in question.

Decision of WARRINGTON, J., [1907] 2 Ch. 76, affirmed.

Notes. Considered: *Re Lewis, Lewis* v. *Lewis*, [1908–10] All E.R.Rep. 281. Distinguished: *Williams* v. *Barton*, [1927] All E.R.Rep. 751. Considered and Distinguished: *Re Macadam, Dallow* v. *Codd*, [1945] 2 All E.R. 664. Explained and Applied: *Re Gee, Wood* v. *Staples*, [1948] 1 All E.R. 498. Referred to: *Bath* v. *Standard Land Co.*, [1911] 1 Ch. 618.

As to remuneration of directors, see 6 HALSBURY'S LAWS (3rd Edn.) 289–293; and for cases see 9 DIGEST (Repl.) 476–485.

Cases referred to in argument:

Dean v. *MacDowell, Dean* v. *MacDowell* (1878), 8 Ch.D. 345; 47 L.J.Ch. 537; 38 L.T. 862; 42 J.P. 580; 26 W.R. 486, C.A.; 36 Digest (Repl.) 528, *917*.

Boston Deep Sea Fishing and Ice Co. v. *Ansell* (1888), 39 Ch.D. 339; 59 L.T. 345, C.A.; 9 Digest (Repl.) 87, *375*.

Appeal by the liquidator of the Dover Coalfield Extension, Ltd., from a decision of WARRINGTON, J., dismissing a misfeasance summons taken out against two directors of the company.

In June, 1901, the company purchased 5,105 shares in the Consolidated Kent Collieries Corporation, which were transferred into the names of the chairman and secretary of the company as trustees for the company. On Feb. 11, 1902, two directors of the company, W. J. Cousins and C. F. R. Fonrobert, were elected directors of the corporation, and it was common ground that they were so elected in order that they might look after the interests of the company in the affairs of the corporation. The articles of association of the corporation provided that the qualification of a director should be the holding of shares in the corporation of the nominal amount of £1,000, and that a director might act before acquiring his qualification. On Feb. 28, 1902, at a board meeting of the company, at which Cousins and Fonrobert were the only directors present (there being at the time one other director of the company), it was resolved that 1,000 of the 5,105 shares of the corporation belonging to the company should be transferred to Cousins to provide for his qualification as a director of the corporation, and that a further 1,000 should be transferred to Fonrobert to provide for his qualification. In pursuance of that resolution the shares were transferred to Cousins and Fonrobert, who executed a declaration of trust of them in favour of the company. Cousins and Fonrobert acted as directors of the corporation, and both continued to hold the shares thus acquired till February, 1903, when Cousins, who had in the meantime acquired the necessary qualification from another source, retransferred his 1,000 shares. The fact that the shares had been dealt with in this manner was communicated to the shareholders by a note on a balance-sheet issued in December, 1902, and to the general meeting of the company. On Mar. 31, 1903, the company was ordered to be wound-up, and an application was made by misfeasance summons by the liquidator of the company against Cousins and Fonrobert for a declaration that they were liable to contribute to the assets of the company the remuneration received by them for acting as directors of the corporation and for payment of the same to the liquidator. The summons was not served on Fonrobert, who was out of the country, and was, therefore, only heard against Cousins. WARRINGTON, J., was of opinion that the remuneration was not profit derived from the use of the qualification shares, but was payment for work done by Cousins as director of the corporation, which had been fixed by a fair bargain between him and the corporation, and he accordingly dismissed the application. The liquidator appealed.

E. C. Macnaghten, K.C., and *Martelli* for the liquidator.

Cave, K.C., and *E. G. Palmer* for Cousins.

Arnold Statham for creditors who had obtained leave to intervene in the liquidation.

SIR HERBERT COZENS-HARDY, M.R.—This is a very plain case. Certain shares in the corporation were held by the company. These shares were put with perfect propriety in the names of Cousins and another gentleman. That had been communicated to the company in general meeting in plain language, and even apart from that it seems to me to be a perfectly proper transaction, and indeed there was no suggestion of any impropriety in it. In that state of things these gentlemen could not claim the dividends arising from the shares standing in their names, but they were, by virtue of that circumstance, in a position of being eligible to act as directors of the corporation, and were entitled to remuneration for the services so rendered, not from the company, but from the corporation. The money was received, not by virtue of the shares, but by virtue of a separate contract with the corporation, and to hold that the mere fact that a director of a company holds his qualification shares as trustee of another company, renders him accountable to the second company for the director's fees which he earns would, in my opinion, be going further than either authority or principle justifies the court in going. The appeal must be dismissed.

FLETCHER MOULTON, L.J.—I am of the same opinion. Counsel for the liquidator have frankly stated that they make no complaint in respect of these shares being placed in the names of these directors, nor do I see how they could do so, because it was plainly stated to the company at the next general meeting that this had been done and no objection was made. Therefore, by no improper use of the shares these two gentlemen have become persons capable of performing the services of directors of another company, for which they got reward. I cannot see that they are trustees of the original company in respect of the wages which they thus receive.

FARWELL, L.J.—I agree. The claim is that because these directors hold their qualification shares as trustees for the Dover Co., therefore they are accountable to that company for money paid for work done and services rendered by them as directors of the corporation. They did the work; they are entitled to the money. The answer to the suggestion that they could not have earned the money unless they had been qualified to act as directors by shares belonging to the company is that they were requested by the company to become directors of the corporation.

Solicitors: *Paddison, Trevor & De la Chapelle*; *Pilgrim & Phillips*; *E. A. Fuller.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

A

KEITH *v.* TWENTIETH CENTURY CLUB, LTD.

[CHANCERY DIVISION (Buckley, J.), April 26, 27, 1904]

[Reported 73 L.J.Ch. 545; 90 L.T. 775; 52 W.R. 554; 20 T.L.R. 462; 48 Sol. Jo. 458]

B

Easement—Right of way—User—Grant to grantee and his lessees, sub-lessees, or tenant, or families or friends—Proprietary club—User by resident and non-resident members.

By a deed rights of user of an ornamental garden were granted to C.H.B., his heirs, executors, administrators, and assigns, and his or their lessees or sub-lessees or tenants (being occupiers for the time being) of houses immediately C contiguous or adjoining to the ornamental inclosure, and for his or their families or friends in his or their company or without. A limited company, having purchased certain of the houses and started a social and residential club authorised and allowed its members to use the garden.

Held: on the true construction of the deed the relation of the members to the club was that of customers, and not sub-lessees, tenants, or friends, and, D therefore, the company could not authorise such user.

Notes. Followed: *Re Ellenborough Park, Re Davies (Deceased), Powell* v. *Maddison*, [1955] 2 All E.R. 38.

As to benefits enjoyed with land sold, see 34 HALSBURY'S LAWS (3rd Edn.) 365–369; and for cases see 40 DIGEST (Repl.) 337 et seq.

E

Cases referred to in argument:

Watkins v. *Milton-next-Gravesend Overseers* (1868), L.R. 3 Q.B. 350; 18 L.T. 601; 32 J.P. 294; 16 W.R. 1059; 30 Digest (Repl.) 531, *1687*.

Kimber v. *Admans*, [1900] 1 Ch. 412; 69 L.J.Ch. 296; 82 L.T. 136; 48 W.R. 322; 16 T.L.R. 207; 44 Sol. Jo. 260, C.A.; 40 Digest (Repl.) 348, *2808*.

Stamper v. *Sunderland Overseers* (1868), L.R. 3 C.P. 388; 37 L.J.M.C. 137; 18 L.T. 682; 32 J.P. 439; 16 W.R. 1063; 38 Digest (Repl.) 605, *812*. F

Thompson v. *Ward*, *Ellis* v. *Burch* (1871), L.R. 6 C.P. 327; 1 Hop & Colt. 530, 537; 40 L.J.C.P. 169; 24 L.T. 679; 35 J.P. 582; 20 Digest 23, *130*.

Baxendale v. *North Lambeth Liberal and Radical Club, Ltd.*, [1902] 2 Ch. 427; 71 L.J.Ch. 806; 87 L.T. 161; 50 W.R. 650; 18 T.L.R. 700; 46 Sol. Jo. 616; 19 Digest (Repl.) 114, *703*.

Bridgewater Case, *Cook* v. *Humber* (1862), 11 C.B.N.S. 33; K. & G. 413; 31 L.J.C.P. 73; 5 L.T. 838; 26 J.P. 391; 8 Jur.N.S. 698; 10 W.R. 427; 142 E.R. 705; 20 Digest 15, *82*. G

Wood v. *Leadbitter* (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 9 Jur. 187; 153 E.R. 351; 30 Digest (Repl.) 543, *1771*.

Harris v. *Drewe* (1831), 2 B. & Ad. 164; 9 L.J.O.S.K.B. 200; 109 E.R. 1104; 19 Digest (Repl.) *500*, *3331*. H

Action for an injunction to restrain the use of a garden.

The plaintiffs were the owners in fee simple as to one and the occupiers as to others of certain houses, Nos. 22 and 23, Stanley Gardens, and Nos. 36, 37, 38, and 39, Kensington Park Gardens, situate at Notting Hill, in the county of London, and were entitled under a deed dated June 25, 1852, to certain rights over a certain I ornamental garden situate between the two rows of houses. They were also the committee of management of the garden. The defendants were an incorporated company registered in 1902 under the Joint Stock Companies Acts, under the name of the Twentieth Century Club, the nominal capital being £10,000, in 1,000 shares of £10 each, and the registered offices being at Nos. 26, 27, and 28, Stanley Gardens. Its objects were to provide, at a reasonable cost, a comfortable home, combined with the facilities of a high-class club, for ladies engaged in professional or other work in London. In 1902, shortly after their registration, the defendant company

purchased the fee simple of four houses, Nos. 26, 27, 28, and 29, Stanley Gardens, and afterwards acquired a lease of No. 25. The club, which was of a social character, governed by directors, who elected members and controlled its general affairs, contained eighty-eight single and twelve double bedrooms and also a suite of reception apartments, and was a proprietary club, imposing no liability on the members beyond the payment of the annual subscription of 10s. 6d., payable, in the first instance, on application for election, afterwards on May 1 in each year. Country and non-resident members, by paying an annual subscription of 10s. 6d., could avail themselves of the facilities of the club; they could also have the use of a bedroom if there was one vacant. Any member who wished to withdraw from the club or to vacate her apartment could do so by giving one week's notice to the honorary secretary in writing. Members could not give orders to or correct the servants, or interfere in any way with the management or organisation of the club. The members of the club were subject to the following byelaws:

"1. Payments for sleeping apartments and board are due and shall be paid weekly. 2. The cost of a furnished sleeping apartment, payable in advance, is 10s. 6d. per week. 13. The club entrance is closed at dusk. Members desiring to enter later than 11 p.m. shall obtain a latchkey (deposit 1s. 6d.) at the office to avoid the risk of being shut out. 15. The directors do not undertake to reserve any particular bedroom for a member if vacated during holidays, etc., unless paid for. 17. The directors reserve to themselves the right, notwithstanding anything stated or implied in the foregoing byelaws, to remove from the club register the name of any member whose room may be required for other use. In every such case a proportionate amount of the last annual subscription will be returned."

There were also regulations as to the uses which the members might make of their bedrooms; they might not bring candles into their bedrooms or use oil lamps or stoves for lighting or cooking purposes; they might not use sewing machines or play musical instruments, knock nails in the walls without permission, or smoke.

By an indenture dated June 25, 1852, Felix Ladbroke granted to Charles Henry Blake, his heirs, and assigns for ever all that piece or parcel of ground situate at Notting Hill (including the site of the houses afterwards built in Stanley Gardens) bounded on the north by Ladbroke Gardens Road, on the east by the Kensington Park Road, and on the south by the ornamental pleasure grounds laid out for the use of the houses in Kensington Park Gardens. And the indenture proceeded:

"And this indenture further witnesseth that for the consideration aforesaid he the said Felix Ladbroke doth hereby give, grant, and confirm to the said Charles Henry Blake, his heirs, executors, administrators, and assigns, and his or their lessees and sub-lessees or tenants (being occupiers for the time being) of the houses now in course of erection or at any time hereafter to be erected immediately contiguous and adjoining to the hereinafter mentioned ornamental inclosure or pleasure ground, and for his or their families and friends in his or their company or without, free use and right of ingress, egress, and regress at all times hereafter into, out of, and upon the said ornamental garden or pleasure ground delineated and described in the plan hereto annexed and coloured green. Together with all rights, privileges, advantages, and appurtenances whatsoever to the said free use and right of ingress, egress, and regress belonging or in anywise necessary for the full and absolute enjoyment thereof respectively, he and they nevertheless conforming to such rules and regulations as to user of the same as shall be ordered and laid down by the said Felix Ladbroke, his heirs or assigns, and the committee (if any) of the resident inhabitants of the houses adjoining the said ornamental ground to whom the management and control of the said ornamental ground shall be committed for the preservation and the keeping of the same, and also contributing towards the expenses of maintaining and keeping up the same such annual sum not exceeding £2 2s. per house as shall be contributed by the

owners or occupiers of the other houses on the south side of the said ground. To have and to hold the said free use and right of ingress, egress, and regress with the other rights, privileges, and advantages thereto belonging or appertaining unto the said C. H. Blake, his heirs, appointees, and assigns, and his and their lessees and sub-lessees or tenants (being occupiers for the time being) of the houses as aforesaid for ever."

At the date of execution of the deed the houses in Kensington Park Gardens had been built, and some of the houses in Stanley Gardens were in course of erection. The defendants through their predecessor in title, C. H. Blake, were entitled to the benefits of this indenture, and the members of the club from time to time entered and used the gardens in the same manner as the owners and occupiers of the other houses in Stanley Gardens and Kensington Park Gardens.

The present action was brought by the plaintiffs, the freeholder himself not being a party, asking for an injunction to restrain the defendants, their directors, officers, and servants, from authorising or permitting any of the members of the club from entering or using the garden. By an order of BYRNE, J., made by consent on Mar. 3, 1904, it was ordered that the following points of law be set down to be argued before the court—namely: (i) Whether the resident members of the club known as the Twentieth Century Club were entitled as of right during their resident membership to enter into and use the gardens. (ii) Or whether the defendants were entitled to authorise or allow such entry and user by such resident members. (iii) Whether the defendants were entitled to authorise or allow non-resident members of the club to enter and use the said gardens.

Buckmaster, K.C., and *G. W. Brabant* for the plaintiffs.
Astbury, K.C., and *Ashworth James* for the defendants.

BUCKLEY, J. (after reading the deed of June 25, 1852, and stating the facts as above set out, continued:)—The garden ground in question belongs to a freeholder, who is the common grantor of both the plaintiffs and defendants, but he is not a party to this action. The plaintiffs are asking for an injunction to restrain the defendants from going behind what the plaintiffs say is the grant which is made to them; and they are doing that in the absence of the common grantor, who might have granted, so far as I see, rights to people other than those who are here before me. But I am not trying this action; and the question whether it is complete as to parties is not necessary for my determination, for this reason, that I am only proceeding under an order made by BYRNE, J., by which by consent it was ordered that certain points of law raised by the pleadings be set down to be argued.

The plaintiffs say that, as regards the use of the garden by the ladies, there will not be necessarily any objection to it on the part of the other householders. Whether there will be ultimately or not I do not know, but they say they want to know what limits there are to the rights of occupiers of the houses under the deed of 1852; because, if they suffer this to go on, and it is not within the deed, they may be prejudiced hereafter in saying what the rights are. Therefore, for the purpose of knowing what their rights are, they ask the court to determine the true construction of the deed. There is contained in the deed no words by way of covenant or restriction at all to fetter the purchaser of the ground as to the buildings which he is to put up upon the land. He might for anything that is contained by implication in the deed, put up residences, or shops, or a factory, or anything he liked. There is nothing about it in the deed at all except the following, which is at least a fair inference, particularly from the language which I have read, that what was in the minds of the parties was residential houses. They were to be built in the neighbourhood of existing residential houses that were already abutting on this garden. Some of them were in course of erection, and it would be known what their nature was, and they were, in fact, residential houses. They are also spoken of as houses which will be in the occupation of persons who have families and

friends. That rather points to residential houses, but, beyond that, I have no guide upon the language of the deed.

The club imposes a large number of restrictions upon its members by its byelaws, and also upon the room which the member is to have; and what seems to me to be contemplated is, that the club staff will go into her room for necessary purposes, and that she will not have the exclusive occupation. Then there is nothing affirmatory, except as to country members, with regard to the right of a member to have a room at all. It is inferred that they will become entitled to a room, but there are no affirmative words directly giving a right to a room. As to country members there is this, that they may have the use of a bedroom if there be one vacant. That seems to imply that town members will have the prior right. Country members will only get one in default of there being a town member who wants a room. But, again, there is no provision as between the town members as to how any member is to have a room in case of competition. I mean, supposing there are two rooms empty and five members want a room, there seems to be no provision at all as to how there is to be any right as between one and another to have a room given to her, and there seems no limit as to the number of members. There may be more town members than rooms. It seems to me to have nothing more in contemplation than that the ladies, if they are paying for the rooms, may ask to have a room, and that a room will presumably be given them upon the payment which is required—namely, 10s. 6d. a week. Then it has been pointed out that this 10s. 6d. a week is payable in advance. Certainly, having paid the rent in advance for her room, the lady has rights; and certainly the document contemplates that during the week, having paid her rent in advance, she will have a room. But is there anything which shows that she is to have any definite and particular room—in fact, that the room she is put into first she is to have for a week? There is nothing about it at all affirmatively. There is only this to guide me, that byelaw 15 provides that,

> "The directors do not undertake to reserve any particular bedroom for a member if vacated during the holidays, etc., unless paid for,"

from which the inference is that if the member does pay for it during her holidays they will keep it for her until she comes back. That is the fair inference, and that, I think, would involve inferentially the major proposition, that if it were not holidays, as the member was not away, they would keep her room for her, and not remove her into another one. But that is all by way of implication.

Having regard to all these provisions, the first question I have to answer is, whether these ladies can within the language of the deed be spoken of as lessees, or sub-lessees, or tenants of the limited company. In my opinion, they cannot. All those words imply and involve the existence of some estate or interest in the land by the person who is spoken of as the lessee, sub-lessee, or tenant. There are many circumstances under which a person makes a payment as the price of a right, and with the result that he has the right of entering upon land and doing something upon land of which, nevertheless, he is not a tenant. As, for instance, if a man pays a sum for the occupation of a stall at the opera or theatre. He pays for the right of occupation of a particular seat to view a particular performance. Or take the case of a man who pays for the right to enter a picture gallery and look at the pictures. The right which follows to him is that he is entitled, without being a trespasser, to go into the picture gallery and say: "I have a right over this land—namely, a right to come in and see the pictures." Or take another case. A man pays a sum of money as the price of being allowed to go into a strawberry garden and eat as much fruit as he pleases. In none of those cases does the person become a tenant at all; he is a licensee. He is a person who cannot be quarrelled with as a trespasser, he being on the land because he has received a licence to go upon the land, but he is not a tenant. He has no estate right or interest in the land as land. He has a right to come upon the land by licence of the person who remains the sole owner of all the estate and interest in the land. I can conceive that every lessee or

tenant must be capable of being spoken of as being a person who has some estate or interest in the land carved out of the estate or interest of the person to whom he is the lessee or tenant. In my judgment, these ladies are not, in respect of this right of occupation, anything more than licensees. When the lady has paid her 10s. 6d. in advance for the week she has derived, by virtue of that payment, the right, as against the defendant company, who have taken her money, to be provided with a sleeping-room for a period of seven days, the company, as the person to whom the room belongs, having all the rights to which I have referred. As to the room, which she, in point of fact, had the use of for the time, she is simply a user by licence, and not a tenant.

Having so far dealt with the words, "lessees, sub-lessees, or tenants," I must now consider the words following them—namely, "being occupiers for the time being of the houses." I do not found anything on the difference between an occupier of a house and the occupier of part of a house—of a room in the house. In my opinion, the occupier of a room may be properly spoken of as the occupier of a house, but I think it is plain that those words, "being occupiers," are not words of grant at all, but words of restriction on that which precedes. The user is to the lessee "being occupier of the house"—that is to say, that the lessee who is not an occupier cannot use the garden; if he has underleased, and gone to reside elsewhere, he cannot say he is entitled to use it. You must be able to predicate of the person who wants to exercise the right of user that he is a lessee, and also an occupier. The words occupiers are, as I said, not words of grant, but words of qualification of the lessee. Nothing arises, therefore, upon the fact that these ladies are occupiers of the house. In my judgment they are, but there is no grant to the occupier of the house unless he be also a tenant, and they are not tenants.

Then I have to go on to this, that the clause which entitled them to use includes further "his or their families and friends in his or their company or without." "His or their" is the freeholder, or lessee, or tenant, and so on. Nothing arises on the word "families." Of course, these ladies are not of the family of the limited company. The family there spoken of is the wife and children and relations of the man who is supposed to be the occupier of the house. This corporation has no family in that sense. But what is the meaning of the word "friends"? There the first distinction to draw is this: that the lessee or other person—the company in this case—cannot invite anybody they choose to come in merely from friendly motives. Supposing a lady tenant or occupier of one of these houses was interested in a neighbouring Sunday school, and was desirous of inviting all the children from it to come in for an afternoon's play, and have tea with her in the garden, I conceive she could not do that. Or, supposing she had a brother in a factory, employing a number of workmen, and she wished to invite her brother's servants and work-people to come there with their wives and children for an afternoon, she could not do that from friendly motives. The test is not whether you invite persons to come there from friendly motives, but whether the person is your friend. I am not going to attempt to draw an exact line, and say exactly where friendship begins and ends. I have to look and see whether the ladies I have to deal with here can properly be spoken of as friends of a limited company. Friendly relations may exist between them, but they are not friends within the meaning of this deed. The word by which I should describe them would be "customers." The defendant company are carrying on business; it is no less a business because it is one for the advantage of ladies of small means. The persons who become members of this proprietary club, and make a payment—out of which the company may or may not make a profit—are accepted as such, not because of friendship existing between the one party and the other, but from the commercial relationship between them. The lady finds it worth her while to find a home with the conveniences that are offered to her for the payment demanded, and the company find it worth their while, as proprietors of the club, to accept the payment from her in return for giving her the advantages which they hold out. I think these persons are properly described as customers,

and are not properly described as friends. It seems to me extremely difficult to draw the line.

I will give one or two illustrations by way of showing what I think upon it. Supposing the inhabitant of one of these houses invites friends to stay with him in his house, he may certainly invite them into the garden. If he has friends to dine with him, they may go into the garden. Supposing he meets a man on his way home, and describes to him the advantages of his house, and asks him to come in with him and see the garden; he is a friend. It does not turn on the duration of the friendship, but on the nature of the relationship between the parties. If the inhabitant of a house takes in a paying guest, it may be a nice question as to whether he is a friend or not. It seems he might be. But if it were a boarding-house, or a private hotel, or a hospital, or board school, or anything of that kind, persons invited by the owner under those circumstances would, in my opinion, not be friends, and I think that therefore they are outside this definition. The first question I have to answer is whether the members themselves have a right. In my opinion they have not. The second and third questions must also be answered in the negative.

Solicitors: *Caprons, Hitchins, Brabant & Hitchins; Seaton F. Taylor.*

[*Reported by* W. HUNTER BOND, ESQ., *Barrister-at-Law.*]

Re WRIGHT. MOTT *v.* ISSOTT

[CHANCERY DIVISION (Kekewich, J.), October 30, 31, November 7, 1906]

[Reported [1907] 1 Ch. 231; 76 L.J.Ch. 89; 95 L.T. 697; 51 Sol. Jo. 47]

Will—Forfeiture—Gift to legatee to hold and occupy house—Condition as to residence during lifetime—Forfeiture on marriage—Marriage of legatee—Termination of condition of residence—Effect on provision for forfeiture.

A testator, who died in 1890, gave his leasehold house upon trust to permit C. E. C. to hold and occupy the same during her lifetime free from all payments, but subject to the condition thereinafter mentioned, and to her residing upon the premises during her lifetime. In a subsequent part of the will the gift was stated to be given upon the express condition that after the testator's decease she should remain single and unmarried, with a forfeiture clause in the event of her contracting marriage. C. E. C. resided in the house until April, 1894. She married in March of that year a husband who, some years afterwards, took a residence a short distance away from it, and she followed him, retaining the use of a small room in the leasehold house which she had let under a verbal arrangement to a weekly tenant. She had occasional use of other rooms in the house, placing books and clothes in the small room, and resorting there frequently. There was evidence that she occasionally had a meal and slept there. Letters were addressed to her at the house, and she had keys to the room and to the front door.

Held: the condition as to marriage was to be read into the gift; having married, C. E. C. was incapable of fulfilling it, and so the condition of residence did not apply and no forfeiture had taken place.

Notes. Applied: *Re Vivian, Vivian* v. *Swansea* (1920), 36 T.L.R. 222. Considered: *Re Coxen, Maccallum* v. *Coxen*, [1948] 2 All E.R. 492.

As to void conditions of a gift by will, see 34 HALSBURY'S LAWS (2nd Edn.) 105–109; and for cases see 44 DIGEST 466–469. As to general principles of construction of wills, see 34 HALSBURY'S LAWS (2nd Edn.) 187 et seq.; and for cases see 44 DIGEST 530 et seq.

Cases referred to:

(1) *Walcot* v. *Botfield* (1854), Kay, 534; 2 Eq. Rep. 758; 23 L.T.O.S. 127; 18 Jur. 570; 2 W.R. 393; 69 E.R. 226; 44 Digest 468, *2880*.

(2) *Re Moir, Warner* v. *Moir* (1884), 25 Ch.D. 605; 53 L.J.Ch. 474; 50 L.T. 10; 32 W.R. 377; 44 Digest 468, *2881*.

(3) *Morley* v. *Rennoldson*, [1895] 1 Ch. 449; 64 L.J.Ch. 485; 72 L.T. 308; 43 W.R. 518; 39 Sol. Jo. 283; 12 R. 158, C.A.; 44 Digest 385, *2195*.

Also referred to in argument:

Re Trenchard, Trenchard v. *Trenchard*, [1902] 1 Ch. 378; 71 L.J.Ch. 178; 86 L.T. 196; 50 W.R. 266; 46 Sol. Jo. 231; 40 Digest (Repl.) 810, *2896*.

Dunne v. *Dunne* (1855), 7 De G.M. & G. 207; 3 Eq. Rep. 760; 25 L.T.O.S. 60; 1 Jur.N.S. 1056; 3 W.R. 380; 44 E.R. 81; L.JJ. 44 Digest 442, *2676*.

Maclaren v. *Stainton* (1858), 27 L.J.Ch. 442; 30 L.T.O.S 331; 4 Jur.N.S. 199; 44 Digest 958, *8109*.

Wynne v. *Fletcher* (1857), 24 Beav. 430; 53 E.R. 423; 44 Digest 442, *2677*.

Reynish v. *Martin* (1746), 3 Atk. 330; 26 E.R. 991; sub nom. *Rhenish* v. *Martin*, 1 Wils. 130, L.C.; 44 Digest 486, *3057*.

Wheeler v. *Bingham* (1746), 1 Wils. 135; 3 Atk. 364; 95 E.R. 535, L.C.; 44 Digest 483, *3026*.

Clavering v. *Ellison* (1859), 7 H.L.Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282, H.L.; 44 Digest 440, *2667*.

Fillingham v. *Bromley* (1823), Turn. & R. 530; 37 E.R. 1204, L.C.; 44 Digest 442, *2675*.

Wilkinson v. *Wilkinson* (1871), L.R. 12 Eq. 604; 40 L.J.Ch. 242; 24 L.T. 314; 19 W.R. 558; 44 Digest 454, *2762*.

Adjourned Summons to decide the meaning of "residence" as used in a will.

By his will, dated Sept. 16, 1889, the testator Henry Richard Wright appointed the applicant (Henry Charles Mott) and John Edward Buckland Burroughs trustees and executors, and gave certain pecuniary and specific legacies and an annuity of £30 to his wife for life, and after her death he directed that the annuity should be paid to the respondent Clara Elizabeth Issott, then Clara E. Couldery, spinster, during her life, subject to a proviso and condition thereinafter mentioned, and, after giving certain specific legacies (including a specific legacy to the respondent Clara E. Couldery, subject to the proviso and condition aforesaid), the testator specifically devised his freehold interest in certain hereditaments in Boones-road, Lee, and devised a freehold messuage known as No. 26, Turner-road, Lee, with the appurtenances, to his trustees upon trust for one Caroline Rogers for life, subject to a proviso and condition thereinafter mentioned, and also subject to her personally residing in the messuage during her lifetime, and after her decease the freehold messuage to be sold and the income of the investments of the proceeds to be paid to the respondent Clara E. Issott during life, and at the decease of both to fall into his residuary estate. The will then proceeded as follows:

"I give and devise unto my said trustees all that my leasehold house and premises situate No. 33, Turner Road, Lee, aforesaid, to hold to them my said trustees, their executors, administrators, and assigns, upon trust to permit and suffer the said Clara Elizabeth Couldery to hold and occupy the same during her lifetime free from all payments in respect of rent, rates, taxes, insurance, and repairs, but subject to the proviso and condition hereinafter mentioned and to her residing upon the said premises during her lifetime, and after her decease I direct that the said leasehold house be sold by my

trustees and executors either by public auction or private contract, as they may consider most expedient and advantageous, and that the proceeds of such sale, after deduction of any legal or other expenses lawfully incurred, shall be distributed or divided among my residuary legatees hereinafter mentioned in the manner directed by this my will."

The testator then directed the sale of his real and personal estate (with certain exceptions, including the premises in Boones Road, and Nos. 26 and 33 Turner Road, and certain other articles) within twelve months from the date of his decease, and that the proceeds of sale, after payments of debts, expenses, and legacies, should as to £1,000 be held upon trusts in his will mentioned, then as to the balance upon trust to invest and make certain half-yearly payments to Caroline Rogers, the respondent Clara E. Issott, and another, the payments in the case of Clara E. Issott being subject to the proviso and condition therein mentioned under which the gifts by the will given to her, subject to a proviso and condition, were given. The testator further provided:

"That the use and occupation of the house, No. 33, Turner Road, Lee, rent free are given by me on the express condition that after my decease she remain single and unmarried, and that in the event of her contracting marriage she should forfeit the bequest and other benefits made to her by this my will and that the same fall into my residuary estate."

The testator gave his residuary estate upon trust for the persons in his will now in statement mentioned, including the respondent William Philip Want. The testator also directed that on the decease of the respondent Clara E. Issott, or upon her contracting marriage, the capital sums invested by his trustees should (subject as in his will mentioned) be divided among his residuary legatees or their children (if any) surviving, and in default of children fall into his residue.

The testator died on April 7, 1890, his will being proved by the first applicant alone, John E. B. Burroughs having renounced probate thereof, and having by deed-poll of May 9, 1890, renounced and disclaimed the office of trustee and executor. By an indenture dated June 15, 1903, the second applicant, Henry Ernest Mott, was appointed a trustee of the testator's will in the place of a retiring trustee. Clara E. Couldery married one William Issott on or about Mar. 21, 1894. After the death of the testator the respondent Clara Elizabeth Issott resided from June, 1891, in the house No. 33, Turner Road, Lee, possession of which was handed over to her by the trustees of the testator's will, and the rent, rates and taxes, insurance, and repairs of the house had been paid out of the testator's residue. For about ten years after her marriage her husband resided there with her, but in April, 1904, he left the house and took up a residence at a cottage, No. 7, Eltham Road, Lee, which was his only home afterwards, situate about half a mile from No. 33, Turner Road. Mrs. Issott spent part of her time at her husband's residence and part of her time at No. 33 Turner Road, as mentioned in the judgment, as follows: Under a verbal arrangement she let a part of the house, which was a seven-roomed house, to a Mrs. Leigh, who with her husband occupied part of the house on a weekly tenancy at 10s. a week rent, on the terms that Mrs. Issott paid all rates and taxes, and keeping one room exclusively for her own use furnished as a bedroom and sitting-room, which she kept locked when not in use, reserving for herself the part use of the sitting-room and part use of the garden. It was the address known to her bankers, and was the address at which she was described in the register of her stocks and shares, and to which her dividends on them were sent. She kept her books and writing materials at No. 33 Turner Road, and often went and had tea there in her own rooms, where she also did sewing work and wrote letters. She frequently slept there, and kept a wardrobe of clothes there. Mrs. Issott retained the key of the front door. In the year 1906, the tax collector, having served a demand note upon Mrs. Leigh, the tenant, was referred to the applicant, who, on asking Mrs. Issott for an explanation, was informed that she still occupied the premises.

The present summons asked whether Mrs. Issott had continued to reside upon the leasehold premises within the meaning of the testator's will. A

B. A. Hall for the representative of the persons interested in the residue.
P. Ogden Lawrence, K.C., and *Manning* for Mrs. Issott.
R. M. Pattisson for the trustees.

B

KEKEWICH, J.—This will is a somewhat curious illustration of what is within the experience of all practising lawyers, that a document which at first sight appears to be perfectly plain does present more difficulties than a document which at first sight seems to be obscure. Taking this will up for the first time, it would be difficult to see any difficulty arise. Here a house is given to a lady to occupy during her life, subject to her residing. Knowing that the case was going to be C argued today, I took the opportunity of examining those authorities which had been cited and reflecting upon the general subject, and had the great advantage of being addressed by counsel with a mind prepared to receive their arguments. In the first place, I will take the will as containing a trust to permit the testator's niece to hold and occupy this house during her lifetime free from rent, rates, taxes, insurance, and repairs, subject to the condition of her residing upon the D premises during her lifetime without more. Now the lady has married, and, though she occupied it as the matrimonial home for a time, the husband took another house, and she followed him there. What has she done with the house in question? Briefly, she has let all the rooms but one on an arrangement which is of the vaguest possible character. It happens that she made use of a kitchen that she may come into and do as she pleases when there. She also has a key E of the front door, but she retains nothing in the house as her own except one little room, which is not the principal room, which she calls by the familiar expression "her den," and in which she keeps any such things as she frequently requires—writing materials, some clothes, and a few other trifles of that kind. She can make herself comfortable, and she has a bed there which she keeps really for her use and occasionally only uses. She resorts there two or three F times a week at irregular times. If she is there in the afternoon she has a cup of tea, which she makes herself in the kitchen, and if she is disposed to stay late, because her husband has not come home, or for some other reason, she has her supper, which consists of something which she takes from home. I ought to mention that she occasionally sleeps there. That is all. Now, can the applicant be said to reside there?

G

I have read with great interest, and pondered over, the judgment of Wood, V.-C., in *Walcott* v. *Botfield* (1). The great point in this judgment is that the residence must be personal—that is, occupied so as to give rise to the personal enjoyment of the person who is to reside. If that is the true view, that deprives of value the reference of counsel for the applicant to the contrast between "residing" and "personally residing." "Residing" and "personally residing" are H much the same thing. There is another case before Bacon, V.-C.—*Re Moir, Warner* v. *Moir* (2)—in which he went into the same subject, but his language falls very far short of a definition, and is very little guide to me. Nor do I think it necessary to go into other authorities. No doubt a man may have two residences—I do not know that there is any difference between a man and a woman in this respect—and he or she may reside sometimes in one, sometimes in another.

I

I have to consider here the point of what is the plain meaning of a person residing in a house. I cannot bring myself to think that what the respondent is doing amounts to residing in this house. It seems to me she is using it for rest and amusement. I cannot conceive that when she is there she is at home. There are certain business letters addressed to her there as I gather, and dividends remitted twice a year, and a sister who is in America sometimes addresses her there and sometimes at her husband's house, which is, of course, her home. I cannot conceive that constitutes residence so as to make it what the testator

intended it to mean—making it her home, the place she would refer to as her home. I know I am using language which is more adapted to the language which is used in domicil cases, and might be taken as confusing residence and domicil. If, therefore, I was bound to decide on this ground whether she had or had not forfeited her right to occupy this house during her lifetime, I should be bound to say that she had not occupied it in the sense intended by the testator.

If that is the true view, I need say very little upon the objection that forfeiture ought not to be insisted upon unless the words of the document creating the forfeiture are clear, and the breach is clear. Those propositions are thoroughly sound. But I think that the terms of the condition are clear, and that the breach is also reasonably clear. Again, I need not consider what would amount to a residence. It would be a difficult task to perform. If I found that in this case the lady had resided, it would be my duty to go on and say what she should do if she resided in future in the house. It would be my duty to assist the trustees by deciding, if I thought differently from what I do, whether residence apart from the actual fact of the lady making the house her home would fulfil the condition in the future. That I do not go into, because, the condition once being broken, residence in the future is perfectly immaterial.

That deals with all the points except one, and on that I have come to a conclusion favourable to the lady. The will is difficult to construe. But there is a condition which for the present moment I have omitted. The testator gives his house No. 33, Turner Road, Lee, upon trust to permit and suffer the defendant to hold and occupy the same during her lifetime, but

> "subject to the proviso and condition hereinafter mentioned and to her residing upon the said premises during her lifetime."

In order to construe that clause, I must, either by writing it out or by bringing it before my mind's eye, bring in the "condition hereinafter mentioned." The condition to which reference is made is some distance on in the will, and it is an express condition that she is to remain unmarried. That is the condition, "that she remain single and unmarried." Reading the material parts of the whole condition, it is

> "subject to the proviso and condition that after my decease she remain single and unmarried and to her residing upon the said premises during her lifetime."

The grammar is defective. It ought to be, "and subject to her residing upon the said premises during her lifetime." It matters not for present purposes that the condition of her remaining single and unmarried is bad. What does he mean? Subject to the condition of her remaining single and unmarried and residing there during her lifetime. To construe that literally is to make it absolute nonsense. He cannot mean that she is to have it on the condition of her remaining single and unmarried, but if she marries still to have residence on the premises during her lifetime. The two positions are contradictory. He is contemplating, no doubt, in the second condition a lifetime single and unmarried.

It was suggested in argument that I might read the conditions as to marrying and the condition as to residing as independent of one another. That would be contrary to the decision in *Morley* v. *Rennoldson* (3). I know how difficult it was to deal with that case, and the difficulty the Court of Appeal found when it was before them, and I do not care to rest my judgment upon *Morley* v. *Rennoldson* (3). Although the result is the same, I do not think you get quite at the conclusion that you are justified in reading in "whichever event should first happen." But I think the testator must have intended the meaning to be "during the lifetime"—during the lifetime while she is capable of residing, not during her lifetime when she cannot reside there, when according to his directions she would have forfeited her interest and would be turned out. He must mean "subject to her residing there so long as she is unmarried and, according to the terms of my will, she can reside there." I cannot on reflection see that you can give

any other meaning to the words than during her life as a spinster. If I read the condition as to marriage into the gift, it seems to me I must restrict the meaning by construing it in that way. The result is that, having married, she is incapable of fulfilling it, and the condition of residence does not apply, and no forfeiture has taken place.

Solicitors: *Claremont & Haynes*; *Newton, Lewin & Levett.*

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

Re WESTON'S SETTLEMENT. NEEVES *v.* WESTON

[Chancery Division (Buckley, J.), August 8, 9, 1906]

[Reported [1906] 2 Ch. 620; 76 L.J.Ch. 54; 95 L.T. 581]

Power of Appointment—Exercise—Appointment by will—Construction—Absence of intention to exercise power.

A testator had a power of appointment by will. The only indications that he had exercised the power were (i) the use of the word "appoint" in the phrase in his will "give, devise, bequeath, and appoint" his residuary estate; and (ii) the fact that he never had any other power of appointment. On the other hand, there were cumulative indications that the testator had not intended to exercise the power, as the directions which he gave with regard to the administration of his residuary estate were in several respects inapplicable to the property over which he had a power of appointment.

Held: the power of appointment had not been exercised.

Re Mayhew, Spencer v. *Cutbush* (1), [1901] 1 Ch. 677, distinguished.

Notes. Considered: *Wrigley* v. *Lowndes*, [1908] P. 348. Followed: *Re Sanderson, Sanderson* v. *Sanderson*, [1911–13] All E.R.Rep. 374. Applied and followed: *Re Holford's Settlement, Lloyds Bank, Ltd.* v. *Holford*, [1944] 2 All E.R. 462. Referred to: *Re Ackerley, Chapman* v. *Andrew*, [1911–13] All E.R.Rep. 183; *Re Beresford's Will Trusts, Sturges* v. *Beresford*, [1938] 3 All E.R. 566; *Re Welford's Will Trusts, Davidson* v. *Davidson*, [1946] 1 All E.R. 23; *Re Knight, Re Wynn, Midland Bank Executor and Trustee Co.* v. *Parker*, [1957] 2 All E.R. 252.

As to special powers of appointment exercised by will, see 30 Halsbury's Laws (3rd Edn.) 255–262; and for cases see 37 Digest 449–454.

Cases referred to:

(1) *Re Mayhew, Spencer* v. *Cutbush*, [1901] 1 Ch. 677; 70 L.J.Ch. 428; 84 L.T. 761; 49 W.R. 330; 45 Sol. Jo. 326; 37 Digest 452, *542*.

(2) *Re Hayes, Turnbull* v. *Hayes*, [1901] 2 Ch. 529; 70 L.J.Ch. 770; 85 L.T. 770; 85 L.T. 85; 49 W.R. 659; 17 T.L.R. 740; 45 Sol. Jo. 722, C.A.; 37 Digest 425, *335*.

(3) *Von Brockdorff* v. *Malcolm* (1885), 30 Ch.D. 172; 55 L.J.Ch. 121; 53 L.T. 263; 33 W.R. 934; 37 Digest 480, *771*.

(4) *Re Cotton, Wood* v. *Cotton* (1888), 40 Ch.D. 41; 58 L.J.Ch. 174; 37 W.R. 232; 37 Digest 451, *539*.

Also referred to in argument:

Re Milner, Bray v. *Milner*, [1899] 1 Ch. 563; sub nom. *Re Milner, Milner* v. *Bray*, 68 L.J.Ch. 255; 80 L.T. 151; 47 W.R. 369; 37 Digest 453, *551*.

Sykes v. *Carroll*, [1903] 1 I.R. 17; 36 I.L.T. 125; 44 Digest 519, *3376i*.

Kent v. *Kent*, [1902] P. 108; 71 L.J.P. 50; 86 L.T. 536; 18 T.L.R. 293; 46 Sol. Jo. 247; 37 Digest 435, *405*.

Re Mills, Mills v. *Mills* (1886), 34 Ch.D. 186; 56 L.J.Ch. 118; 55 L.T. 665; 35 W.R. 133; 37 Digest 447, *506*.

Re Swinburne, Swinburn v. *Pitt* (1884), 27 Ch.D. 696; 54 L.J.Ch. 229; 33 W.R. 394; 37 Digest 453, *550*.

Originating Summons to determine whether a power of appointment in a will had been exercised.

By a marriage settlement, dated Sept. 11, 1863, between the testator and J. J. H. Lowe, certain leasehold hereditaments which were at that date vested in the said J. J. H. Lowe were conveyed to the trustees upon trust for the said J. J. H. Lowe for her life, and after her death for the testator, if he should survive her, for his life, and after the death of the survivor, upon trust for the children of the marriage in such portions as the survivor should by his or her last will and testament "direct or appoint, give or bequeath, and in default of appointment in trust for all the children of the marriage. The marriage was duly solemnised and children were born and survived their parents. The said J. J. H. Lowe, who by marriage became J. J. H. Weston, died in 1902 intestate. The testator died in 1905. By his will, dated Sept. 9, 1903, he gave certain specific legacies to certain of his children, and, as to all the residue of his estate real as well as personal, he gave, devised, bequeathed, and appointed the same unto his executors upon trust that they convert into money such parts of the said trust premises as should not consist of money, and should out of the proceeds pay his funeral expenses and debts, and should pay and divide the residue of such trust moneys and premises unto and equally between his sons A. P. and R. declaring that he made no provision for his other children because they were sufficiently provided for. The testator declared that his trustees might postpone the conversion of his real and personal estate respectively for so long as they should deem proper, and during such postponement his trustees might manage to lease his real and leasehold estates, and make out of the capital or income thereof any outlay which his trustees might think proper for improvements, etc. And the testator declared that the net rents and profits or other income produced from his real or personal estate previously to the conversion or collection thereof should be applied in the same manner as if the same were income arising from investments therein authorised, and that all income produced from his estate in its actual condition for the time being, whether consisting of property or investments of an authorised or of an unauthorised description, and whether of a wasting or permanent character, should as well during the first year of his death as at all times afterwards be applicable as income under the trusts of his will, no part thereof being in any event liable to be retained as capital, but no property not actually producing income which should form part of his estate should be treated as producing income or as entitling any party to the receipt of income. The estate of the testator consisted of money, furniture, some leasehold premises, and income due to him under the above-mentioned marriage settlement of Sept. 11, 1863. Evidence was before the court that the testator had not either at the date of his will or his death any other power of appointment. This summons was taken out by the sole surviving trustee of the marriage settlement of Sept. 11, 1863, and by the executor of the testator's will for the determination of the question whether by the residuary gift in his will the testator had exercised the power of appointment vested in him by the marriage settlement.

A. Cairns for the summons.

Buckmaster, K.C., and *Harold Bompas* for persons who would take in default of appointment.

R. Nevill for persons who would take by appointment.

Cur. adv. vult.

Aug. 9, 1906. **BUCKLEY, J.,** read the following judgment.—This testator at the dates of his will and of his death was entitled to a special power to appoint

among his children. The question for decision is whether by his will he exercised the power. A

For the exercise of a special power there must be either (i) a reference to the power; or (ii) a reference to the property subject to the power; or (iii) an intention, otherwise expressed in the will, to exercise the power. ROMER, L.J., in *Re Hayes, Turnbull* v. *Hayes* (2) ([1901] 2 Ch. 531):

> "The intention to exercise a special power must be gathered from the whole will. The cases do not lay down any general principles and are not easily reconcilable." B

This testator had no power other than this special power, and in his will he uses the verb "appoint." Those are the two circumstances relied on for the purpose of evidencing an intention to exercise the power. In these circumstances I must C read the whole will, and if I find indications negativing the intention then, quoting PEARSON, J., in *Von Brockdorff* v. *Malcolm* (3) (30 Ch.D. at p. 179),

> "there being various indications in the will, some one way and some the other, the question I have to decide as well as I can is, on which side does the balance weigh most strongly?" D

Looking at the will I find that the beneficiaries are entitled to have divided among them what the testator calls "the residue of such trust moneys and premises." It is upon these words that the title of the appointees rests. If they are entitled to the property which was subject to the power, it must be because it is within the words "such trust moneys and premises." I find that the testator directs the conversion into money of such part of "the said trust premises" as shall not con- E sist of money. These are the trust premises which are presently called "such trust moneys and premises." The trust is for the conversion of all the trust premises other than such as consist of money.

As regards the property subject to the power, he could not direct its conversion. Either, therefore, he has directed the conversion of the property subject to the power—which he could not do—or that property is not within the words "trust F premises." In this I find a first indication that he was not dealing with the property which was subject to the power. Then he gives his trustees power to postpone the conversion "of my said real and personal estate." The original words of the gift were of "my estate real as well as personal." "My said real and personal estate," therefore, logically means "all that which I have above called 'my estate real as well as personal.'" If he was disposing of the property which G was subject to the power, he was here giving power to postpone the conversion of that property. But he had no power to direct either its conversion or the postponement of its conversion. This is a second indication that he was not dealing with the property the subject of the power. Then there is a power to manage and let "my real and leasehold estates," a direction relating to income as regards property which is not actually producing income, and a declaration that the trustees H are to invest "the trust moneys representing the shares" of two of the persons who take beneficially under his will during their minority. He had no power to direct the investment of the property which was subject to the power. He here treats the share of the beneficiary in the aggregate sum as being property as to the investment of which he is competent to give directions.

Reading the whole will, therefore, I find the verb "appoint" on the one side of I the balance, and all the several considerations to which I have adverted on the other. In my judgment, the scale falls against the inference to be drawn from the use of the verb "appoint." I have been much and properly pressed by the decision of my brother FARWELL in *Re Mayhew, Spencer* v. *Cutbush* (1). The cases are very similar, I agree, in some respects. There also the testatrix had no other power of appointment, and then also there was a trust for conversion, and a direction for payment of debts. But there were not there the cumulative indications of intention upon which I rest my judgment in this case. There are indications here

which, in my judgment, forbid my inserting here the words which FARWELL, J., inserted there—viz., "in exercise of every power enabling me in this behalf" I appoint. In *Re Cotton, Wood* v. *Cotton* (4) even in a will which contained words to that effect, NORTH, J., nevertheless, upon indications similar to those upon which I rely, held that the power was not exercised. In my judgment, the will did not exercise the special power.

Solicitors: *Harry Watkins*; *Colyer & Colyer.*

[*Reported by* R. C. CARTER, ESQ., *Barrister-at-Law.*]

Re FRASER. LOWTHER *v.* FRASER

[COURT OF APPEAL (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.), March 10, 16, 17, 29, 1904]

[Reported [1904] 1 Ch. 726; 73 L.J.Ch. 481; 91 L.T. 48; 52 W.R. 516; 20 T.L.R. 414; 48 Sol. Jo. 383]

Will—Bequest—General bequest—Exception of specific property—Death of beneficiary—Intestacy as to excepted property.

By a will made in 1886 a testator bequeathed all his personal estate, except what he otherwise disposed of by his will or any codicil thereto and chattels real, to trustees upon certain trusts, and he devised and bequeathed "all real estate and chattels real in England to which I may be entitled at my death, except what I have otherwise disposed of by this my will" to his brother absolutely for all his estate and interest therein. In July, 1898, the testator made the last of seven codicils to his will. It contained a recital that his brother was dead, but it did not revoke the bequest to him, nor the general bequest of the personalty, though it made some alterations in the will and previous codicils.

Held: as the will and codicils must be read together as if the testator had made a will at the date of the last codicil, the testator had not excepted the chattels real from the general bequest for the purpose only of giving them to his brother, but he had excepted them generally, and, therefore, there was an intestacy as to them.

Rentcharge—Rentcharge issuing out of leaseholds—Death of purchaser before completion of purchase—Chattel real—Vendor's lien for unpaid purchase money—Liability of next-of-kin—Real Estate Charges Acts, 1854 (17 & 18 *Vict.*, *c.* 113), *s.* 1; 1867 (30 & 31 *Vict.*, *c.* 69), *s.* 2; 1877 (40 & 41 *Vict.*, *c.* 34), *s.* 1.

In April, 1898, the testator agreed to purchase a rentcharge issuing out of leasehold property in England. He died in August, 1898, without having completed the purchase.

Held: the rentcharge contracted to be purchased was a chattel real and under the Real Estate Charges Acts, 1854, 1867, and 1877, the next of kin took it subject to a liability to pay the amount of the vendor's lien for the unpaid purchase money.

Decision of BYRNE, J., [1904] 1 Ch. 111, affirmed.

Notes. The Real Estate Charges Acts, 1854, 1866, and 1877, 9 HALSBURY'S STATUTES (2nd Edn.) 688, 703 and 705, respectively, were repealed except as to deaths before 1926, by the Administration of Estates Act, 1925. See now s. 35 of that Act, 9 HALSBURY'S STATUTES (2nd Edn.) 739.

Applied: *Re Taylor, Dale* v. *Dale*, [1909] W.N. 59; *Re Whiting, Ormond* v. *De Launay*, [1913] 2 Ch. 1; *Re Wedgwood, Sweet* v. *Cotton*, [1914] 2 Ch. 245. Considered: *Re Aynsley, Kyole* v. *Turner*, [1914] 2 Ch. 422; *Re Smith, Prada* v. *Vandroy*, [1916] 1 Ch. 523. Applied: *Re Reeves, Reeves* v. *Pawson*, [1928] All E.R.Rep. 342. Referred to: *Re Joseph, Pain* v. *Joseph* (1908), 98 L.T. 392; *Re Florence, Lydall* v. *Haberdashers' Co.* (1917), 87 L.J.Ch. 86; *Re Tilden, Coubrough* v. *Royal Society of London* (1938), 82 Sol. Jo. 334; *Re Tredgold, Midland Bank Executor and Trustee Co.* v. *Tredgold*, [1943] 1 All E.R. 120; *Re Picton, Porter* v. *Jones*, [1944] Ch. 303; *Countess of Berkeley* v. *R. G. W. Berkeley*, [1946] 2 All E.R. 154; *Re Heath's Will Trust, Hamilton* v. *Lloyds Bank, Ltd.*, [1949] 1 All E.R. 199.

As to codicils in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 97–102; and for cases see 44 DIGEST 382 et seq. As to creation of rentcharges, see 32 HALSBURY'S LAWS (3rd Edn.) 540–545; and for cases see 39 DIGEST 115 et seq.

Cases referred to:

(1) *Blight* v. *Hartnoll* (1883), 23 Ch.D. 218; 52 L.J.Ch. 672; 48 L.T. 543; 31 W.R. 535, C.A.; 44 Digest 427, *2573*.

(2) *Doe d. York* v. *Walker* (1844), 12 M. & W. 591; 13 L.J.Ex. 153; 2 L.T.O.S. 424; 152 E.R. 1334; 44 Digest 372, *2067*.

(3) *Re Champion, Dudley* v. *Champion*, [1893] 1 Ch. 101; 62 L.J.Ch. 372; 67 L.T. 694; 2 R. 162, C.A.; 44 Digest 372, *2068*.

(4) *Solomon* v. *Solomon* (1864), 33 L.J.Ch. 473; 10 L.T. 54; 10 Jur.N.S. 331; 12 W.R. 540; 44 Digest 201, *309*.

(5) *Re Wormsley's Estate, Hill* v. *Wormsley* (1876), 4 Ch.D. 665; 46 L.J.Ch. 102; 25 W.R. 141; 23 Digest (Repl.) 496, *5612*.

(6) *Re Kershaw, Drake* v. *Kershaw* (1888), 37 Ch.D. 674; 57 L.J.Ch. 599; 58 L.T. 512; 36 W.R. 413; 23 Digest (Repl.) 496, *5613*.

Also referred to in argument:

Re Bagot, Paton v. *Ormerod*, [1893] 3 Ch. 348; 62 L.J.Ch. 1006; 69 L.T. 399; 37 Sol. Jo. 730, C.A.; 23 Digest (Repl.) 470, *5418*.

Bernard v. *Minshull* (1859), John. 276; 28 L.J.Ch. 649; 5 Jur.N.S. 931; 70 E.R. 427; 44 Digest 746, *6040*.

Evans v. *Jones* (1846), 2 Coll. 516; 63 E.R. 840; 44 Digest 418, *2492*.

Tomkins v. *Jones* (1889), 22 Q.B.D. 599; 58 L.J.Q.B. 222; 60 L.T. 939; 37 W.R. 328; 5 T.L.R. 302, C.A.; 38 Digest (Repl.) 787, *44*.

Great Western Rail. Co. v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787; 53 L.J.Ch. 1075; 51 L.T. 798; 48 J.P. 821; 32 W.R. 957, H.L.; 19 Digest (Repl.) 10, *14*.

Re Kidd, Brooman v. *Withall*, [1894] 3 Ch. 558; 63 L.J.Ch. 855; 71 L.T. 481; 13 R. 101; sub nom. *Re Kidd, Bloomer* v. *Withall*, 43 W.R. 51; 23 Digest (Repl.) 497, *5625*.

Appeal against a decision of BYRNE, J.

In April, 1898, Sir William Fraser entered into a contract to purchase a rentcharge issuing out of and charged upon certain leasehold hereditaments in Hampshire for the residue of a term of ninety-nine years, terminating on Dec. 25, 1967. In August, 1898, Sir William Fraser died, and in January, 1899, the trustees of his will completed the purchase, and paid the purchase money out of the testator's general personal estate, and the rentcharge was conveyed to them as trustees of the will and upon the trusts thereof. By his will dated Dec. 1, 1886, the testator after certain specific bequests bequeathed

> "all the personal estate and effects to which I shall at my death be entitled or over which I shall at my death have a general power of appointment or disposition (except what I otherwise dispose of by this my will or any codicil hereto and except chattels real) unto and to the use of"

certain trustees upon trust out of the personal estate, or the proceeds of the sale

and conversion thereof, to pay his funeral and testamentary expenses, debts, and legacies and the legacy and other duties, and to stand possessed of the residue upon trust for investment and accumulation during the term of twenty-one years from his death, and after the expiration of the term to hold the trust fund upon trust for successive tenants for life and remaindermen as therein mentioned. And the testator devised and bequeathed

> "all real estate and chattels real in England to which I may be entitled at my death, except what I have otherwise disposed of by this my will"

to his brother Charles Crauford Fraser absolutely for all his estate and interest therein. C. C. Fraser died in the lifetime of the testator. The testator made seven codicils to his will. The seventh was dated July 21, 1898, and contained a recital of the death of C. C. Fraser. By it the testator altered some depositions of his property, but did not revoke the gift of chattels real to his brother, or the general bequest of personalty. In other respects the testator confirmed his will as altered by the prior codicils.

Questions having arisen between the next-of-kin of the testator and the persons entitled under the settlement of the personal estate as to the ultimate destination of the rentcharge an originating summons was taken out by the trustees of the will for the determination by the court of (inter alia) the question whether a rentcharge issuing out of leaseholds was a chattel real; in which case it was admitted it passed to the testator's next-of-kin as undisposed of; and, if so, whether it was within the provisions of Locke King's Act of 1854, and the amending Acts of 1867 and 1877 (the Real Estate Charges Act, 1854, 1867 and 1877), so that the next-of-kin would take it subject to the vendor's lien for unpaid purchase money.

The summons came before BYRNE, J., on Nov. 13, 1903, who held that the rentcharge was a chattel real and that it passed, as undisposed of by the will, to the testator's next-of-kin, but subject, under the Real Estate Charges Acts, to the obligation to discharge the vendor's lien for unpaid purchase money. From this decision Sir Keith Alexander Fraser appealed.

Levett, *K.C.*, and *L. W. Byrne* for Sir Keith Alexander Fraser, the first tenant for life and one of the testator's next-of-kin.

Leeke for another of the next-of-kin.

Norton, *K.C.*, and *Merivale* for one of the cestuis que trust of the residue.

Cur. adv. vult.

Mar. 29, 1904. **STIRLING, L.J.**, read the following judgment of the court.—The first point to be dealt with on this appeal is one which was not taken in the court below. It was contended that the testator's chattels real in England, which formed part of the chattels real in terms excepted from the general bequest of the testator's personal estate contained in his will, have nevertheless fallen into that bequest by reason of the death of the legatee of those chattels real in England under that will—viz., Charles Crauford Fraser—in the testator's lifetime. In support of that contention, *Blight* v. *Hartnoll* (1) was mainly relied on. The law appears to be that, when in a will property is excepted from a general gift of the testator's personal estate and is afterward specifically bequeathed, but the bequest fails by lapse or otherwise, then it is to be taken that the object of the testator in making the exception was simply to give the property in question to another; and, that being the sole object, there is no reason why upon the failure of the bequest it should not be held to be included in the residuary gift. If, however, the testator makes no disposition by will of the excepted property, this reasoning does not apply, and the excepted property passes as on an intestacy. If our decision turned on the will alone there would be much to be said in favour of the contention referred to. But the testamentary dispositions of the testator include several subsequent codicils, and in particular one of the July 21, 1898, which begins by reciting the death of Charles Crauford Fraser (the legatee of the chattels real in

England) and contains a confirmation of the will as altered by prior codicils. The A
The effect of this is to bring the will down to the date of the codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alterations introduced by the various codicils: (see *Doe d. York* v. *Walker* (2); *Re Champion* (3)). The result in the present case is that the testator has, on the face of the testamentary dispositions existing at his death, excepted the chattels real B
from the general bequest, and has not really made any bequest of them, the apparent bequest being on the face of the instruments themselves ineffective. In my opinion, therefore, the doctrine of *Blight* v. *Hartnoll* (1) does not apply.

As regards the two points decided by BYRNE, J., I agree with him. I have nothing to add to the reasons given by him for holding that the rentcharge in question is a chattel real. As regards the construction of Locke King's Act, 1854, C
and the amending Acts of 1867 and 1877, I think that these Acts are to be read together. The language of the first part of sect. 1 of the Act of 1854, though admitted to be in itself wide enough to extend to all interests in land, was, by reason of the subsequent clauses of the same section being confined to heirs and devisees, held to be limited in its operation to freehold interests: see *Solomon* v. *Solomon* (4); *Re Wormsley's Estate* (5). By the amending Act of 1877, the legis- D
lature has clearly shown that this limitation is no longer to operate, and it has been held that the Acts now extend to leaseholds: *Re Kershaw* (6). It is true that legatees only are spoken of in the Act of 1877, and not next-of-kin; but, in my opinion, there is in the Act of 1877 enough to show that the Act of 1854 ought no longer to receive the narrow interpretation placed on it in *Solomon* v. *Solomon* (4) and *Re Wormsley's Estate* (5). Notwithstanding some difficulties arising from E
the language of the Act of 1877, I think it is decidedly preferable so to construe the Act of 1854 rather than to hold that the next-of-kin escape from a liability to which the legatee would have been subject had he survived the testator.

Solicitors: *Rowcliffes, Rawle & Co.*; *Bompas, Bischoff & Co.*; *Fox, Trotter & Co.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*] F

Re TYLER. Ex Parte OFFICIAL RECEIVER

[Court of Appeal (Vaughan Williams, Farwell and Buckley, L.JJ.), February 21, 1907]

[Reported [1907] 1 K.B. 865; 76 L.J.K.B. 541; 97 L.T. 30; 23 T.L.R. 328; 51 Sol. Jo. 291; 14 Mans. 73]

Bankruptcy—Property available for distribution—Life policy—Mortgage—Voluntary payment of premiums and interest by mortgagor's wife—Death of mortgagor—Right of widow to repayment.

Shortly before his bankruptcy a debtor, having mortgaged certain policies on his life, requested his wife to pay the premiums on them, together with the interest on the mortgage. The wife paid one premium before the bankruptcy, and continued to pay the premiums and interest until the bankrupt's death. The mortgagees paid the balance of the policy moneys, after deducting the amount due to them, to the official receiver, and the wife claimed to be repaid out of it the sum paid by her for premiums and interest. The official receiver had no knowledge that the wife had been paying these premiums, but it appeared that from the preliminary examination of the bankrupt the fact came to the knowledge of the then trustee.

Held: an officer of the court should do what was just and right, and, even if the widow had no charge on the policy moneys for the payments she had made, the court ought not to allow its officer to retain that money without repaying the amount paid by her for premiums and interest, having regard to the knowledge which the trustee had as to the policies.

Re Condon, Ex parte James (1) (1874), 9 Ch. App. 609, applied.

Decision of Bigham, J., 95 L.T. 808, affirmed.

Notes. Distinguished: *Re Hall, Ex parte Official Receiver*, [1907] 1 K.B. 875. Explained and Distinguished: *Tapster* v. *Ward* (1909), 101 L.T. 25. Distinguished: *Re Phillips*, [1914] 2 K.B. 689; *Re Craig, Ex parte Hinchcliffe* (1916), 115 L.T. 157. Considered: *Re Stokes, Ex parte Mellish*, [1918–19] All E.R.Rep. 1179; *Re Thellusson, Ex parte Abdy* v. *Official Receiver*, [1918–19] All E.R.Rep. 729; *Re Wigzell, Ex parte Hart*, [1921] 2 K.B. 835; *Scranton's Trustee* v. *Pearse*, [1922] 2 Ch. 87; *Finance and Guarantee Corpn.* (1930), 69 L.Jo. 283. Referred to: *Wells* v. *Wells*, [1914] P. 157; *Re Wilson, Ex parte Salaman, The Trustee* v. *Keith, Prowse & Co.* (1925), 133 L.T. 814; *Re Gozzett, Ex parte Messenger & Co.* v. *Trustee*, [1936] 1 All E.R. 79.

As to property of bankrupt available for distribution among creditors, see 2 Halsbury's Laws (3rd Edn.) 404 et seq.; and for cases see 4 Digest (Repl.) 507 et seq.

Cases referred to:

(1) *Re Condon, Ex parte James* (1874), 9 Ch. App. 609; 43 L.J.Bcy. 107; 30 L.T. 773; 22 W.R. 937, L.JJ.; 4 Digest (Repl.) 226, *2031*.

(2) *Re Carnac, Ex parte Simmonds* (1885), 16 Q.B.D. 308; 54 L.T. 439; 34 W.R. 421; sub nom. *Re Rivett-Carnac, Ex parte Simmonds*, 55 L.J.Q.B. 74; 2 T.L.R. 18, C.A.; 4 Digest (Repl.) 227, *2032*.

(3) *Else* v. *Else* (1872), L.R. 13 Eq. 196; 41 L.J.Ch. 213; 25 L.T. 927; 20 W.R. 286; 40 Digest (Repl.) 71, *535*.

(4) *Re Banister, Broad* v. *Munton* (1879), 12 Ch.D. 131; 48 L.J.Ch. 837; 40 L.T. 319, 828; 27 W.R. 547, 826, C.A.; 40 Digest (Repl.) 76, *582*.

Appeal by the official receiver from a decision of Bigham, J.

The bankrupt was entitled to two policies of assurance effected on his own life with the Guardian Assurance Co., one for the sum of £300 at an annual premium of £9 19s. 3d., and another for the sum of £500 at an annual premium of £16 12s. 1d. By a mortgage dated April 13, 1896, these policies were assigned to

Messrs. Child & Co., bankers, to secure an overdraft of £400. This contained the usual covenant to pay the interest and the premiums on the policies. Towards the end of 1895 the bankrupt, being pressed for money, requested his wife to make these payments for him, and promised to repay her when his financial affairs improved. She instructed Messrs. Child & Co. to pay the interest due to themselves and the premiums due to the assurance company as and when they became due, and to debit her account with them with such payments. This they continued to do from December, 1895, until the death of the bankrupt in March, 1906. The total amount paid for premiums and interest on the loan was £481 14s. 2d. On Jan. 29, 1896, the debtor committed an act of bankruptcy. On April 21, 1896, a petition was presented against him in respect of which a receiving order was made on July 16, 1896, and he was duly adjudicated a bankrupt on Aug. 27, 1896. The moneys having become payable under the policies, the Guardian Assurance Co. paid to Messrs. Child & Co. £936 10s., being the policy moneys and bonuses due under the two policies, and there remained £514 16s. 8d. in their hands after payment of the principal and interest of their loan. This sum was, in consequence of the usual notice of bankruptcy which had been served upon them, paid to the trustee in bankruptcy. The widow claimed to be repaid out of the sum of £514 16s. 8d. the amount paid by her as premiums and interest. At the date of the receiving order the surrender value of the policies was insufficient to discharge the mortgage debt. A trustee had been appointed in the bankruptcy, but he had long since been released, and the official receiver had become the ex-officio trustee. Neither of them was aware of the payment of the premiums by the debtor's wife until this claim was made. However, it had come to the knowledge of the official receiver that the bankrupt had during his preliminary examination in 1901 stated that his life was insured, that the policy was held as security by Messrs. Child & Co., and that his wife paid the interest and premiums, and this apparently had not come to the knowledge of the former trustee.

The official receiver moved for a declaration that the proceeds of the policies after deducting the amount of the mortgage thereon formed part of the property of the bankrupt divisible among his creditors, but BIGHAM, J., held that although the widow had no legal right to be recouped the amount she had paid for interest and premiums, the trustee, as an officer of the court, ought to do what was just, and directed him to refund the amount the widow had expended. The official receiver appealed.

The Solicitor-General (*Sir William Robson, K.C.*) and *Hansell* for the official receiver.

Whinney for the widow.

VAUGHAN WILLIAMS, L.J.—In this case I think the judgment of BIGHAM, J., is quite right. In truth and in fact the object of this appeal is to induce the court to say that the decisions in *Ex parte James* (1) and *Ex parte Simmonds* (2) are limited to the particular case of money paid under a mistake of law. In my opinion, in those two cases the Court of Appeal did not intend to limit their decision to that particular case, but intended to decide as a general principle that which JAMES, L.J., at the end of his judgment in *Ex parte James* (1), laid down as the duty of the court. He says (9 Ch. App. at p. 614):

> "I am of opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The court, then, finding that he has in his hands money which in equity belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

One must bear in mind the facts of the case, but what were the facts of that case? The money had been paid under such a mistake of law that it could not be re-

A covered by any judicial process whatsoever, either in law or equity. When JAMES, L.J., says that the trustee has in his hands money which in equity belongs to somebody else, he is not referring to an equity which is capable of forensic enforcement in a suit or action, but to a moral principle which he describes when he says that the Court of Bankruptcy ought to be as honest as other people.

In *Ex parte Simmonds* (2) LORD ESHER states exactly the same principle. He B says (16 Q.B.D. at p. 312):

> "When I find that a proposition has been laid down by a court of equity or by the Court of Bankruptcy which strikes one as a good, a righteous, and a wholesome one, I eagerly desire to adopt it. Such a proposition was laid down by JAMES, L.J., in *Ex parte James* (1). A rule has been adopted by courts of C law, for the purpose of putting an end to litigation, that if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it. But the court has never intimated that it is a high-minded thing to keep money obtained in this way; the court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order, that is, to put an end to litigation. But D JAMES, L.J., laid it down in *Ex parte James* (1) that, although the court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do—viz., not to take advantage of the mistake of law."

Those two decisions clearly lay down a general principle and they are not limited E to the particular case of mistake of law, and we ought to follow those decisions. I know it is said that it opens the door dangerously wide when you allow the court or its officer to order money to be repaid in a case where there is no legal right of recovery, but although these decisions allow those who are acting judicially in bankruptcy to exercise this discretion, the discretion which is given must be acted on on judicial principles. It is not a case in which there is no appeal.

F If we thought that BIGHAM, J., had exercised his discretion upon other than proper judicial principles we should hold that he was wrong, but in this particular case these policies were entered into by the bankrupt before the commencement of his bankruptcy, and then the wife at his request advanced the money to pay the premiums, it seems that, quite irrespective of the rule in *Ex parte James* (1) and in *Ex parte Simmonds* (2), the wife had such an interest in the policies as entitled G her to prevent the trustee or other representative getting the benefit of these policies without recouping the premiums which she had paid. That would be sufficient to dispose of the case. But I do not wish to dispose of it only on that ground, especially as the Solicitor-General desires the court to determine what is the true principle laid down in *Ex parte James* (1) and in *Ex parte Simmonds* (2). We find that it came to the knowledge of the trustee for the time being, from the preliminary H examination of the bankrupt, that the wife was paying these premiums, or some premiums. I pause here to say that, in my opinion, it makes not the slightest difference to the representation of the estate whether there is one trustee throughout or whether there are several trustees; if any question arises as to the knowledge of the trustee, the knowledge of the first trustee is the knowledge of the second for such a purpose. Nor does it matter, to my mind, whether in his preliminary I examination the bankrupt gave an exact description of the policies in respect of which the premiums were paid or whether he even stated the amount of the premiums correctly. There was quite enough to put the trustee on inquiry, and in this state of things the wife goes on paying the premiums, and ultimately the bankrupt dies and the trustee wishes to take the benefit of these policies without any regard to the fact that the wife has been paying the premiums which had kept the policies alive. In my judgment, to use the words of JAMES, L.J., the court would be allowing its officer to do a thing which from a moral point of view would be dishonest if it allowed the trustee to keep the whole of the sum realised by the

policies without any recognition of the rights of the widow in respect of those payments. The appeal must be dismissed.

FARWELL, L.J.—I agree. On this general question I should like to say what is my understanding of the principle on which this court proceeds, because this discretion cannot be left to be determined or regulated according to the length of the foot, to use an old phrase, of the particular judge who has to exercise it. Our courts have two functions, one to decide rights between the parties, and the other to administer estates. In administering estates, whether in Chancery, bankruptcy, or the winding-up of companies, the court by its officer often finds itself in the position of a quasi litigant. The principle laid down in the cases to which my Lord has referred is that the officer of the court is bound to be even more straightforward and honest than an ordinary person in the affairs of everyday life. It would be insufferable for this court to have it said of it that it had been guilty by its officer of a dirty trick. Test that by the case of money paid under mistake of law. Theoretically, both sides know the law. Therefore, the man who is receiving knows that he is receiving that to which he is not lawfully entitled. No high-minded man, of course, would dream of doing such a thing, and the court will not allow its officer to put it in the position of insisting upon its right to keep money which it has received from a third party with full knowledge that he was not bound to pay the money, also with full knowledge that he was not aware of that fact. That may be the rule of law, but the court will not allow its officer to act upon it.

In this case I will assume that this lady had not a charge on the policy moneys for the premiums she had paid, although I think she had. The trustee in bankruptcy is told that the bankrupt's life is insured and that the wife had always paid the premiums, and he takes no further steps. He knew that if the premiums were not paid the policies would lapse. He knew that the wife had been paying them, and he assumed that she would go on paying them, otherwise he was bound to pay them himself or get them paid. Inasmuch as by recent decisions the person who pays premiums cannot, contrary to what was thought some years ago, put in force in his own favour the doctrine of salvage and so recover the premiums by which alone the policy has been preserved, to my mind it would certainly not be in accordance with fair dealing—that open, honest dealing to which reference has been made—that the court should allow its officer to say: "I knew the wife was paying and I let her go on paying, and said nothing to her to lead her to believe that I was going to claim the policy moneys at the end without repaying the premiums which she had paid." I do not suggest that the officer of the court actually went through that mental process in the case, or that he intended to make an unfair claim against the wife, but, when it comes to be analysed, that is the process which is gone through theoretically, if not actually; and that is the dirty trick which JAMES, L.J., said the court would not allow to be put upon it. Certainly that equity, or whatever you may call it, is not confined to a case of money paid under mistake of law. I have already referred to *Else* v. *Else* (3), a case of vendor and purchaser, where the principle was applied to the construction of conditions of sale, and I find the same principle stated in *Re Banister* (4), where FRY, J., said (12 Ch.D. at p. 136):

> "Another thing equally plain is this, that where the conditions of sale are framed in bad faith, so as in effect to trap the purchaser, the court will not hold him to be bound. It is also perfectly plain that where the sale is under the direction of the court, the court will lean, if possible, to a more exact requirement of good faith and honesty on the part of the vendor; it will endeavour to insist upon that fair, straightforward, honest, open dealing which ought to characterise transactions between vendor and purchaser."

COTTON, L.J., in the same case on appeal from FRY, J., said (ibid. at p. 150):

> "I think in a case of this sort, where the sale is by the court, the court is bound to take more especial care, if possible, that there shall be nothing in the conditions, or in the representations therein contained, which by possibility

can mislead a vendor, because the purchaser has a right to assume that the court will take very good care that there shall be nothing that can in any way mislead him as to the title he is getting."

Adopting those principles, if they are applied with judicial discretion, I see no risk as has been held out to us by the Solicitor-General, and I think that the decision of BIGHAM, J., was quite right.

BUCKLEY, L.J.—In *Ex parte James* (1) JAMES, L.J., speaks of money which in equity belongs to someone else. In my judgment, he there meant money which in point of moral justice and honest dealing belongs to someone else. He was using the words in a popular sense, and not in the sense of money which in a court of equity would be treated as belonging to someone else. I think the context of his judgment plainly shows that that was his meaning. In *Ex parte Simmonds* (2) LORD ESHER, referring to that case, says that the court will direct its officer to act as any high-minded man would act—namely, not to take advantage of a mistake of law. That is to say, assuming that he has a right enforceable in a court of justice, the Court of Bankruptcy, or the court for the administration of estates in Chancery, will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do. In *Ex parte Simmonds* (2) the court were extending the doctrine of *Ex parte James* (1) in this sense, that they were holding not merely that if the trustee had the money still in his hands he ought to hand it to the person who in point of justice was entitled to it, but that if he had parted with the money and there was other money coming in from the bankruptcy he ought to appropriate it to make good the fund which he had by error misappropriated.

Applying that principle to the present case, the facts may be stated very shortly. The wife had in December, 1895, paid a premium, and from that time forward down to 1901 she continued to pay the premiums upon these policies. In 1901 the trustee by the preliminary examination learned that she was paying the premiums, and, although it is said that he learned also from what was said there that the policies were mortgaged to their full extent, I think that does not make any difference, because he was bound to inquire. He knew in 1901 that there were policies and that the wife was paying the premiums on those policies. Knowing that, he allowed those payments to go on from 1901 to 1906, and in 1906 the life dropped. Under these circumstances, disregarding the legal rights, the real fact is that the policy moneys payable in 1906 originated from and owed their existence to the premiums which the wife had paid, and it would be grievously unfair and contrary to natural justice between man and man that she should have kept up the policies and then, when the life had dropped, that somebody else should take the money. No one can say that she can enforce that right, but as matter of justice it cannot be right, when the time comes for the payment of the moneys due on the policies, to allow the trustee to turn round and say: "I know you were keeping down the premiums, but I shall take the policy moneys and you shall go without the money you have paid." That is not consistent with justice, and no high-minded man would do it. The principle in *Ex parte James* (1) applies to this case, but, beyond that, inasmuch as the wife paid a premium in 1895 before the act of bankruptcy, she thus acquired certain rights in respect of the policies, it is clear that the decision of BIGHAM, J., is quite right, and that the appeal must be dismissed with costs.

Solicitors: *Solicitor to the Board of Trade*; *Finch & Jennings*.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law*.]

A

Re SHEPHARD. GEORGE *v.* THYER

[Chancery Division (Kekewich, J.), January 30, February 9, 1904]

[Reported [1904] 1 Ch. 456; 73 L.J.Ch. 401; 90 L.T. 249]

Marriage—Presumption of marriage—Ceremony followed by cohabitation—Strict proof unnecessary—Ceremony abroad—Illegality according to lex loci celebrationis.

B

An Englishman and an Englishwoman travelled to France and there purported to go through a form of marriage. Thereafter, for thirty years, they lived together in England, as man and wife, and had several children. There was some evidence of recognition of the children by the family of the parties.

C

Held: in view of the long-continued cohabitation of the parties as man and wife a valid marriage between them would be presumed and strict proof of the marriage not required even on the assumption that the ceremony in France could not constitute a lawful marriage. The offspring of such a union were, therefore, entitled to share in a gift under a will to "children."

D

Notes. Referred to: *Goldstone* v. *Goldstone* (1922), 127 L.T. 32; *Re Taplin, Watson* v. *Tate*, [1937] 3 All E.R. 105; *Re Bradshaw, Blandy* v. *Willis*, [1938] 4 All E.R. 143.

As to presumption and proof of marriage, see 19 Halsbury's Laws (3rd Edn.) 812–816; and for cases see 27 Digest (Repl.) 69 et seq.

Cases referred to:

E

(1) *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (1881), 6 App. Cas. 364; 44 L.T. 895; sub nom. *Sastry Velaider Aronegary and Sembacutty Sinnepullei* v. *Kassanader Sambonade*, 50 L.J.P.C. 28, P.C.; 27 Digest (Repl.) 69, *476*.

(2) *Piers* v. *Piers* (1849), 2 H.L.Cas. 331; 13 L.T.O.S. 41; 13 Jur. 569; 9 E.R. 1118, H.L.; 27 Digest (Repl.) 75, *555*.

F

(3) *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163; 1 Jur. 911; 7 E.R. 365, H.L.; 3 Digest (Repl.) 399, *14*.

Also referred to in argument:

Breadalbane Case, Campbell v. *Campbell* (1867), L.R. 1 Sc. & Div. 182, H.L.; 27 Digest (Repl.) 72, *528*.

G

R. v. *Stockland* (1762), Burr.S.C. 508; 2 Bott. 6th Edn. 58; 27 Digest (Repl.) 71, *503*.

St. Devereux v. *Much Dew Church* (1762), 1 Wm. Bl. 367; 96 E.R. 205; sub nom. *R.* v. *St. Devereux (Inhabitants)*, Burr. S.C. 506; 37 Digest 243, *344*.

Standen v. *Standen* (1791), Peake, 45, N.P.; 27 Digest (Repl.) 47, *241*.

Hervey v. *Hervey* (1773), 2 Wm. Bl. 877; 96 E.R. 516; 27 Digest (Repl.) 72, *506*.

H

Lyle v. *Ellwood* (1874), L.R. 19 Eq. 98; 44 L.J.Ch. 164; 23 W.R. 157; 27 Digest (Repl.) 74, *551*.

Adjourned Summons to decide which persons were entitled under a residuary gift in a will.

I

Mrs. Ann Priscilla Shephard by her will, dated Dec. 13, 1897, bequeathed her residuary estate to trustees, one of whom was the plaintiff, Richard J. George, and directed them to pay two-thirds thereof "to and in equal shares between all such of the children of the said George Allen as shall be living at my decease." Testatrix died on July 7, 1902, and her will was proved by plaintiff on Aug. 23, 1902. At the date of Mrs. Shephard's decease the George Allen mentioned in her will had five children living by his first wife, to whom he was married in the year 1860, and who died in the year 1870. The remaining six defendants to the summons also claimed to be the children of G. Allen. The five defendants, children of his first marriage, had supplied evidence of that marriage and of their births. The

plaintiff, as executor and trustee of A. P. Shephard, had called on the six remaining defendants to prove the second marriage of G. Allen. The certificates of birth of the six defendants, the surviving younger children, were produced to the plaintiff, George Allen being registered in them as the father and "Elizabeth Allen, formerly Williams," as the mother. George and Elizabeth Allen had filed a joint affidavit, upon which each of them was cross-examined in open court. In this affidavit they swore they were intermarried at some town in France in 1873, whose name they did not recollect. There was also evidence of the marriage ceremony as well as of the attendant circumstances. On behalf of the six last defendants affidavits were filed with the object of showing that testatrix regarded them as the lawful children of G. Allen, and their mother, Elizabeth Allen, as lawfully married to him. One of them had at her request lived with testatrix, who was G. Allen's "sister," both being born out of wedlock; moreover, testatrix had in a letter to her signed herself "your loving aunt," and had given her and her brothers and sisters numerous presents. On the other hand, some of the children of the first marriage, who now for the first time disputed the validity of the second marriage, filed affidavits in support of that view, the most relevant fact stated therein being that G. Allen had since the institution of these proceedings stated to one of these that he was not married.

J. M. Gover for the trustee.
A. H. Jessel for the six surviving younger children.
E. Beaumont for four children of the first marriage.
E. Ford for one child of the first marriage.

KEKEWICH, J.—No one who has listened to this case can doubt that it is a case of considerable difficulty and peculiarity. Having now heard the evidence to-day, I am prepared to give judgment at once and without hesitation, and it is the examination here to-day which has enabled me to dispose of the case.

It is a very singular story. George Allen was, in 1873, a widower with seven children. It is said that he desired to be married to Elizabeth Williams, and that she wished to be married to him. That is beyond doubt. They had been living together and there had been intimacy between them which made an early marriage extremely desirable. He was in the police force, and he knew that he should have to report his marriage to the chief constable. He did not intend to avoid that, and he apparently did not intend to conceal his marriage, but he did not wish anybody to know it until after the marriage had taken place. If he meant to live with her ultimately, I do not know why he did not go to the parish church instead of to France to be married, he did not know how or where. Nor is it easy as regards the wife—except that she desired to be married and, that being the desire on her part, was actuated by a reasonable wish to please her intended husband—and I can the more easily conceive her consenting to go to France to be married than his wishing to take her. She had relations who were "not agreeable." I understand that to mean that they knew that she had been on very friendly terms with George Allen, and they did not care for him as part of the family. She was content that the marriage should take place under the circumstances, not to be disclosed, in fact, until accomplished.

That being the state of affairs before they started, Elizabeth Williams had a brother, captain of a merchant steamer. His name was Johnny Williams. He was engaged to a governess in France, and either Johnny Williams or this lady suggested this marriage in France. How much was resolved on it is impossible to say. According to the cross-examination of Mr. and Mrs. Allen, who were cross-examined with proper severity, there is no doubt that it was arranged that these two should go in Johnny Williams' ship to France, and that they left Falmouth, stayed for a short time, and came back to Plymouth. What they did in France it is very difficult to ascertain. On the evidence, they went somewhere, in accordance with an arrangement made by the intended sister-in-law, where they went

through something purporting to be a ceremony of marriage. There was a ring put on by the lady herself not very formally. There was some kind of ceremony, and there was something like an acknowledgment of their being husband and wife. They both agree that there was something in the form of a certificate given them, in what names they cannot tell. What it was, it is difficult to say, and I think it will be safer to leave it out of the question. It is not likely to have been in English; neither of them know what it was like. They tell a long story about producing it to the chief constable of the county, and somehow or other the certificate was lost and is not forthcoming. We had better leave it out of consideration. They came home and shortly afterwards lived together as husband and wife. There seems to have been some reason for not doing so during the first two or three weeks. They have lived together as husband and wife up to the present time—that is, for thirty years. She has borne several children, whose claim I am considering. There is some evidence on the affidavits of recognition by the family, and there was some given in the witness-box to-day. It is not strong, and might be severely criticised.

The question is whether, under these circumstances, I ought to require strict evidence of the marriage before I admit the children to share in the property which has been given to the children of George Allen. Counsel on behalf of the elder children wished to call evidence of a French expert to prove the impossibility of this man and this woman having been married in France in the way alleged. To avoid controversy, I have asked him to assume that this marriage, as alleged, was impossible according to French law, and according to the habits of law-abiding people in France. Beyond that the evidence of an expert could not possibly go. And no one can say that persons might not have met together in a room, and purported to marry them, and go through certain ceremonies, and even give them some certificate. But I will assume that it was impossible, according to the law of France and the habits of law-abiding people in France, that the marriage as alleged should take effect.

What is the proper conclusion? There are many cases where the fact of marriage has been made a great deal of. If we start from the fact of marriage, the presumption arising from cohabitation is exceedingly strong. There are other cases which go very much on the recognition of the children and wife, or more often of the children, and point to that as strengthening the presumption in favour of a valid marriage. But counsel argues that, in the first place, the old law has been largely abrogated by the greater facilities afforded for proof since the establishment of registries; and, secondly, he says that the cases cited are to a great extent dependent on Scottish law, under which, even at the present day, there are facilities for irregular marriages. But the case in the Judicial Committee of the Privy Council of *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (1) negatives both these arguments. So far as I know, it is the last case. There we have a case decided in quite modern times, long after all that legislation in favour of publicity and registries, and also it is free from the Scottish law. It was from Ceylon, and no doubt in the judgment there is a most interesting discussion of the law of Ceylon and the people called Tamils; but what was said by Sir Barnes Peacock was this (6 App. Cas. at p. 371):

> "It appears from the authorities which he [Dr. Phillimore] cited that, according to Roman-Dutch law, there was a presumption in favour of marriage rather than of concubinage. It does not, therefore, appear to their Lordships that the law of Ceylon is different from that which prevails in this country; namely, that where a man and a woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they are living together in consequence of a valid marriage, and not in a state of concubinage."

Later on he alludes to *Piers* v. *Piers* (2), where there was a reference to *Morris* v. *Davies* (3).

So I have here the decision of a high authority getting rid of the fact of marriage and the recognition of children. It does not show that either of these is essential, but the fact that the parties were living together as man and wife for a time was, coupled with other facts, there held sufficient to establish the marriage. If that was enough to support the presumption there, so it is here. I have the intention of marriage. About that there is not a shadow of doubt. I have some evidence about which there is a great deal of doubt. There is a somewhat romantic story, which is certainly doubtful in some of its details, as to a marriage de facto, of something gone through to perfect the intention of marriage. And then I have some evidence of recognition of children afterwards. Now, after thirty years, the court is asked to say that because the marriage has not been proved, and cannot be proved, the children of George Allen are not entitled to share. To hold that would go against the authorities. I must, therefore, hold that they are entitled to share in the bequest to his children.

Solicitors: *Mead & Co.*, for *S. G. C. Cossham*, Bristol; *Gribble, Oddie, Sinclair & Johnson*, for *Eastley & Eastley*, Paignton; *Busk, Mellor & Norris*, for *Cleverton & Son*, Plymouth.

[*Reported by* W. P. PAIN, ESQ., *Barrister-at-Law.*]

WEST LEIGH COLLIERY CO., LTD. *v.* TUNNICLIFFE AND HAMPSON, LTD.

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord Asbourne, Lord James of Hereford and Lord Atkinson), July 9, 11, December 2, 1907]

[Reported [1908] A.C. 27; 77 L.J.Ch. 102; 98 L.T. 4; 24 T.L.R. 146; 52 Sol. Jo. 93]

Land—Right to support—Subsidence through working of mine—Damages—Measure—Compensation for subsidence actually occurred—Exclusion from consideration of risk of future subsidence.

In assessing the damages for injury to buildings caused by subsidence occasioned by the working of a mine under the site of the buildings, the depreciation in the value of the property due to the risk of future subsidence cannot be taken into consideration. Damages can only be assessed on the damage caused by the subsidence which has actually occurred.

Decision of the Court of Appeal, [1906] 2 Ch. 22, reversed.

Notes. The coal industry was nationalised by the Coal Industry Nationalisation Act, 1946 (16 HALSBURY'S STATUTES (2nd Edn.) 276).

Considered: *Re Beckermet Mining Co., Ltd.'s Application*, [1938] 1 All E.R. 389. Distinguished: *London and North Eastern Rail. Co.* v. *B.A. Collieries, Ltd.*, [1945] 1 All E.R. 51. Referred to: *Wednesbury Corpn.* v. *Lodge Holes Colliery Co.*, [1907] 1 K.B. 78.

As to subsidence damage in general, see 26 HALSBURY'S LAWS (3rd Edn.) 371–376; and for cases concerning prospective and continuing damage, see 17 DIGEST (Repl.) 84–89.

Cases referred to:

(1) *Bonomi* v. *Backhouse* (1858), E.B. & E. 622; 27 L.J.Q.B. 378; 4 Jur.N.S. 1182; reversed (1859), E.B. & E. 646; 28 L.J.Q.B. 380; 5 Jur.N.S. 1345, Ex. Ch.; affirmed sub nom. *Backhouse* v. *Bonomi* (1861), 9 H.L.Cas. 503; 34 L.J.Q.B. 181; 4 L.T. 754; 7 Jur.N.S. 809; 9 W.R. 769; 11 E.R. 825, H.L.; 17 Digest (Repl.) 87, 75.

(2) *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127; 55 L.J.Q.B. 529; 54 L.T. 882; 51 J.P. 148; 2 T.L.R. 301, H.L.; 17 Digest (Repl.) 85, *62*.

(3) *Lamb* v. *Walker* (1878), 3 Q.B.D. 389; 47 L.J.Q.B. 451; 38 L.T. 643; 42 J.P. 532; 26 W.R. 775, D.C.; 17 Digest (Repl.) 87, *77*.

Also referred to in argument:

Rust v. *Victoria Graving Dock Co. and London and St. Katherine Dock Co.* (1887), 36 Ch.D. 113; 56 L.T. 216; 35 W.R. 673, C.A.; 17 Digest (Repl.) 124, *351*.

Rowbotham v. *Wilson* (1860), 8 H.L.Cas. 348; 30 L.J.Q.B. 49; 2 L.T. 642; 24 J.P. 579; 6 Jur.N.S. 965; 11 E.R. 463, H.L.; 34 Digest 613, *121*.

Battishill v. *Reed* (1856), 18 C.B. 696; 20 J.P. 775; 4 W.R. 603; 139 E.R. 1544; sub nom. *Bathishill* v. *Reed*, 25 L.J.C.P. 290; 19 Digest (Repl.) 78, *443*.

Appeal from a decision of the Court of Appeal (Sir Richard Henn Collins, M.R., and Cozens-Hardy, L.J., Romer, L.J., dissenting), reported [1906] 2 Ch. 22, reversing a decision of Swinfen Eady, J., reported [1905] 2 Ch. 390, in an action brought by the respondents, who were owners of cotton mills, against the appellants, who were a colliery company, to recover damages for subsidence caused by the appellants' mining operations. Both parties consented to a judgment directing an inquiry as to the amount of damages. The matter was sent to an official referee, who estimated that the respondents were entitled to £1,300 in respect of damage already sustained, and he assessed the damages for depreciation of the selling value of the property in consequence of apprehension of the risk of future damage by further subsidence at £13,200. The appellants contended that they were not liable for this sum. No question was raised as to the £1,300.

Swinfen Eady, J., decided in favour of the appellants' contention, but his judgment was reversed by the majority of the Court of Appeal.

C. A. Russell, K.C., *Jessel, K.C.*, and *Leslie Scott* for the appellants.

Cripps, K.C., *Langdon, K.C.*, and *F. L. Wright* for the respondents.

Their Lordships took time for consideration.

Dec. 2, 1907. The following opinions were read.

LORD MACNAGHTEN.—I agree with Swinfen Eady, J., and Romer, L.J. I think that this case is concluded by authority. In my opinion, it is impossible to reconcile the judgment under appeal with the principles laid down in this House in *Backhouse* v. *Bonomi* (1) and *Darley Main Colliery Co.* v. *Mitchell* (2). It is undoubted law that a surface owner has no cause of action against the owner of a subjacent stratum who removes every atom of the mineral contained in that stratum, unless and until actual damage results from the removal. If damage is caused, then the surface owner "may recover for that damage," as Lord Halsbury, L.C., says in the *Darley Main Colliery Case* (2), "as and when it occurs." The damage, not the withdrawal of support, is the cause of action. And so the Statute of Limitations is no bar, however long it may be since the removal was completed; nor is it any answer to the surface owner's claim to say that he has already brought one or more actions and obtained compensation once and again for other damage resulting from the same excavation. If this be so, it seems to follow that depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action by itself. That was the conclusion reached by Cockburn, C.J., in his dissentient judgment in *Lamb* v. *Walker* (3), which was approved in this House in the *Darley Main Colliery Case* (2). I think, as the Chief Justice thought, that this conclusion necessarily follows from the principles asserted by the noble and learned Lords who took part in *Backhouse* v. *Bonomi* (1), and particularly by Lord Cranworth and Lord Wensleydale.

But if depreciation caused by apprehension of future mischief does not furnish a cause of action by itself, because there is no legal wrong, though the damage may be very great, it is difficult to see how the missing element can be supplied by presenting the claim in respect of depreciation tacked on to a claim in respect of a

wrong admittedly actionable. If one examines this claim in respect of depreciation, and tries to investigate its origin, it will be found that it really depends upon a notion, which is now exploded, that the right of the surface owner is a right in the nature of an easement, or a right to have pillars of support left for his security, while, in reality, his right, as LORD WENSLEYDALE observes, is merely the right of a landowner to the ordinary enjoyment of his land. I cannot help thinking that a surface owner who complains of depreciation in the value of his property caused by underground workings is not wholly free from blame himself. In a sense it is his own folly. He has erected buildings or acquired buildings erected upon ground which is, or may be, undermined. So long as there are no underground workings, or it is taken for granted that his buildings rest upon a foundation that is solid throughout, all is well. But when it becomes known from some accident in the neighbourhood, or from evidence given in court, or in some other way, that his buildings have beneath them a cavity or hollow, then people begin to think that it is probable, or at least possible, that some day his land, with the buildings upon it, may be let down. The secret has come out, and the character of his property suffers in public estimation. In truth, surface ground, with a stratum beneath it belonging to a different owner from which the minerals have been or are liable to be removed, is not justly entitled to the credit of absolute stability. I am of opinion that the order appealed from should be reversed, and the judgment of SWINFEN EADY, J., restored, with costs here and below.

LORD ASHBOURNE.—This action is brought to recover damages for injuries by subsidence owing to a removal of minerals, and the official referee who considered the question of what damages the plaintiffs were entitled to awarded two separate sums. As to the cost of all the repairs necessary, he measured the damages at the sum of £1,300, and he assessed the damages for the depreciation of the premises at £13,200. It is the latter sum which has been the subject of controversy before your Lordships. The broad objection urged against it by the appellants is that it is inconsistent with the former decisions of your Lordships' House in the well-known cases of *Backhouse* v. *Bonomi* (1) and *Darley Main Colliery Co.* v. *Mitchell* (2). It was urged by the appellants that this large sum was mainly composed of an allowance for the risk of future damage, and that, as they must remain liable for any future subsidence, if it should occur, they might thus have to pay twice over for the same loss. The excavations in themselves give no right of action. It is only the damage caused to the respondents' right of enjoyment of their property by a subsidence caused by the excavations that gives any right of action. Before any subsidence it might be that the known excavations and the fears resulting therefrom would cause a depreciation in the value of the property for which no action would lie. The fear of a subsidence, although founded on the known fact of extensive excavations, cannot give any cause of action, even although there may have been already a subsidence. This is clear from the two cases already referred to, and cannot now be questioned. If no action for interfering with the enjoyment of property can be brought before a subsidence, could it be urged that a comparatively small subsidence, the consequences of which would be repaired for far less than £1,300, would give a right to an inquiry as to depreciation which might result in the large figure awarded by the official referee? There is no secret about these large excavations. They are, I should think, always known to the owners and occupiers in the neighbourhood. There may be a certain amount of uneasiness in the minds of those whose lands are near and adjoin, but each party has clear rights. The mine owner can excavate all that he thinks worth taking, subject to the risk of an action on the part of those whose enjoyment of their property he may interfere with, and those who are so interfered with may bring actions as often as a fresh subsidence takes place and their enjoyment of their property is so interfered with.

It has been strongly urged before your Lordships that if the depreciation in the present value of the property by the fear of future damage is not now compensated

for injustice will be done to the owner, because a purchaser will now give much less for the property on which the subsidence has taken place. It is pressed that the loss that may so arise is part of the damage now recoverable by reason of the present subsidence. SIR RICHARD HENN COLLINS, M.R., puts it:

> "The first subsidence has established that the plaintiffs' mill is within the area of danger created by the acts of the defendants. It has been changed from the position of buildings presumably stable into that of buildings presumably unstable."

But the fact of the excavations was what constituted the area of danger and of fear, and that would not justify the owner on the occasion of the first subsidence in making such a claim. An owner can bring a fresh action for the damage caused by each fresh subsidence, but he cannot recover anything for the risk of future damage. To give damages for depreciation, because a purchaser, from fear of future damage, would give less after the subsidence would be a method of doing that which the law as laid down in this House would not sanction. COCKBURN, C.J., well puts the position in his judgment in *Lamb* v. *Walker* (3) which has been accepted as law. He said (3 Q.B.D. at pp. 399, 400):

> "Taking the view I do of [*Backhouse* v. *Bonomi* (1)] I am unable to concur in holding that in addition to the amount to which he may be entitled for actual damage sustained through the excavation of the adjacent soil by the defendants, the plaintiff is entitled to recover in respect of prospective damage—that is to say, anticipated damage expected to occur which has not actually occurred, and may never arise."

I am glad, however, to note that SWINFEN EADY, J., did not limit his judgment to the £1,300 for repairs, but has sanctioned a reference back to the official referee to "assess the damages in respect of depreciation of premises." As the learned judge says,

> "a mill which has been much cracked and injured and with walls bulging and out of plumb, although repaired, is manifestly not of the same selling value as before it was injured. The repairs are very far from entirely reinstating it, and the loss to the plaintiffs is the same whether the mill be sold and the loss realised or whether the mill be retained by the plaintiffs, its value being reduced."

In my opinion the appeal should be allowed, and the judgment of SWINFEN EADY, J., restored, with costs here and in the courts below.

LORD JAMES OF HEREFORD.—It is after some hesitation, and with considerable reluctance, that I have come to the conclusion that the opinion delivered by LORD MACNAGHTEN contains the correct application of the principles of law governing this case. I come to that conclusion on the ground that the authorities quoted by my noble and learned friend bind us, and must prevail. Although I much doubt if justice to either party to this suit is certain to be secured by further litigation, I think that it should be made clear that your Lordships' judgment proceeds upon the ground that if further surface damage should occur, a just claim for damages may from time to time be made, and the plaintiffs in this action may make a further claim for damage caused at that time. I will only add that while I concur in the result of my noble and learned friend's opinion, I prefer, for the present, to withhold my full acquiescence in the views expressed by him towards the end of his opinion as to the rights of a surface owner to damages.

LORD ATKINSON.—I concur. I admit that during the progress of the argument I entertained some doubt as to whether this case was covered by the authorities cited in your Lordships' House to which LORD MACNAGHTEN has referred. On consideration, however, I agree with him. In my view, to give damages for depreciation in the market value due to the apprehension of future injury by

A subsidence is to give damages for a wrong which has never been committed, since it is the damage caused by subsidence, and not the removal of the minerals, which gives the right of action.

LORD LOREBURN, L.C.—I have read the opinion just given by Lord Macnaghten, and I so entirely agree in his conclusion, and in the reasoning by B which it is reached, that little is left for me to add. I see no middle course between saying one of two things—either a surface owner is to recover once for all for the diminution in the value of his property which may be caused by the fact that the mineral owner beneath him has excavated, or the surface owner can recover only for the actual physical damage so caused, as and when it occurs. The former alternative would be inconvenient and capricious in its results, but it need not be C discussed, because it is excluded by authority of the highest order. The latter is affirmed as law by equally high authority, and it draws with it the result that the compensation disputed in this case cannot be allowed. To say that the surface lands would sell for less because of the apprehension of future subsidence is, no doubt, true. To say that the depreciation in present value caused by that apprehension ought to be included as an element of compensation is, in my view, unD sound; for that is asking compensation, not for physical damage which has in fact been caused, but for the present influence on the market of a fear that more such damage may occur in future. Etymological confusion lies at the root of many difficulties, and perhaps there has been in this subject something of the kind in regard to the use of the word "damage." Be that as it may, I am unable, with the utmost respect, to agree with the opinion of the majority of the Court of Appeal. E I think that this appeal ought to be allowed.

Appeal allowed.

Solicitors: *Fowler & Co.*, for *Grundy, Lamb & Grundy*, Manchester; *Patersons, Snow, Bloxam & Kinder*, for *Wilsons, Wright & Wilsons*, Manchester.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

FITZROY *v.* CAVE

[Court of Appeal (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), May 24, 25, June 9, 1905]

[Reported [1905] 2 K.B. 364; 74 L.J.K.B. 829; 93 L.T. 499; 54 W.R. 17; 21 T.L.R. 612] B

Chose in Action—Assignment—Validity—Immateriality of motive of assignee—Assignment of debts taken with view to making debtor bankrupt.

Maintenance of Action—Chose in action—Assignment—Action on assignment—Assignment of debts—Acquirement by assignee of only bare right of litigation. C

The motive which actuates the assignee of a chose in action, e.g., a debt, in taking the assignment is immaterial on the question whether or not the assignment is valid.

The plaintiff and the defendant were co-directors of a company, and to be enabled to get the defendant made a bankrupt and so removed from the board of the company—a step which, he alleged, was necessary for the good of the company and his own protection—the plaintiff took an absolute assignment from creditors of the defendant of their debts. In that assignment no pecuniary consideration was provided and the plaintiff took no beneficial interest, for he covenanted that if he should recover the debts, he would pay over to the assignors (the creditors) the amounts of the debts, or so much as he could recover, less the costs necessarily incurred. Notice of the assignment was given to the defendant. In an action by the plaintiff against the defendant to obtain a judgment for the amount of the debts on which bankruptcy proceedings could be founded, D E

Held: although by the assignment the plaintiff acquired nothing but a bare right of litigation the action was not void on the ground of maintenance, nor did the motive for which the assignment was taken render it invalid as being against public policy; and, therefore, the assignment was enforceable and the plaintiff was entitled to succeed in his action. F

Comfort v. *Betts* (1), [1891] 1 Q.B. 737, applied.

Notes. Considered: *Bruty* v. *Edmundson* (1915), 113 L.T. 1197. Referred to: *British Cash and Parcel Conveyors* v. *Lamson Store Service Co.*, [1908–10] All E.R.Rep. 146; *Powell* v. *Hemsley* (1909), 101 L.T. 262; *County Hotel and Wine Co.* v. *London and North Western Rail. Co.*, [1918] 2 K.B. 251; *Ellis* v. *Torrington*, [1918–19] All E.R.Rep. 1132; *Holt* v. *Heatherfield Trust, Ltd.*, [1942] 1 All E.R. 404; *Martell* v. *Consett Iron Co.*, [1955] 1 All E.R. 481. G H

As to the assignment of choses of action, see 4 Halsbury's Laws (3rd Edn.) 483 et seq.; and for cases see 8 Digest (Repl.) 547 et seq. As to maintenance, see 1 Halsbury's Laws (3rd Edn.) 39–43; and for cases see 1 Digest (Repl.) 80 et seq.

Cases referred to: I

(1) *Comfort* v. *Betts*, [1891] 1 Q.B. 737; 60 L.J.Q.B. 656; 64 L.T. 685; 55 J.P. 630; 39 W.R. 595; 7 T.L.R. 475, C.A.; 8 Digest (Repl.) 571, *223*.

(2) *Wood* v. *Downes* (1811), 18 Ves. 120; 34 E.R. 263; 1 Digest (Repl.) 101, *770*.

(3) *Prosser* v. *Edmonds* (1835), 1 Y. & C.Ex. 481; 160 E.R. 196; 1 Digest (Repl.) 89, *668*.

(4) *Harrington* v. *Long* (1833), 2 My. & K. 590; 39 E.R. 1069; 1 Digest (Repl.) 93, *693*.

(5) *Stevenson* v. *Newnham* (1853), 13 C.B. 285, 297; 22 L.J.C.P. 110; 20 L.T.O.S. 279; 17 Jur. 600; 138 E.R. 1208, Ex. Ch.; 1 Digest (Repl.) 34, *260*.

(6) *Bradford Corpn.* v. *Pickles*, [1895] A.C. 587; 64 L.J.Ch. 759; 73 L.T. 353; 60 J.P. 3; 44 W.R. 190; 11 R. 286, H.L.; 1 Digest (Repl.) 34, *261.*

(7) *Row* v. *Dawson* (1749), 1 Ves. Sen. 331; cited in 1 De G.M. & G. 774; 27 E.R. 1064, L.C.; 8 Digest (Repl.) 582, *294.*

Also referred to in argument:

Tolhurst v. *Associated Portland Cement Manufacturers* (*1900*), *Associated Portland Cement Manufacturers* (*1900*) v. *Tolhurst*, [1902] 2 K.B. 660; 71 L.J.K.B. 949; 87 L.T. 465; 51 W.R. 81, C.A.; on appeal, [1903] A.C. 414; 72 L.J.K.B. 834; 89 L.T. 196; 52 W.R. 143; 19 T.L.R. 677, H.L.; 8 Digest (Repl.) 547, *33.*

Master v. *Miller* (1791), 4 Term Rep. 320; 100 E.R. 1042; affirmed, 5 Term Rep. 367; 1 Digest (Repl.) 73, *550.*

Hare v. *London and North Western Rail. Co.* (1860), John. 722; 30 L.J.Ch. 817, 821 n.; 2 L.T. 229; 7 Jur.N.S. 1145, 1147 n.; 8 W.R. 352; 70 E.R. 610; 1 Digest (Repl.) 92, *680.*

Torkington v. *Magee*, [1902] 2 K.B. 427; 71 L.J.K.B. 712; 87 L.T. 304; 18 T.L.R. 703, D.C.; on appeal, [1903] 1 K.B. 644; 72 L.J.K.B. 336; 88 L.T. 443; 19 T.L.R. 331, C.A.; 1 Digest (Repl.) 95, *705.*

Dawson v. *Great Northern and City Rail. Co.*, [1905] 1 K.B. 260; 74 L.J.K.B. 190; 92 L.T. 137; 69 J.P. 29; 21 T.L.R. 114, C.A.; 1 Digest (Repl.) 95, *706.*

Bradlaugh v. *Newdegate* (1883), 11 Q.B.D. 1; 52 L.J.Q.B. 454; 31 W.R. 792; 1 Digest (Repl.) 82, *618.*

Alabaster v. *Harness*, [1894] 2 Q.B. 897; 64 L.J.Q.B. 76; 71 L.T. 740; 11 T.L.R. 675; affirmed, [1895] 1 Q.B. 339; 64 L.J.Q.B. 81; 71 L.T. 740; 43 W.R. 196; 11 T.L.R. 96; 14 R. 54, C.A.; 1 Digest (Repl.) 96, *713.*

May v. *Lane* (1894), 64 L.J.Q.B. 236; 71 L.T. 869; 43 W.R. 193; 39 Sol. Jo. 132, C.A.; 1 Digest (Repl.) 89, *669.*

Wallis v. *Duke of Portland* (1797), 8 Bro. Parl. Cas. 161; 3 Ves. 494; 3 E.R. 508; 1 Digest (Repl.) 83, *629.*

De Hoghton v. *Money* (1866), 2 Ch. App. 164; 15 L.T. 403; 15 W.R. 214, C.A.; 1 Digest (Repl.) 92, *682.*

Rees v. *De Bernardy*, [1896] 2 Ch. 437; 65 L.J.Ch. 656; 74 L.T. 585; 12 T.L.R. 412; 1 Digest (Repl.) 85, *649.*

Appeal from a decision of LAWRANCE, J., in an action brought by the plaintiff to recover £90 11s. 5d., being the price of goods sold and delivered to the defendant by various tradesmen, which moneys were, by an indenture dated Oct. 13, 1904, assigned to the plaintiff. Notice of the assignment had been duly given to the defendant.

The deed of assignment stated that the assignment was made by the various assignors to the plaintiff in consideration of the covenant and agreement on the part of the assignee contained in the deed. The covenant was as follows:

"And the assignee hereby covenants with the assignors, and with each of them, that, in case he shall be able to recover and realise the amount of the said debts from the said Arthur Oriel Singer Cave, he will immediately thereupon pay over to them, the assignors, their executors, administrators, and assigns, the said respective amounts, or so much thereof as he may be able to recover or realise, after payment of all costs necessarily incurred by him."

LAWRANCE, J., gave judgment for the defendant

"because it does seem to me that the plaintiff was guilty of the greatest malice and was actuated by the greatest malice that it is possible to conceive, and acted as he did for his own purposes, having no direct interest in this matter at all. He got these people to assign these debts to him simply and solely for the purpose of getting this man out of his position as director by making him a bankrupt."

The plaintiff appealed. A

Roskill, K.C., and *Raymond Asquith* for the plaintiff.
Holman Gregory for the defendant.

Cur. adv. vult.

June 9, 1905. The following judgments were read. B

SIR RICHARD HENN COLLINS, M.R.—This is an action originally started under Ord. 14, but sent to be tried in the short cause list. LAWRANCE, J., has given judgment for the defendant, and the plaintiff appeals. The facts appear from the affidavits made under Ord. 14, and from the evidence of the plaintiff given at the trial. The plaintiff claimed as assignee of some small debts assigned to him by various creditors of the defendant on the terms of a deed which the plaintiff had C caused to be prepared under the advice of a solicitor. The plaintiff explained that his object in taking these assignments was that he was desirous of getting rid of the defendant as a co-director of a company in which they were both interested, being satisfied that it was for the best interests of the company that the defendant, with whose conduct he was thoroughly dissatisfied, should be removed from the board. The defence was that the conditions of the assignment and the purpose for which it D was procured rendered it unenforceable as evidencing a transaction which savoured of maintenance. The learned judge was of that opinion, and gave judgment for the defendant.

There is no dispute about the facts. The plaintiff's statement in cross-examination, as appears by the judge's note, was:

> "I want to get him off the board, and I want to make him bankrupt, and he E would have to leave the board. . . . Sole object was to get right of action to make him a bankrupt."

It is necessary to scrutinise the terms of the assignment. The deed, which was between five tradesmen, of the one part, and the plaintiff, of the other part, after reciting that the defendant was indebted to the five tradesmen in certain sums, and F that the tradesmen had agreed to assign the said debts to the plaintiff upon the terms and for the considerations thereinafter set forth, witnessed that in pursuance of such agreement and for and in consideration of the covenant and agreement on the part of the plaintiff thereinafter contained, they, the tradesmen, thereby assigned to the plaintiff all the said debts to hold the same respectively to the plaintiff absolutely. The deed then proceeded:

G

> "And the assignee hereby covenants with the assignors, and with each of them, that, in case he shall be able to recover and realise the amount of the said debts from the said Arthur Oriel Singer Cave, he will immediately thereupon pay over to them, the assignors, their executors, administrators, and assigns, the said respective amounts, or so much thereof as he may be able to recover or realise after payment of all costs necessarily incurred by him."

H

It is to be observed that no consideration is given by the assignee under the terms of this document except the undertaking to hand over so much as he may be able to recover after payment of all costs necessarily incurred by him. If nothing is realised, no costs will be payable by the assignors. It seems to me, therefore, that under this arrangement he acquired nothing but a bare right of litigation, giving him no interest in the proceeds, but enabling him to take collateral proceedings for I an ulterior purpose. Had he, without taking an assignment, undertaken to find the money for the litigation to be followed up to bankruptcy, I think the case of maintenance would be quite clear in its simplest form, unless actions to recover debts are incapable of being the subject of maintenance. So long as the real transaction is the same, the form in which it is carried out ought not to alter the legal effect, and in the view of a court of equity it was not allowed to do so. Whether maintenance or not in the strictest sense, it savoured of maintenance: see *Wood* v. *Downes* (2) (18 Ves. at pp. 125, 126); *Prosser* v. *Edmonds* (3) (1 Y. & C.

at pp. 496 et seq.); and *Harrington* v. *Long* (4). The terms of the assignment in this case, by which the assignor pays no costs and has to submit to a deduction for them only in the case of a sum being realised from which such deduction can be made, seem to be equivalent in this respect to the deed of indemnity to which so much importance was attached in the last of the above cases. The illustrations given in argument in that case by the defendant's counsel, both on the hearing before the MASTER OF THE ROLLS and on the re-hearing before LORD BROUGHAM, seem to cover the precise facts of this case.

Assuming, therefore, that actions of debt do not stand on a different footing in this respect from all other actions, and are capable of being made the subject of maintenance, in my opinion, but for *Comfort* v. *Betts* (1), the argument for the defendant ought to succeed. That is a decision of the Court of Appeal and binds us, unless there is such a difference in the terms of the assignment as to distinguish it from the assignment in this case. There is nothing mentioned in the LAW REPORTS as to the provision for costs. The effect of the transaction, however, was referred to in these terms by LORD ESHER, M.R. ([1891] 1 Q.B. at p. 739):

> "Large numbers of debts were assigned to debt collectors without their having any interest in such debts, and merely for the purpose of their being sued for."

We were told by the plaintiff's counsel that the conditions of the assignment were the same as those in this case; and from the report in 64 L.T. 685, this would seem to be so. If this be so, I see no reason why the transaction might not have been impeached on precisely the same grounds as those which were urged in this case. It is true that the point of maintenance was not distinctly raised, but some considerations of public policy were undoubtedly discussed, and the court held that the assignment was good under s. 25 (6) of the Judicature Act, 1873 [now Law of Property Act, 1925, s. 136]. The decision is, therefore, an authority in this court that such an assignment can be enforced. No doubt, there was no evidence in that case as there is here of a special collateral purpose for which the assignment was taken; but, if the transaction as described in the document was free from all taint of maintenance, the title of the assignee was absolute, and could not be impeached because he acted maliciously in contemplation of law in enforcing it: see *Stevenson* v. *Newnham* (5); *Bradford Corpn.* v. *Pickles* (6). Without, therefore, attempting to grapple with the broader question whether at the time when that case was decided actions to recover debts had ceased to be a possible subject of maintenance, I think it binds us, and I am constrained to differ from the conclusion of the learned judge below, and to hold that the plaintiff is entitled to judgment. The appeal must be allowed.

COZENS-HARDY, L.J.—This is an appeal from the judgment of LAWRANCE, J., in favour of the defendant. The plaintiff is the assignee of five debts amounting together to over £50 due from the defendant to five creditors resident in Ireland. The assignment is effected by a deed dated Oct. 13, 1904. It is in the common form of an absolute assignment, but there is no pecuniary consideration, and the assignee takes no beneficial interest, for he covenants that, in case he is able to recover the amount of the debts from the defendant, he will pay over to the assignors the respective amounts or so much thereof as he may be able to recover or realise after payment of all costs necessarily incurred by him. The existence of the debts is not disputed, and unless the plaintiff can recover the amounts the defendant has been relieved from all responsibility. It has, however, been strenuously contended by counsel for the defendant that the plaintiff's action is open to the objection of maintenance, or is otherwise such that on grounds of public policy the court ought to refuse its assistance. This view was adopted by the learned judge.

It is desirable to consider the limits of the doctrine of maintenance as applied to choses in action. There are undoubtedly many choses in action which are not and

never were assignable either at law or in equity. A right to set aside a deed on the ground of fraud is a typical instance. It is plain that no court would allow the assignee of such a right to maintain an action. The instrument would be equally void at law and in equity. And an agreement by which a third person (not being within the recognised exceptions, such as master and servant) undertakes to institute or prosecute or assist the litigation in the name of the claimant, and to indemnify him wholly or partly against the costs of the litigation, is a principle open to precisely the same objections. If not technically maintenance, it savours of maintenance. This is well illustrated by LORD ELDON'S judgment in *Wood* v. *Downes* (2), and by LORD ABINGER'S judgment in *Prosser* v. *Edmonds* (3). *Harrington* v. *Long* (4) is inadequately reported, but it seems to me to be only another instance of the same principle. For the supplemental bill, in which the assignee and assignor were co-plaintiffs, sought to set aside a deed of gift by the testator in favour of the defendant, and the assignment was executed and the deed of indemnity was given

> "solely for the purpose of enabling him to prosecute the original suit and to impeach the deed."

There are, however, other choses in action which, though not assignable at common law, were always regarded as assignable in equity. A debt presently due and payable is an instance. At common law such a debt was looked upon as a strictly personal obligation, and an assignment of it was regarded as a mere assignment of a right to bring an action at law against the debtor. Hence the assignment was, with some exceptions which need not be referred to (see HAWKINS' PLEAS OF THE CROWN, p. 458), looked upon as open to the objection of maintenance.

After a time the common law courts recognised the right of anyone who had a pecuniary interest in the debt to sue in the name of the creditor. This, however, was the limit of their departure from the old strict rule, so far as I have been able to discover. But the courts of equity took a different view: *Row* v. *Dawson* (7). They admitted the title of an assignee of a debt, regarding it as a piece of property, an asset capable of being dealt with like any other asset, and treating the necessity of an action at law to get it in as a mere incident. They declined to hold such a transaction open to the charge of maintenance. Thus, in *Prosser* v. *Edmonds* (3) LORD ABINGER says (1 Y. & C.Ex. at p. 491):

> "With respect to the question as to the validity of an assignment of a right to file a bill in equity [i.e., to set aside an alleged fraudulent deed], I must distinguish between this sort of case and the assignment of a chose in action [i.e., a debt]."

Again (ibid. at pp. 496, 497):

> "It was urged . . . that the assignee in a chose in action [i.e., a debt] may file a bill in equity to recover it, though he cannot proceed at law for that purpose. But where an equitable interest is assigned, it appears to me, that, in order to give the assignee a locus standi in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. . . . So, where a person takes an assignment of a bond, he has the possession; and though a court of equity will permit him to file a bill on the bond, it does not follow that he is obliged to go into a court of equity to enforce payment of it."

A court of equity recognised not merely transactions which amounted to sales or mortgages of debts, under which the assignee took a beneficial interest in the debt, but also the creation of trusts, under which the trustee took no interest. Thus A., the creditor, might assign the debt to B., with or without a power of attorney, upon trust for C. Or A. might simply declare himself a trustee of the debt for C. In either case the trustee would take no beneficial interest, and would, by virtue of his position as trustee, be entitled to be indemnified out of the moneys recovered

A against all costs of the action brought in the name of A. against the debtor. If the debt were secured by a promissory note or bill or other negotiable instrument, A. might deliver the instrument to B. upon trust for C., and B. could sue at law on it. Or A. might create a trust in favour of himself by delivering the instrument to B. upon trust for himself. It would, I apprehend, in this case be no objection to say that B. had no interest in the debt. It has never, so far as I am aware, been B suggested that a trustee to whom a debt is assigned is exposed to a charge of maintenance. Mortgages are every day dealt with in this fashion, including an assignment of the debt.

From time to time particular classes of obligation have by statute been rendered assignable at law, and by the Judicature Act, 1873, s. 25 (6), any debt is made assignable at law by an absolute assignment in writing, of which notice is given to C the debtor. Henceforth in all courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods. And on principle I think it is not possible to deny the right of the owner of any property capable of legal assignment to vest that property as a trustee for himself, and thereby to confer upon such trustee a right of indemnity. It is not easy to see how the doctrine of maintenance can be applied to a case like the present. The decision of D this court in *Comfort* v. *Betts* (1) really proceeds upon this footing, and seems to me to be decisive of the present case. The court is not asked to exercise any discretionary jurisdiction. If the assignment is valid at all, it is valid in all courts, and the plaintiff is entitled to judgment ex debito justitiæ. The plaintiff is merely seeking by this action to recover payment of debts admitted to be justly due. It is said that the plaintiff does not really desire to be paid and can take nothing for his E own benefit under the judgment. For the reasons above stated I think this is of no moment. It is further urged that his only object is to obtain a judgment which may serve as the foundation of bankruptcy proceedings, the ultimate result of which will be the removal of the defendant from his position as director of a company in which the plaintiff is largely interested. But I fail to see that we have anything to do with the motives which actuate the plaintiff, who is simply asserting a legal F right consequential upon the possession of property which has been validly assigned to him. If the defendant pays, no bankruptcy proceedings will follow. If he does not pay, bankruptcy is a possible result. In my opinion this appeal must be allowed. **MATHEW, L.J.**, has read these judgments and concurs in them.

Appeal allowed.

Solicitors: *Herbert Z. Deane*; *Leigh & Naish.*

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*]

A

LYTTELTON TIMES CO., LTD. *v.* WARNERS, LTD.

[PRIVY COUNCIL (Lord Loreburn, L.C., Lord Robertson, Lord Collins, Sir Ford North and Sir Arthur Wilson), May 8, 9, July 31, 1907]

[Reported [1907] A.C. 476; 76 L.J.P.C. 100; 97 L.T. 496; 23 T.L.R. 751]

B

Landlord and Tenant—Covenant for quiet enjoyment—Interference with demised premises caused by use by landlords of another part of premises—Use contemplated by both parties—Nuisance.

The appellants, who were printers, agreed with the respondents to let to them, for a term of years, rooms to be erected over their printing works, for use as bedrooms in connection with an hotel of the respondents. Both parties were under the belief that the noise and vibration from the printing machinery would not be felt in the bedrooms. The appellants worked their machinery in a reasonable and proper manner, but the vibration and noise caused thereby affected the bedrooms and resulted in a nuisance. In an action by the respondents for an injunction and damages,

C

D

Held: that, as it was in the contemplation of both parties that the lower part of the building should be used as printing works, both parties should be held to all that was implied in the common intention, and the respondents had no cause of action.

Held: the machinery having been used in a proper manner the noise occasioned by it did not constitute a breach of the implied covenant for quiet enjoyment, as effect would not be given to the intention to use part of the premises as bedrooms at the expense of the intention to use the machinery in the other part.

E

Notes. Considered: *Jones* v. *Pritchard*, [1908–10] All E.R.Rep. 80; *Phelps* v. *City of London Corpn.*, [1916] 2 Ch. 255. Referred to: *Harmer* v. *Jumbil (Nigeria) Tin Areas*, [1920] All E.R.Rep. 113; *Hansford* v. *Jago*, [1920] All E.R.Rep. 580; *Sack* v. *Jones*, [1925] Ch. 235; *O'Cedar, Ltd.* v. *Slough Trading Co.*, [1927] All E.R.Rep. 446; *Aldridge* v. *Wright*, [1929] 2 K.B. 117; *Vanderpant* v. *Mayfair Hotel Co., Ltd.*, [1929] All E.R.Rep. 296; *Liddiard* v. *Waldron*, [1933] 2 K.B. 319; *Matania* v. *National Provincial Bank, Ltd.*, [1935] All E.R.Rep. 923; *Thomas* v. *Lewis*, [1937] 1 All E.R. 137; *Port* v. *Griffith*, [1938] 1 All E.R. 295; *Re Webb, Sandom* v. *Webb*, [1951] 2 All E.R. 131.

F

G

As to a landlord's covenant for quiet enjoyment, see 23 HALSBURY'S LAWS (3rd Edn.) 601–609; and for cases see 31 DIGEST (Repl.) 143–146.

Cases referred to in argument:

Myers v. *Catterson* (1889), 43 Ch.D. 470; 59 L.J.Ch. 315; 62 L.T. 205; 38 W.R. 488; 6 T.L.R. 111, C.A.; 19 Digest (Repl.) 53, *289*.

H

Birmingham, Dudley and District Banking Co. v. *Ross* (1888), 38 Ch.D. 295; 57 L.J.Ch. 601; 59 L.T. 609; 36 W.R. 914; 4 T.L.R. 437, C.A.; 19 Digest (Repl.) 50, *277*.

Caledonian Rail. Co. v. *Sprot* (1856), 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 19 Digest (Repl.) 49, *272*.

Broomfield v. *Williams*, [1897] 1 Ch. 602; 66 L.J.Ch. 305; 76 L.T. 243; 45 W.R. 469; 13 T.L.R. 278; 41 Sol. Jo. 348, C.A.; 19 Digest (Repl.) 36, *187*.

I

Aldin v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; 63 L.J.Ch. 601; 71 L.T. 119; 42 W.R. 553; 10 T.L.R. 452; 38 Sol. Jo. 458; 8 R. 352; 19 Digest (Repl.) 51, *280*.

Pollard v. *Gare*, [1901] 1 Ch. 834; 70 L.J.Ch. 404; 84 L.T. 352; 65 J.P. 264; 19 Digest (Repl.) 36, *188*.

Rigby v. *Bennett* (1882), 21 Ch.D. 559; 48 L.T. 47; 47 J.P. 217; 31 W.R. 222, C.A.; 19 Digest (Repl.) 50, *275*.

Appeal from a decision of the Court of Appeal of New Zealand by which an injunction was granted restraining the appellant company from working their printing plant and machinery between the hours of 9 p.m. and 8 a.m. so as to cause any noise or vibration whereby the respondent company should be interfered with in the enjoyment of its freehold and leasehold premises, and directing an inquiry as to damages.

By an agreement made in 1902 between the appellants, who carried on business as printers and publishers, and the respondents, who carried on business as hotel keepers, it was agreed that the appellants should rebuild certain of their premises which adjoined a hotel owned by the respondents, and that the appellants should then let part of the upper floors of their building to the respondents to be used as additional hotel bedrooms, while the appellants would use the remainder of their building for printing and publishing. The negotiations were carried out through an intermediary, Mr. Luttrell, who was an architect. Each party entertained doubts as to the wisdom of combining in the same building an engine house and printing machinery with hotel bedrooms, and in each case the doubts were removed by the representation of Mr. Luttrell as to his ability to neutralise the risk of noise and vibrations. Each party signed the agreement in the belief that the noise and vibrations, if not absolutely unfelt in the bedrooms would be so slight as not to be an inconvenience. The noise and vibrations, however, caused substantial inconvenience in the new bedrooms and also in some of the old bedrooms close to the openings made in the old wall of the hotel to communicate with the new building, even though the appellants established and worked their plant and machinery properly. The respondents brought this action alleging that the noise and vibration caused by the appellant company's plant and machinery seriously disturbed them in the enjoyment of the premises leased to them and interrupted the quiet enjoyment thereof, and that they (the respondent company) were seriously disturbed in the enjoyment of their freehold property, and suffered great loss and damage. They claimed an injunction restraining the appellant company from using or working the plant and machinery so as to occasion a nuisance to the respondent company, and claimed damages in respect of its leasehold and freehold premises. The action was tried in the Supreme Court of New Zealand by DENNISTON, J., in February, 1905, when evidence was given on behalf of both parties, and on the findings of the learned judge the respondents moved for judgment. On June 22, 1905, it was by consent ordered that the motion for judgment should be removed into the Court of Appeal, who, by a majority, consisting of the Chief Justice, WILLIAMS and COOPER, JJ., decided that the respondent company was entitled to an injunction and an inquiry as to damages with costs, EDWARDS and CHAPMAN, JJ., dissenting. The respondents duly moved the Supreme Court for a decree in the terms of the said judgment, which decree was obtained on Dec. 12, 1905. The appellants appealed with leave from the judgment of the Court of Appeal to His Majesty in Council upon the usual conditions.

Hughes, K.C., and *J. M. Paterson* for the appellants.
Levett, K.C., and *Dighton Pollock* for the respondents.

July 31, 1907. **LORD LOREBURN, L.C.**—In this case there has been a marked difference of opinion among the learned judges in the Supreme Court of New Zealand, rising out of a state of facts which may be summarised as follows. In 1902, Warners, Ltd., owned an hotel in Christchurch adjoining buildings in which the Lyttelton Times Co., Ltd., carried on business as printers and newspaper publishers. It occurred to Mr. Luttrell, an architect, that the hotel could be provided with additional bedrooms (which were needed) and that the printing-house could be provided with better accommodation (which was desired) if the printing-house were rebuilt so that its business could be carried on in the lower floor and part of the upper floors should consist of bedrooms, and be let as such to the hotel. Negotiations ensued, in which Luttrell, though an intermediary,

was the agent of neither side, and in the end an agreement was reached under which the building was to be erected, and Warners, Ltd., were to rent a portion of the upper floors for ten years at a rent of £300 a year.

What occurred in the negotiations preceding this agreement has been stated by DENNISTON, J., whose findings in fact are accepted on all hands.

> "Each party entertained, very naturally, doubts as to the wisdom of combining in the same building an engine-house and printing machinery with hotel bedrooms. Each party spoke of the risk of noise and vibration. In each case such doubts were so far removed by the representation of Mr. Luttrell as to his ability to neutralise such risk that I am satisfied that each party signed the agreement in the belief that the noise and vibration, if not absolutely unfelt in the bedrooms, would be so slight as not to be an inconvenience. Only on such a supposition can I conceive two bodies of intelligent and experienced men of business entering into the agreement which they did—an agreement containing no stipulation or provision, no guarantee and no indemnity in respect of a risk which was apparent, and admittedly had been considered."

The building proceeded, and Luttrell's anticipations have not been realised. There is noise and vibration which causes substantial inconvenience in the new bedrooms and in some of the old bedrooms close to the openings made in the old wall of the hotel to communicate with the new building. Thereupon Warners, Ltd., brought this action for an injunction and damages.

At the root of the difficulties in the case as presented to their Lordships in argument lies this question. Ought the fact that one of the parties was the grantor and the other the grantee of a lease to dominate the decision of the case? The maxim that a grantor cannot derogate from his grant expresses the duty ordinarily laid on a man who sells or leases land. But it does not touch a similar and equally binding duty that may in certain cases be laid on a man who buys or hires land. If A. lets a plot to B., he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired. So also if B. takes a plot from A., he may not act so as to frustrate the purpose for which in the contemplation of both parties the adjoining plot remaining in A.'s hands was destined. The fact that one lets and the other hires does not create any presumption in favour of either in construing an expressed contract. Nor ought it to create a presumption in construing the implied obligation arising out of a contract. When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose or what were the purposes to which both intended the land to be put, and, having found that, both should be held to all that was implied in this common intention.

In this case their Lordships think that both parties agreed upon a building scheme with the intention that the building should be used for bedrooms and also for a printing-house according to a design agreed upon. Both parties believed that these two uses could co-exist without clashing, and that was why both of them accepted the scheme. Neither would have embarked upon it if he had not thought that his intended enjoyment of the building would be permitted, and both intended that the other should enjoy the building in the way contemplated. They were mistaken in their anticipation. But if it be true that neither has done or asks to do anything which was not contemplated by both, neither can have any right against the other. Counsel for the respondents argued the case as though the common intention was that the plaintiffs should have reasonably quiet bedrooms. It was so, but that was only one half of the common intention. The other half was that the appellants should keep on printing. One cannot bisect the intention and enforce one half of it when the effect of so doing would be to frustrate the other half. Accordingly, their Lordships agree with the conclusions of EDWARDS and CHAPMAN, JJ. If it could be shown that the appellants or their servants had erected the building or established or worked their machinery and plant improperly, no doubt there would have been a cause of action. But that is not found by

A Denniston, J., nor by the majority of the Court of Appeal, nor was it in reality the case made by the respondents. It is rather put on the ground that a duty lay on the appellants to prove affirmatively that the building could not have been so constructed as to avert a nuisance, and that they had failed in that duty. Their Lordships do not think that in this case the burden of proof is on the appellants, and share what appears to have been the opinion of most of the judges in New B Zealand, that negligent or improper construction and working have not been established. Under these circumstances their Lordships will humbly advise His Majesty that this appeal ought to be allowed.

Solicitors: *Hawes, Wood & Ware; A. R. & H. Steele.*

C [*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

D

GLENWOOD LUMBER CO., LTD. *v.* PHILLIPS

[Privy Council (Lord Macnaghten, Lord Davey, Lord Lindley and Sir Arthur Wilson), April 19, May 14, 1904]

E [Reported [1904] A.C. 405; 73 L.J.P.C. 62; 90 L.T. 741; 20 T.L.R. 531]

Landlord and Tenant—Lease—Licence—Distinction—Exclusive possession subject to conditions—Consolidated Statutes of Newfoundland (2nd Series), c. 13, s. 51.

F Whether an agreement creates a lease or licence is a question, not of words, but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself. Accordingly, a person "licensed" to cut timber on Crown lands under the Consolidated Statutes of Newfoundland (2nd Series), G c. 13, s. 51, is a lessee as he has the exclusive possession of the land subject to certain conditions.

A lessee of land has possession of the goods on it and can maintain an action against anyone wrongfully removing those goods, and the wrongdoer cannot set up a jus tertii unless he claims under it.

H *Detinue—Expenses incurred in respect of goods detained—Liability of plaintiff to compensate defendant—Right of defendant to set up jus tertii.*

Where in an action for detinue the plaintiff claims the return of his goods, he is not (in the absence of contrary agreement) obliged to compensate the defendant for expenses incurred in respect of the goods. Such expenses might properly, but would not necessarily, be taken into account in estimating the I alternative damages.

Per Lord Davey: It is a well-established principle in English law that possession is good against a wrongdoer and the latter cannot set up a jus tertii unless he claims under it.

The Winkfield (1), [1902] P. 42, approved.

Notes. Applied: *Clarkson and Forgie* v. *Wishart and Myers*, [1913] A.C. 828; *McPherson* v. *Temiskaming Lumber Co.*, [1913] A.C. 145. Considered: *Eastern Construction Co.* v. *National Trust Co. and Schmidt*, [1914] A.C. 197. Referred to: *Re Timber Regulations, Refund of Dues under*, [1935] A.C. 184.

As to the principles for determining whether an agreement creates a lease or licence, see 23 HALSBURY'S LAWS (3rd Edn.) 427 et seq.; and for cases see 30 DIGEST (Repl.) 527 et seq. As to expenses incurred by a defendant in an action for detinue, see 33 HALSBURY'S LAWS (2nd Edn.) 72; and for cases see 43 DIGEST 523–524.

Cases referred to:

(1) *The Winkfield*, [1902] P. 42; 71 L.J.P. 21; 85 L.T. 668; 50 W.R. 246; 18 T.L.R. 178; 46 Sol. Jo. 163; 9 Asp.M.L.C. 259, C.A.; 43 Digest 515, *522*.

(2) *Jeffries* v. *Great Western Rail. Co.* (1856), 5 E. & B. 802; 25 L.J.Q.B. 107; 26 L.T.O.S. 214; 2 Jur.N.S. 230; 119 E.R. 680; 4 W.R. 201; 43 Digest 514, *519*.

Appeal from a decision of the Supreme Court of Newfoundland affirming a decision of MORISON, J., in favour of the respondent, the plaintiff below.

On Oct. 17, 1898, the appellants without any title to do so, but expecting and believing they would be granted a licence, began cutting timber on certain land. On Jan. 20, 1899, the Crown "licensed" the respondent to cut timber on that land, and granted him the exclusive right of occupation of that land subject to certain conditions. On Jan. 23, 1899, the appellants ceased to cut timber, and subsequently removed the timber they had cut before that date. The respondent brought this action alleging trespass to land and detinue of the timber cut by the appellants.

Sir J. S. Winter, K.C. (of the Colonial Bar), and *W. H. Cozens-Hardy* for the appellants.

J. Eldon Bankes, K.C., and *Dumas* for the respondent.

May 14, 1904. **LORD DAVEY.**—In 1898 the appellants and the respondent Phillips respectively applied to the Governor in Council of the colony of Newfoundland for licences to cut timber on certain blocks of timber land near the Main River flowing into Gander Lake in that colony. The respondent Phillips is hereafter referred to as the respondent.

The practice appears to be for such applications to be first considered in the Colonial Secretary's office, and if they are approved a notification is sent to the Minister of Agriculture and Mines, from whose office the licences are then issued. On Nov. 16, 1898, the Deputy Colonial Secretary wrote a letter of that date to the Minister of Agriculture and Mines inclosing four licences to cut timber which (he stated) had been approved by His Excellency the Governor, and had been granted to the following persons—viz., to the respondent two blocks, one of which is the area in question in this litigation, and to the appellants two other blocks. The respondent's agent was informed by the Colonial Secretary on Nov. 15, 1898, that the grants to him had been passed, but no licence was issued until Jan. 20, 1899. On Oct. 17, 1898, the appellants, without any title to do so but (as stated in their case) "expecting and believing" that their application would be granted by the Government, commenced cutting timber on land which was comprised in the licence afterwards granted to the respondent, and they continued such cutting, notwithstanding a formal notice from the respondent, until Jan. 23, 1899. At that date the timber which had been cut by the appellants either lay on the ground or was piled on the land near the river. None of it was removed until after Jan. 23. The respondents' licence, which was dated Jan. 20, 1899, was granted under the Great Seal of the Colony, in pursuance of s. 51 of c. 13 of the Consolidated Statutes of Newfoundland (2nd Series). The Crown thereby "licensed" to the respondent, his executors, administrators, and assigns, all that tract, piece or parcel of land particularly described to hold for the purpose aforesaid (i.e., for cutting the timber thereon), for the term of twenty-one years from the date of the licence, at an annual rental of ninety-six dollars, and the payment of a bonus of forty dollars on execution. There was a proviso that persons might at all times make and use roads

upon and travel over the ground licensed, and that nothing therein contained should prevent any person taking standing timber without compensation to be used for certain public works by the Government, the authority of the Surveyor-General being first obtained, and that persons settling by lawful authority within the ground licensed should not be interrupted in clearing and cultivation by the licensee.

The appellants contended that this instrument conferred only a licence to cut timber and carry it away, and did not give the respondent any right of occupation or interest in the land itself. Having regard to the provisions of the Act under the powers of which it was executed, and to the language of the document itself, their Lordships cannot adopt this view of the construction or effect of it. In the so-called licence itself it is called indifferently a licence and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not, however, a question of words, but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself. By s. 51 (7) of the Act it is enacted that the lease shall vest in the lessee the right to take and keep exclusive possession of the lands described therein subject to the conditions in the Act provided or referred to, and the lessee is empowered (amongst other things) to bring any actions or suits against any party unlawfully in possession of any land so leased and to prosecute all trespassers thereon. The operative part and habendum in the licence is framed in apt language to carry out the intention so expressed in the Act. And their Lordships have no doubt that the effect of the so-called licence was to confer a title to the land itself on the respondent.

Subsequently to Jan. 23, 1899, the appellants proceeded to remove the logs which they had cut before that date. On June 20, 1899, the respondent commenced an action against the appellants. In the statement of claim it is alleged (i) that the appellants on Jan. 20, 1899, and divers other dates wrongfully entered on the respondent's land and cut down the respondent's trees; (ii) that the appellants detained from the respondent the respondent's goods and chattels—that is to say, 15,500 logs—and the respondent claimed a return of the said goods and chattels or their value, and by para. 3 the respondent claimed an injunction. The defence was a traverse of the allegations in paras. 1 and 2. This defence was, after trial, amended by adding specific allegations that the land described was not the respondent's land, and the trees stated to have been cut down were not the respondent's trees, and the logs stated to have been detained were not the respondent's logs. The action was tried before MORISON, J., and by his judgment, dated Aug. 27, 1900, it was adjudged that the respondent should recover from the appellants 521,979 ft. of lumber then piled in the appellants' mill, or $3,132 their value, and $468 for other lumber, and $400 damages and costs, and that a sum of $1,174·50 (which the respondent had agreed to pay to the appellants for sawing the logs after the date of an interlocutory injunction) be set off against the damages and costs. There was an appeal from this judgment, which, by an order dated April 2, 1901, was ordered to be dismissed with costs. The present appeal is from the latter order.

The first and principal point taken for the appellants at their Lordships' Bar was that the logs having been cut before the date of the commencement of the respondent's title did not vest in, and were not the property of, the respondent. It was also contended that at any rate an alteration should be made in the details of the judgment. An endeavour was made by counsel for the appellant to restrict para. 2 of the statement of claim to logs cut after Jan. 20, 1899. Their Lordships cannot accept this narrow construction of the statement of claim, and they think that the action was in substance for trespassing on the respondent's lands, and for detinue of the logs removed from his lands after Jan. 20, 1899. The action was in fact so treated by the learned judge at the trial.

It was then said that at any rate the logs were as between the respondent and the Crown, the property of the Crown. The answer to this argument is that the appellants were wrongdoers in every step of their proceedings. There is not a

hint in either of the pleadings or the evidence of any title in the appellants to cut the trees. Indeed, any such title is negatived by their own statement in their case that they acted in expectation only that they would afterwards acquire a title, and by the evidence, and their Lordships cannot listen to the suggestion of counsel that the appellants may have had a licence from the Crown. The appellants were wrongdoers in entering on the lands of the respondent for the purpose of removing the logs, and also in removing the logs which were certainly not their property. The respondent on the other hand was, in their Lordships' opinion, lessee and occupier of the lands, and as such, had lawful possession of the logs which were on the land. It is a well-established principle in English law that possession is good against a wrongdoer and the latter cannot set up a jus tertii unless he claims under it. This question has been exhaustively discussed by Sir Richard Henn Collins, M.R., in *The Winkfield* (1). In *Jeffries* v. *Great Western Rail. Co.* (2), Lord Campbell, C.J., is reported to have said (5 E. & B. at p. 805):

> "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person; for against a wrongdoer possession is a title."

The Master of the Rolls, after quoting this passage, continues ([1902] P. at p. 55):

> "Therefore it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all; and, therefore, as between those two parties, full damages have to be paid without any further inquiry."

Their Lordships do not consider it necessary to refer at any greater length to the reasoning and authorities by which the Master of the Rolls supports this conclusion and are content to express their entire concurrence in it.

The learned counsel for the appellants recently moved before their Lordships for leave to make a further statement as to matters which he said had not been considered in the argument. The application was unusual, but their Lordships thought it better to hear the motion. Attention was then drawn to the statement in the judgment of the learned judge as to the agreement of Sept. 7, 1899, entered into between the parties in the course of the litigation. The agreement itself is not in the record and is not referred to in the appellants' case, and it was obviously not intended to be relied on in support of their appeal. Nor does it appear to their Lordships to give them any assistance. These considerations dispose of the appellants' principal point, and it is unnecessary for their Lordships to discuss the opinion expressed by Morison, J., that the communication to the respondent that his application for a licence had been granted would give him as from that date a good title to the logs, although the licence was not completed until a later date.

The appellants' point on the form of the judgment is that the learned judge should have allowed them as against the respondent the expenses of cutting the trees and floating the logs down the river, as well as the expenses of sawing and piling. The latter expenses were allowed by arrangement between the parties. There was no arrangement as to the former. Their Lordships think that the judgment is in the form usual in actions for detinue, and it would not be right to impose on the respondent the obligation of paying the appellants the expenses of their wrongful acts as a condition of recovering what must be considered in this action as his property, although such expenses might properly, but would not necessarily, be taken into account in estimating the alternative damages. Their Lordships will humbly advise His Majesty that the appeal be dismissed.

Solicitors: *Burn & Berridge*; *Godden, Son & Holme.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

WADDLE *v.* SUNDERLAND UNION

[Court of Appeal (Vaughan Williams, Farwell and Kennedy, L.JJ.), January 23, 1907]

[Reported [1908] 1 K.B. 642; 77 L.J.K.B. 509; 98 L.T. 260; 72 J.P. 99; 24 T.L.R. 259; 52 Sol. Jo. 223; 6 L.G.R. 415; 2 Konst. Rat. App. 506]

Rates—Rateable value—Licensed premises—Deduction of expenses—Charge payable to compensation fund—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3—*Parochial Assessments Act*, 1836 (6 *& 7 Will.* 4, *c.* 96), *s.* 1.

The amount of the annual charge payable to the compensation fund on the renewal of an on-licence under the Licensing Act, 1904, s. 1, **held** not to be an expense which could be deducted when ascertaining the rateable value of hereditaments under the Parochial Assessments Act, 1836, s. 1.

Notes. The Licensing Act, 1904, has been repealed, and the provisions for the payment of an annual sum to the compensation fund on the renewal of an on-licence are now contained in the Licensing Act, 1953, ss. 17–18. The Parochial Assessments Act, 1836, was repealed by the Rating and Valuation Act, 1925, and the provisions for the ascertainment of the rateable value of premises are contained in s. 22 of that Act.

Considered: *White* v. *South Stoneham Assessment Committee*, [1915] 1 K.B. 103; *Appenrodt* v. *Central Middlesex Assessment Committee*, [1937] 2 All E.R. 325.

As to valuation for rating, see generally 32 Halsbury's Laws (3rd Edn.) 60 et seq.; as to deductions, see ibid., pp. 65–66; and as to rating of licensed premises, see ibid., pp. 96–97. For cases see 38 Digest (Repl.) 670–671. For the Rating and Valuation Act, 1925, s. 22, see 20 Halsbury's Statutes (2nd Edn.) 127–130; for the Licensing Act, 1953, ss. 17–18, see 33 Halsbury's Statutes (2nd Edn.) 164–168.

Cases referred to:

(1) *Goodchild* v. *St. John, Hackney Trustees, Lamb* v. *St. John, Hackney Trustees, Goodchild* v. *St. John, Hackney Trustees, Hawkins v. Lamberhurst Overseers, Hackney and Lamberhurst Tithe Commutation Rent Charges Case* (1858), E.B. & E. 1; 22 J.P. 144; 4 Jur.N.S. 1050; 6 W.R. 367; 120 E.R. 407; sub nom. *R.* v. *Goodchild, R.* v. *Lamb*, 27 L.J.M.C. 233; sub nom. *R.* v. *St. John, Hackney Trustees*, 31 L.T.O.S. 9; 38 Digest (Repl.) 622, *894*.

(2) *R.* v. *Smith* (1885), 55 L.J.M.C. 49; 54 L.T. 431; 50 J.P. 215; 2 T.L.R. 223, D.C.; 25 Digest 54, *479*.

(3) *Newport Union* v. *Stead, Newport Union* v. *Green*, [1907] 2 K.B. 460; 76 L.J.K.B. 753; 97 L.T. 413; 71 J.P. 263; 5 L.G.R. 892, C.A.; reversed on appeal sub nom. *Green* v. *Newport Union, Stead* v. *Newport Union*, [1909] A.C. 35; 78 L.J.K.B. 97; 99 L.T. 893; 73 J.P. 17; 25 T.L.R. 67; 53 Sol. Jo. 60; 7 L.G.R. 258; 2 Konst. Rat. App. 777, H.L.; 38 Digest (Repl.) 621, *891*.

Also referred to in argument:

Cartwright v. *Sculcoates Union*, [1900] A.C. 150; 69 L.J.Q.B. 403; 82 L.T. 157; 64 J.P. 229; 48 W.R. 394; Ryde & K.Rat. App. 167; sub nom. *Cartwright* v. *Sculcoates Union, Wilford* v. *Same, Walsh* v. *Same, Robinson* v. *Same*, 16 T.L.R. 238, C.A.; 38 Digest (Repl.) 670, *1213*.

R. v. *Bradford* (1815), 4 M. & S. 317; 105 E.R. 852; 38 Digest (Repl.) 672, *1224*.

R. v. *Gainsborough Union* (1871), L.R. 7 Q.B. 64; 41 L.J.M.C. 1; sub nom. *Gainsborough Union* v. *Welch*, 25 L.T. 589; 36 J.P. 534; 38 Digest (Repl.) 621, *892*.

Appeal by the ratepayer from a decision of the Divisional Court (Lord Alverstone, C.J., Ridley and Darling, JJ.), reported [1906] 2 K.B. 899, upon a Case Stated by the quarter sessions for the county of Durham on an appeal against a rate made for the relief of the poor by the overseers of Sunderland on Oct. 27, 1905.

The ratepayer was the owner, licence-holder, and occupier of certain fully licensed premises known as the Central Hotel, situated at 32, Bridge Street, Sunderland. By the rate he was assessed as the occupier of the Central Hotel upon a gross value of £750 and a rateable value of £625. The ratepayer appealed against the rate to quarter sessions on the following grounds. That, in addition to the deduction of one-sixth heretofore deducted by the committee for repairs, insurance, and other expenses necessary to maintain the premises in a state to command the rent at which the same might reasonably be expected to let from year to year, there should also be deducted the amount charged thereon under s. 3 of the Licensing Act, 1904, for the year 1905.

The Licensing Act, 1904, provided:

"Section 3. (1) Quarter sessions shall, in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purposes of this Act impose, in respect of all existing on-licences renewed in respect of premises within their area, charges at rates not exceeding and graduated in the same proportion as the rates shown in the scale of maximum charges set out in the first schedule to this Act. (2) Charges payable under this section in respect of any licence shall be levied and paid together with and as part of the duties on the corresponding excise licence, but a separate account shall be kept by the commissioners of Inland Revenue of the amount produced by those charges in the area of any quarter sessions, and that amount shall in each year be paid over to that quarter sessions in accordance with rules made by the Treasury for that purpose. (3) Such deductions from rent as are set out in the second schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this section and also by any person from whose rent a deduction is made in respect of the payment of such a charge. . . ."

The licence of the Central Hotel was renewed for 1905, and the maximum charge of £80 under s. 3 of the Licensing Act, 1904, was imposed upon the ratepayer in respect thereof. The charge had been levied and paid in accordance with the Act. It was admitted by the rating authority that it would probably be necessary in Sunderland to impose for some years to come the maximum charge under the Act, and that therefore, for the purpose of this Act, £80 might be taken to be the probable average annual amount of that charge.

The Parochial Assessments Act, 1836, provided:

"Section 1. No rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto—that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. . . ."

Quarter sessions made an order dismissing the appeal, subject to this Case, which they stated for the opinion of the court. The question for the opinion of the court was. Were the quarter sessions right in holding that this charge was not such an expense as to constitute a deduction from the gross value within s. 1 of the Parochial Assessments Act, 1836? The Divisional Court (Lord Alverstone,

C.J., RIDLEY and DARLING, JJ.) answered this question in the affirmative, and dismissed the appeal. The ratepayer appealed.

Macmorran, K.C., and *Mitchell-Innes* for the ratepayer.
Tindal Atkinson, K.C. (*E. Shortt* with him) for the rating authority.

VAUGHAN WILLIAMS, L.J.—In spite of the arguments I have heard I cannot doubt that the principles relied upon by the ratepayer as to the application of the Parochial Assessments Act, 1836, are correct. I cannot myself doubt that, notwithstanding the use of the words in s. 1 of that Act defining the deductions from the rent at which the rateable hereditament might reasonably be expected to let from year to year, the words in that section "other expenses" may apply to expenses not ejusdem generis with "repairs" and "insurance"; and that the words "necessary to maintain them in a state to command such rent" may include expenses which have no reference to maintenance in a physical condition to command the rent. Indeed, it is admitted that these words do so extend to analogous expenses in a case where the rateable hereditament is incorporeal. This appears from *R.* v. *Goodchild* (1) which was cited to us, and was a case of tithe rentcharge, and from *R.* v. *Smith* (2). And I myself have no doubt whatever that, where the estimate of the net annual value of a rateable hereditament is based upon a condition not corporeal appertaining to the hereditament such as a licence or a canteen grant, one must in making the estimate deduct expenses necessary for the accrual of that condition. The favourable condition, if it be such that it is to be taken into consideration in the estimate of the net rent, must be taken into consideration subject to a deduction of the cost of the accrual of that condition, and if I had been of opinion that the increased value consequent upon the grant of the justices' licence did not become operative until the grant of the excise licence, and that the payment of the charge in question was by s. 3 of the Licensing Act, 1904, a condition precedent to the accrual of the value consequent on the grant of the licence, I should have given judgment for the ratepayer. But being of opinion that this public-house or hotel acquired its full value as a licensed house independently of the grant of the excise licence, which was, it is true, essential to the realisation of the increased value of the hereditament from being licensed—that is essential—in the trade of a licensed victualler, but not for the purpose of selling or letting the hereditament, I have come to the conclusion that the deduction claimed cannot be allowed, and that the decision of the King's Bench Division must be affirmed.

FARWELL, L.J.—I have had an opportunity of considering the judgment which has been prepared by my Lord during the adjournment, and I entirely agree with all that he has said.

KENNEDY, L.J.—I agree that the appeal should be dismissed, and I will add comparatively few words. The view that I take of this case is not exactly the same as that just expressed by my Lord, but I need hardly say that it is with profound respect for his judgment that I have come to the conclusion which I have arrived at, and, though doubting my own view, I think that I ought not to abstain from adding what I think.

The appeal is against a decision of the Divisional Court. In that decision we have the judgments of the three judges of which that court was composed; and—although I do not lay great stress upon this point, because of course in argument it often happens that some cases are cited which may appear to be not so directly relevant to the case as to be noticed in the judgment—I think it perhaps ought not to be left entirely out of sight, that this case, as decided in the Divisional Court, was cited in the argument in the Court of Appeal in *Newport Union* v. *Stead* (3) [reversed on appeal [1909] A.C. 35]. And not only was the case cited in the argument, but BUCKLEY, L.J., in his judgment cited it in support of the

statement that the annual charge imposed by s. 3 of the Licensing Act, 1904, although necessarily payable by the owner, is not the subject of deduction for purposes of rating. A

In this case, speaking only for myself, I think that I am bound in honesty to express the view which I hold strongly, that there is no colour at all for the argument that the decision of the Divisional Court is in substance wrong; and for these reasons. The charge in question is imposed by the legislature not upon the premises, but upon the licence-holder. It was thought desirable to raise a fund to compensate those persons the renewal of whose licences was refused without any fault on their part, and s. 3 (1) directs the quarter sessions, in each year, to impose in respect of all existing on-licences renewed in respect of premises within their area, certain charges as set out in the first schedule to the Act. Subsection (2) provides that those charges shall be levied and paid together with and as part of the duties on the corresponding excise licence; and sub-s. (3) enacts that any licence-holder who pays a charge under this section may deduct it from the rent payable to his landlord. It is quite true that the strong inference which, as it seems to me, might properly be drawn from the facts that this charge is to be collected not merely with, but as part of, the excise duty, and that the excise duty has never been treated as a sum which may be deducted in rating the premises, is to some extent met by the fact that, if the charge is paid by a tenant, he may recover it from his landlord. That point was strongly argued, but I do not agree that it is a complete answer. It does not seem to me to follow from the fact that the person who is ultimately liable to pay the charge imposed by this Act upon licence-holders is the landlord (if there is one) of the licensed premises, the amount of such payment should be deducted in estimating the value of the premises under s. 1 of the Parochial Assessments Act, 1836. It appears to me that the fallacy (if I may so call it) is to a large extent this: that it would almost follow that any deduction made recoverable by the occupier of the premises from some other person might be from that very circumstance deductable under s. 1 of the Act of 1836, whereas the section clearly provides that the only deductions to be made are the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain the hereditaments that are being rated in a state to command the rent. As Vaughan Williams, L.J., has said (and in this I entirely concur) it is not necessary, in order to command the rent of this hereditament, that the payment of this charge which is levied and paid as part of the excise licence, as well as with it, is necessary for the purpose of realising what one may call the value of the licence. But, further than that, it seems to me that the payment of this charge would not fairly come within the words of this section, even if it could be said that this was a payment which directly enhanced the value of the licence. I have carefully, I hope, considered all that has been argued, and I think that, when dealing with corporeal hereditaments, one must not leave out of consideration the natural meaning of the expression which follows certain specified expenses, "expenses, if any, necessary to maintain them in a state to command such rent." Nor is it possible, as it seems to me, to say that, because those premises may be rated more highly because a hypothetical tenant may be got who would pay a higher rent by reason of the premises being licensed, it would follow that a payment necessary to be incurred in order that that trade may be carried on at those premises, is an expense which could properly be made the subject of a deduction under s. 1 of the Act of 1836. B C D E F G H I

It has been held that certain classes of incorporeal hereditaments are liable to be assessed to poor rate, and it is true that judges have gone a considerable length in allowing deductions under s. 1 (as for instance in the tithe rentcharge case of *R.* v. *Goodchild* (1), of sums which could not strictly be said to be expenses necessary for maintaining the hereditament. The judges there had to apply to an incorporeal hereditament words which strictly were only applicable to a corporeal hereditament. Speaking for myself, I should be sorry to accept finally the conclusion

that a construction which the judges thought ought to be put upon the words of the section in applying those words to the case of an incorporeal hereditament ought also to be put upon the words when dealing with the case of a corporeal hereditament, so as to give an unnatural meaning to those words which are perfectly applicable in their natural meaning to the case of a corporeal hereditament. It seems to me that in the present case the charge imposed upon the ratepayer was not an expense necessary for maintaining the hereditament as licensed premises or at all, even in the sense in which the tax in *R.* v. *Smith* (2) was held to be such an expense. In that case the tax was an expense really necessary for the maintenance of what I may call the essential value of the right of fishery, which was an incorporeal hereditament, but that case ought not to be used for the purpose of widening the area of the deductions to be allowed in the case of a corporeal hereditament. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Godden, Son & Holme*, for *Longden, Mann & Longden*, Sunderland; *Johnson, Weatherall & Sturt*, for *J. G. & T. Marshall*, Sunderland.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

SOUTH WALES MINERS' FEDERATION AND OTHERS *v.* GLAMORGAN COAL CO., LTD., AND OTHERS

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord James of Hereford, and Lord Lindley), February 23, 24, 27, 28, March 2, 3, April 14, 1905]

[Reported [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441]

Tort—Contract—Procurement of breach—No intention to damage other party to contract—Combination to procure breach—Breach bona fide procured in performance of duty to protect party in breach.

While there may be cases in which it may not be actionable to persuade a person to break a contract the general rule is that it is unlawful to combine to procure a number of persons to break contracts. It is no defence that the persons procuring the breaches of contract have a duty to protect the interests of those whom they procure and act in what they regard to be the performance of that duty in good faith, without ill-will towards the other parties to the contracts, and indeed believing that the breaches of contract would be for the benefit of those other parties as well as for those whom they were under an obligation to protect. In an action for such procurement the plaintiffs need not prove malice in the sense of spite or ill-will.

Decision of Court of Appeal, [1903] 2 K.B. 545, affirmed.

Notes. So far as trade unions are concerned, by ss. 1 and 3 of the Trade Disputes Act, 1906 (25 HALSBURY'S STATUTES (2nd Edn.) 1267), an act done in pursuance of a combination by two or more persons, if done in contemplation or furtherance of a trade dispute, shall not be actionable on the ground only that it induces some other persons to break their contracts of employment, but the present case remains an authority on the general law relating to this kind of tort.

Distinguished: *Stott* v. *Gamble*, [1916–17] All E.R.Rep. 724. Applied: *Valentine* v. *Hyde*, [1919] 2 Ch. 129. Considered: *Camden Nominees, Ltd.* v. *Slack*,

[1940] 2 All E.R. 1. Referred to: *National Phonograph Co.* v. *Edison Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335; *Larkin* v. *Long*, [1914–15] All E.R.Rep. 469; *Pratt* v. *British Medical Association*, [1918–19] All E.R.Rep. 104; *Davies* v. *Thomas*, [1920] 1 Ch. 217; *Said* v. *Butt*, [1920] All E.R.Rep. 233; *Ware and De Freville* v. *Motor Trade Association*, [1920] All E.R.Rep. 387; *Brimelow* v. *Casson*, [1923] All E.R.Rep. 40; *Sorrell* v. *Smith*, [1925] All E.R.Rep. 1; *Place* v. *Searle*, [1932] 2 K.B. 497; *British Homophone, Ltd.* v. *Kunz and Crystallate Gramophone Record Manufacturing Co.*, [1935] All E.R.Rep. 627; *De Jetley Marks* v. *Greenwood*, [1936] 1 All E.R. 863; *R.* v. *National Arbitration Tribunal, Ex parte Bolton Corpn.*, [1941] 2 K.B. 405; *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, [1942] 1 All E.R. 142; *Re Schebsman, Ex parte Official Receiver, The Trustee* v. *Cargo Superintendents (London), Ltd., and Schebsman*, [1943] 2 All E.R. 768; *D. C. Thomson & Co.* v. *Deakin*, [1952] 2 All E.R. 361; *Abbott* v. *Sullivan*, [1952] 1 All E.R. 226; *R.* v. *Newland*, [1953] 2 All E.R. 1067.

As to the tort of interference with contractual relations, see 37 HALSBURY'S LAWS (3rd Edn.) 124–131; and for cases see 42 DIGEST 983 et seq.

Cases referred to:

(1) *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426; 70 L.J.K.B. 905; 85 L.T. 147; 65 J.P. 596; 50 W.R. 44; 17 T.L.R. 698; 45 Sol. Jo. 690, H.L.; 43 Digest 127, *1295*.

(2) *Bowen* v. *Hall* (1881), 6 Q.B.D. 333; 50 L.J.Q.B. 305; 44 L.T. 75; 45 J.P. 373; 29 W.R. 367, C.A.; 42 Digest 988, *174*.

(3) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; 37 W.R. 756; 5 T.L.R. 658; 6 Asp.M.L.C. 455, C.A.; affirmed [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 42 Digest 986, *157*.

(4) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 42 Digest 971, *30*.

(5) *Allen* v. *Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 42 Digest 972, *35*.

(6) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, *169*.

(7) *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K.B. 732; 71 L.J.K.B. 994; 87 L.T. 493; 51 W.R. 115; 19 T.L.R. 20; 47 Sol. Jo. 29, C.A.; 42 Digest 988, *176*.

Also referred to in argument:

Temperton v. *Russell*, [1893] 1 Q.B. 715; 62 L.J.Q.B. 412; 69 L.T. 78; 57 J.P. 676; 41 W.R. 565; 9 T.L.R. 393; 37 Sol. Jo. 423; 4 R. 376, C.A.; 42 Digest 987, *170*.

Bromage v. *Prosser* (1825), 4 B. & C. 247; 1 C. & P. 673; 6 Dow. & Ry.K.B. 296; 3 L.J.O.S.K.B. 203; 107 E.R. 1051; 33 Digest 485, *232*.

Stuart v. *Bell*, [1891] 2 Q.B. 341; 60 L.J.Q.B. 577; 64 L.T. 633; 39 W.R. 612; 7 T.L.R. 502, C.A.; 32 Digest 122, *1545*.

Cockayne v. *Hodgkisson* (1833), 5 C. & P. 543; 32 Digest 118, *1500*.

Coxhead v. *Richards* (1846), 2 C.B. 569; 15 L.J.C.P. 278; 10 Jur. 984; 135 E.R. 1069; 32 Digest 122, *1539*.

Jenoure v. *Delmege*, [1891] A.C. 73; 60 L.J.P.C. 11; 63 L.T. 814; 55 J.P. 500; 39 W.R. 388, P.C.; 32 Digest 156, *1887*.

Appeal by the defendants in the action, the South Wales Miners' Federation, from a decision of the Court of Appeal (ROMER and STIRLING, L.JJ., WILLIAMS, L.J., dissenting), reported [1903] 2 K.B. 545, reversing a decision of BIGHAM, J., reported [1903] 1 K.B. 118.

The respondents were the Glamorgan Coal Co. and other colliery owners in the South Wales district, and they brought an action against the executive of the South

A Wales Miners' Federation, claiming damages for wrongfully and maliciously procuring and inducing the workmen employed at the respondents' collieries to break their contract by abstaining from work on specified days in October and November, 1901. The appellants said in defence that they had not wrongfully or maliciously induced the workmen to break their contract of service, and had not been guilty of conspiracy as alleged. For many years the respondents and their workmen worked B under an agreement called the sliding scale. This agreement provided that a joint committee of masters and men should be formed which should be called the sliding scale joint committee, that the rate of wages should depend upon the selling price of coal, and all notices to terminate contracts on behalf of the employers as well as employed should be given on the first day of the month to terminate upon the last. During the continuance of the sliding scale it was the object of both masters and C men to keep up the price of coal against the middlemen, whose interest it was to keep prices down, as they frequently sold forward, hoping to be able to buy later at prices which would make their bargain remunerative. This system had the effect, it was alleged, of depressing the market, and in 1896 and 1897 masters and men tried to regulate the output of the mines by means of "stop-days" to counteract the effect of this class of trading. There was, however, a difficulty in getting a D sufficient number of colliery proprietors to fall in with any scheme having for its object the restriction of the output, and thus nothing was done. On Nov. 12, 1900, a general conference of the appellants' federation passed a resolution authorising the executive council to declare a general holiday at any time when they thought it necessary for the protection of wages and of the industry generally. As a result of this resolution, other "stop-days" were ordered in October and November, 1901. E At the trial BIGHAM, J., held that, having been requested by the men, by a resolution of Nov. 12, 1900, to advise and direct them as to when to stop work, the federation and the members of its executive did so to the best of their ability, and that they were actuated by an honest desire to forward the interests of the men without any prospect of personal gain to themselves and without any intention, malicious or otherwise, of injuring the plaintiffs. The plaintiffs appealed to the F Court of Appeal, who reversed the decision of BIGHAM, J., and the defendants appealed to the House of Lords.

Rufus Isaacs, *K.C.*, *S. T. Evans*, *K.C.*, *Bailhache*, *Holman Gregory*, and *Clement Edwards* for the appellants.

Upjohn, *K.C.*, *M. Lush*, *K.C.*, and *Trevor Lewis* for the respondents.

G Their Lordships took time for consideration.

April 14, 1905. The following opinions were read.

THE EARL OF HALSBURY, L.C.—I cannot think that in this case there is anything to be determined except the question of fact. I say so because the questions of law discussed are well settled by authority, and authority in this House. H To combine to procure a number of persons to break contracts is manifestly unlawful. This is found as a fact to have been done here, and is also found to have caused serious damage to the persons who were entitled to have these contracts performed. It is, further, a principle of the law, applicable even to the criminal law, that people are presumed to intend the reasonable consequences of their acts. It is not, perhaps, necessary to have recourse to such a presumption where, as upon I the facts stated, it is apparent that what they were doing must necessarily cause injury to the employers.

We start, then, with the infliction of an unlawful injury upon the persons entitled to have the services of their workmen. It follows that this is an actionable wrong unless it can be justified. It is sought to justify it, first, because it is said that the men were acting in their own interest, and that they were sincerely under the belief that the employers would themselves benefit by their collieries being interrupted in their work; but what sort of excuse is this for breaking a contract when the co-contractor refuses to allow the breach? It seems to me to be absurd to suppose

that a benefit which he refuses to accept justified an intentional breach of contractual rights. It may, indeed, be urged in proof of the allegation that there was no ill-will against the employers. I assume this to be true; but I have no conception what can be meant by an excuse for breaking a contract because you really think it will not harm your co-contractor. I absolutely refuse to discuss the cases, widely apart from the question of what pecuniary advantage may be reaped from breaking a contract, which have been suggested, where, upon moral or religious grounds, people may be justly advised to refuse to perform what they have agreed to do. Some cases may be suggested when higher and deeper considerations may, in a moral point of view, justify the refusal to do what has been agreed to be done. Such cases may give rise to the consideration whether, in a moral or religious point of view, you are not bound to indemnify the person whom your refusal injures, but a court of law has only to decide whether there is a legal justification. Again, I refuse to go into a discussion of the duty or the moral right to tender advice. The facts in this case show nothing in the nature of advice, even if the supposed duty could be created by people who made other persons their official advisers who were to advise them even to break the law. But these were peremptory orders given by the official superiors of the body, and it has been found by the learned judges who tried the case that the body sued was responsible for the interference with the workmen. I think that the appeal should be dismissed.

LORD MACNAGHTEN.—I agree in the motion which the Lord Chancellor proposes, and I also agree with him in thinking that the question before your Lordships lies in a very narrow compass. It is not disputed that the union, known as the South Wales Miners' Federation, acting by its executive, induced and procured a vast body of workmen, members of the union, who were at the time in the employment of the plaintiffs, to break their contracts of service, and thus the federation, acting by its executive, knowingly and intentionally inflicted pecuniary loss on the plaintiffs. It is not disputed that the federation committed an actionable wrong. It is no defence to say that there was no malice or ill-will against the masters on the part of the federation, or on the part of the workmen at any of the collieries thrown out of work by the action of the federation. It is settled now that malice, in the sense of spite or ill-will, is not the gist of such an action as that which the plaintiffs have instituted. Still less is it a defence to say that if the masters had only known their own interest they would have welcomed the interference of the federation.

It was argued that, although the thing done was primâ facie an actionable wrong, it was justifiable under the circumstances. That there may be a justification for that which in itself is an actionable wrong I do not for a moment doubt; and I do not think that it would be difficult to give instances, putting aside altogether cases complicated by the introduction of moral considerations. But what is the alleged justification in the present case? It was said that the council, the executive of the federation, had a duty cast upon them to protect the interests of the members of the union, and that they could not be made legally responsible for the consequences of their action if they acted honestly in good faith and without any sinister or indirect motive. The case was argued with equal candour and ability. But it seems to me that the argument may be disposed of by two simple questions. How was the duty created? What in fact was the alleged duty? The alleged duty was created by the members of the union themselves, who elected or appointed the officials of the union to guide and direct their action; and then it was contended that the body to whom the members of the union have thus committed their individual freedom of action are not responsible for what they do, if they act according to their honest judgment in furtherance of what they consider to be the interest of their constituents. It seems to me that if that plea were admitted there would be an end of all responsibility. It would be idle to sue the workmen, the individual wrongdoers, even if it were practicable to do so. Their counsellors and protectors, the real authors of the mischief, would be safe from legal proceedings. The only

other question is, What is the alleged duty set up by the federation? I do not think that it can be better described than it was by counsel for the plaintiffs. It comes to this: it is the duty on all proper occasions, of which the federation or their officials are to be the sole judges, to counsel and procure a breach of duty. I agree with ROMER and STIRLING, L.JJ., and I think that the appeal must be dismissed.

LORD JAMES OF HEREFORD.—The nature of the issues raised in this case, and the pecuniary consequences at stake, require that the fullest consideration should be given to your Lordships' judgment. At the same time, the facts to be dealt with are for the most part admitted, and, if not, are easily ascertainable, and in regard to the duty of applying principles of law to such ascertained facts your Lordships have received great assistance from the able arguments of counsel at the Bar of the House.

As the facts and circumstances affecting the case have already been fully dealt with, I need do no more than refer to them very briefly. The action is brought by the plaintiffs as owners of collieries against the South Wales Miners' Federation and certain individual members of it, upon the following grounds set out in the statement of claim:

> "That the defendants, well knowing the terms and conditions of the contracts of service under which the workmen employed at the collieries of the plaintiffs were working, wrongfully and maliciously, by causing notice to be given to the workmen employed at the plaintiffs' collieries, procured and induced the said workmen to break their contracts of service with the plaintiffs, and in breach thereof to abstain, without giving due notice, from working at the said collieries on certain days . . . and the workmen employed at the said collieries did, by reason of such procurement and inducement, and in breach of their contracts of service with their employers, abstain, without due notice, from working at the said collieries."

The defendants, in addition to denying the above allegations, among other arguments, alleged that they acted in the bona fide belief that the course of action advised by them would greatly benefit both the plaintiffs and defendants, and that they, the defendants, had reasonable justification and excuse for the course pursued by them.

The first question to be determined is: Did the defendants procure and induce the plaintiffs' workmen to break their contracts of service? I think it clear that this question must be answered in the affirmative. On Nov. 5, 1900, the following resolution was passed by the defendants' federation:

> "It was unanimously resolved to order a stop-day on Friday next, and that a conference be held on Monday next to decide upon our future action."

On the same day a manifesto was issued by the federation addressed to the workmen, in which it is stated:

> "We have unanimously resolved that a general holiday be taken throughout the coalfields by all colliery workmen on Friday, Nov. 9, 1900."

The colliers carried out the resolution of the federation, and the stop-day took place. The employers protested, and warned the workmen that if such stoppage of work was repeated legal remedy would be sought. In October, 1901, steps were taken by the federation to cause the workmen again to stop work. But, *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* (1) having been determined by your Lordships in July, 1901, the danger of legal liability was apparent, and the federation, therefore, slightly disguised themselves as being the workmen's members of the sliding scale committee. But this disguise was scarcely maintained, and was not persisted in during the argument at the Bar. On Oct. 15, 1901, Mr. W.

Brace, as vice-president of the defendants' federation, in a speech said that in certain events A

> "the executive council of the federation in whom power was vested by the whole body of workmen according to a conference resolution would unhesitatingly declare a series of stoppages with a view to regulate the supply according to the demand."

B

On Oct. 29, 1901, the following resolution was passed by those who called themselves the workmen's representatives of the sliding scale joint committee:

> "It was unanimously resolved to issue instructions to the workmen to observe Thursday next as a general holiday at all the collieries throughout the South Wales coalfield."

C

On Oct. 23, Oct. 29, and Nov. 4, 1901, telegrams were sent on behalf of the executive council to the representatives of the different branches in the following form: On Oct. 23.—"Sliding scale committee has decided that all collieries must observe Friday and Saturday next as a general holiday." Oct. 29.—"Men must be idle Thursday next." Nov. 4—"Stop next Wednesday." In addition to these communications evidence was given which justifies the conclusion that the defendants did more than advise the workmen upon the subject of these stop-days. No doubt there was, by the rules of the federation, a general duty cast upon it D

> "to take into consideration the question of trade and wages, and to protect workmen generally, and to regulate the relation between them and employers,"

and these somewhat indefinite words might justify advice being given by the executive council to the workmen. E

Still there remains the question: Can it be lawful to advise the unlawful breaking of a contract of service? But, be this as it may, I think it established that both in 1900 and 1901 responsible officers of the federation did far more than give advice. They initiated, they directed, and they gave orders; so that it is correct to employ the legal term, and say that they induced and procured the workmen to break their contracts. If it be that the defendants' acts amount to inducing and procuring, a great portion of the able arguments placed before your Lordships on behalf of the appellants becomes of no avail. It is true that great difficulty arises when hypothetical cases are suggested of advice given under a great moral sense of right, or where great good would result from a contract being broken, or where the claims of relationship or guardianship demand an interference amounting to protection. Each of such cases must be determined as it arises; but upon the facts as I think that they must be found in this case no such difficulties arise. The action of the defendants, going, as I have said, to the extent of inducing and procuring the commission of an unlawful act, places them in a very different position from that occupied by a person whose duty it is to offer advice to one who needs to be guided or protected. If this view be correct, the allegation in the statement of claim that the defendants induced and procured the workmen to break their contracts is established. It is admitted that the workmen in so acting committed an unlawful act, that in consequence the employers sustained damage, and that the defendants had notice of such contracts and of the consequences of the breach. F G H

It yet remains to deal with the words "wrongfully and maliciously" as averred in the statement of claim. As to the word "wrongfully," I think that no difficulty arises. If the breach of the contract of service by the workmen was an unlawful act, any one who induces and procures the workmen, without just cause and excuse, to break such contract also acts unlawfully, and thus the allegation that the act done was wrongfully done is established. But the word "maliciously" has also to be dealt with. The judgment of Bigham, J. ([1903] 1 K.B. at p. 133), proceeds on the ground that I

> "to support an action for procuring a breach of contract it is essential to prove actual malice."

I cannot concur in this view of the law. The word "maliciously" is often employed in criminal and civil pleadings without proof of actual malice, apart from the commission of the act complained of, being required. If A. utters a slander of B., even if he be a stranger to him, the averment that A. maliciously spoke such words of B. is established by simply proving the uttering of words taken to be false until the contrary be proved. In such an action the word "maliciously" may be treated either as an unnecessary averment or as being proved by inference drawn from the proof of the act being wrongfully committed. I think also that the learned judge's judgment is not supported by the authorities to which he refers. In *Bowen* v. *Hall* (2) BRETT, L.J., with the sanction of LORD SELBORNE, L.C., thus expressed his view (6 Q.B.D. at p. 337):

> "Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, in the natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie."

In *Mogul Steamship Co.* v. *McGregor* (3) BOWEN, L.J., also said (23 Q.B.D. at p. 613):

> "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."

And in *Quinn* v. *Leathem* (4) LORD MACNAGHTEN thus defined the law on the subject ([1901] A.C. at p. 510):

> "A violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

It will be observed that none of these three very learned judges employs the word "maliciously" as being necessary in order to constitute a right of action.

But a further question has to be disposed of. At the trial and at the Bar of your Lordships' House the counsel for the appellants contended that their clients had good cause and excuse for the alleged unlawful act they committed. That such justification—such "good cause and excuse"—may exist, is, I think, a sound proposition. The above words of LORD MACNAGHTEN and of BOWEN, L.J., so declare. The facts upon which this attempted justification in this case is based are fully before your Lordships, and need not be recapitulated. I take the results of them to be that in one sense the defendants acted in good faith. They, I think, honestly believed that the stoppage of work upon which they resolved would increase the price of coal and so benefit both the workmen and the employers. Towards their employers the defendants entertained no malice. At the same time, they knew that the employers had given notice of their objection to any such stoppage of work. And so the federation not only advised, but resolved and ordered that the workmen should break their contracts under conditions that would constitute an unlawful act in the men. As far as the defendants could exercise control the men were not allowed to make use of their own discretion. In order, therefore, to establish the existence of good cause and excuse, all that the defendants can say is: We, the federation, had a duty cast upon us to advise the workmen. We did advise them to commit an unlawful act, but in giving that advice we honestly believed that they would be in a better financial position than if they acted lawfully and fulfilled their contracts. Even if it be assumed that such allegations are correct in fact, I think that no justification in law is established by them. The intention of the defendants was directly to procure the breach of contracts. The fact that their motives were good in the interests of those whom they moved to action does not form any answer to those who have suffered from the unlawful act.

During the arguments that have been addressed to your Lordships I do not think that quite sufficient distinction was drawn between the intention and the motives of the defendants. Their intention clearly was that the workmen should break their

contracts. Their motives, no doubt, were that by so doing wages should be raised. But if in carrying out the intention the defendants purposely procured an unlawful act to be committed, the wrong that is thereby inflicted cannot be obliterated by the existence of a motive to secure a money benefit to the wrongdoers. For these reasons I think that the judgment of the Court of Appeal should be affirmed.

LORD LINDLEY.—I agree so entirely with the judgments of ROMER and STIRLING, L.JJ., that I should say no more were it not for the great importance of some of the arguments addressed to your Lordships on this appeal, which deserve notice. It is useless to try to conceal the fact that an organised body of men working together can produce results very different from those which can be produced by an individual without assistance. Moreover, laws adapted to individuals not acting in concert with others require modification and extension if they are to be applied with effect to large bodies of persons acting in concert. The English law of conspiracy is based upon and is justified by this undeniable truth. But the possession of great power, whether by one person or by many, is quite as consistent with its lawful as with its unlawful employment; and there is no legal presumption that it will be or has been unlawfully exercised in any particular case. Some illegal act must be proved to be threatened and intended, or to have been committed, before any court of justice in the United Kingdom can properly make such conduct the basis of any decision. These remarks are as applicable to trade unions as to other less powerful organisations. Their power to intimidate and coerce is undoubted; its exercise is comparatively easy and probable; but it would be wrong on this account to treat their conduct as illegal in any particular case without proof of further facts which make it so. It is not incumbent on a trade union to rebut any presumption of illegality based only on their power to do wrong. Freedom necessarily involves such a power; but the mere fact of its existence does not justify any legal presumption that it will be abused. In the case before your Lordships there is proof that the members of the federation combined to break, and did break, their contracts with their employers by stopping work without proper notice and without proper leave. There is also proof that the officials of the federation assisted the men to do this by ordering them to stop work on particular days named by the officials.

To break a contract is an unlawful act; or, in the language of LORD WATSON in *Allen* v. *Flood* (5) ([1898] A.C. at p. 96), "A breach of contract is in itself a legal wrong." The form of action for such a wrong is quite immaterial in considering the general question of the legality or illegality of a breach of contract. Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do so, he must stipulate for an option to that effect. Non-lawyers are apt to think that everything is lawful which is not criminally punishable, but this is an entire misconception. A breach of contract would not be actionable if nothing legally wrong was involved in the breach. The federation by its officials are clearly proved in this case to have been engaged in intentionally assisting in the concerted breach of a number of contracts entered into by workmen belonging to the federation. This is clearly unlawful according to *Lumley* v. *Gye* (6) and *Quinn* v. *Leathem* (4), and the more recent case of *Read* v. *Friendly Society of Operative Stonemasons* (7). Nor is it opposed to *Allen* v. *Flood* (5) or *Mogul Steamship Co.* v. *McGregor* (3), where there was no unlawful act committed.

The appellants' leading counsel did not deny that in his view of the case the defendants' conduct required justification, and it was contended (i) that all which the officials did was to advise the men, and (ii) that the officials owed a duty to the men to advise and assist them as they did. As regards advice, it is not necessary to consider when, if ever, mere advice to do an unlawful act is actionable when the advice is not libellous or slanderous. Nor is it necessary to consider those cases in which a person, whose rights will be violated if a contract is performed, is justified in endeavouring to procure a breach of such contract. Nor is it necessary to con-

A sider what a parent or guardian may do to protect his child or ward. That there are cases in which it is not actionable to exhort a person to break a contract may be admitted; and it is very difficult to draw a sharp line separating all such cases from all others. But the so-called advice here was much more than counsel; it was accompanied by orders to stop, which could not be disobeyed with impunity. A refusal to stop work as ordered would have been regarded as disloyal to the federa-
B tion. This is plain from the speeches given in evidence on the trial, and, in my opinion, it is a very important element in the case which cannot be ignored. As regards duty, the question immediately arises—duty to do what? The defendants have to justify a particular line of conduct, which is wrongful in aiding and abetting the men in doing what both the men and the officials knew was legally wrong. The constitution of the union may have rendered it the duty of the officials to advise
C the men what could be legally done to protect their own interests, but a legal duty to do what is illegal and known so to be is a contradiction in terms. A similar argument was urged without success in *Read* v. *Friendly Society of Operative Stonemasons* (7). Then your Lordships were invited to say that there was a moral or social duty on the part of the officials to do what they did, and that, as they acted bona fide in the interests of the men and without any ill-will to the employers,
D their conduct was justifiable; and your Lordships were asked to treat this case as if it were like a case of libel or slander on a privileged occasion. This contention was not based on authority, and its only merits are its novelty and ingenuity. The analogy is, in my opinion, misleading; and to give effect to this contention would be to legislate and introduce an entirely new law and not to expound the law as it is at present. It would be to render many acts lawful which, as the law stands,
E are clearly unlawful. I have purposely abstained from using the word "malice." Bearing in mind that malice may or may not be used to denote ill-will, and that in legal language presumptive or implied malice is distinguished from express malice, it conduces to clearness in discussing such cases as these to drop the word "malice" altogether and to substitute for it the meaning which is really intended to be conveyed by it. Its use may be necessary in drawing indictments; but when all that
F is meant by malice is an intention to commit an unlawful act, and to exclude all spite or ill-feeling, it is better to drop the word and so avoid all misunderstanding. The appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors: *Smith, Rundell & Dods*, for *Walter Morgan, Bruce & Nicholas*,
G Pontypridd; *Bell, Brodrick & Gray*, for *C. & W. Kenshole*, Aberdare.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

THOMAS *v.* BRADBURY, AGNEW & CO., LTD. AND ANOTHER

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Sir Gorell Barnes, P., and Cozens-Hardy, L.J.), June 13, 14, 25, 1906]

[Reported [1906] 2 K.B. 627; 75 L.J.K.B. 726; 95 L.T. 23; 54 W.R. 608; 22 T.L.R. 656]

B

Libel—Fair comment—Malice—Literary criticism—Admissibility of evidence of malice on part of writer.

When a defence of fair comment on a matter of public interest is raised in an action for libel, the fact that the writer was actuated by malice is admissible in evidence on the ground that proof of malice may take a criticism primâ facie fair outside the right of fair comment.

C

Per SIR RICHARD HENN COLLINS, M.R.: It is, of course, possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment. Comment distorted by malice cannot, in my opinion, be fair on the part of the person who makes it.

D

Notes. Considered: *Longdon-Griffiths* v. *Smith*, [1950] 2 All E.R. 662. Referred to: *Walker* v. *Hodgson*, [1909] 1 K.B. 239; *Pratt* v. *British Medical Association*, [1918–19] All E.R.Rep. 104; *Crozier* v. *Wishart & Co. and Western Printing Services, Ltd.*, [1936] 1 All E.R. 1.

E

As to the defence of fair comment, see 24 HALSBURY'S LAWS (3rd Edn.) 70 et seq.; and for cases see 32 DIGEST 161 et seq.

Cases referred to:

(1) *McQuire* v. *Western Morning News Co.*, [1903] 2 K.B. 100; 72 L.J.K.B. 612; 88 L.T. 757; 51 W.R. 689; 19 T.L.R. 471, C.A.; 32 Digest 151, *1826*.

F

(2) *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769; 3 F. & F. 421; 2 New Rep. 20; 32 L.J.Q.B. 185; 8 L.T. 201; 27 J.P. 501; 9 Jur.N.S. 1069; 11 W.R. 569; 122 E.R. 288; 32 Digest 149, *1802*.

(3) *Merivale* v. *Carson* (1887), 20 Q.B.D. 275; 58 L.T. 331; 52 J.P. 261; 36 W.R. 231; 4 T.L.R. 125, C.A.; 32 Digest 152, *1837*.

(4) *Henwood* v. *Harrison* (1872), L.R. 7 C.P. 606; 41 L.J.C.P. 206; 26 L.T. 938; 20 W.R. 1000; 32 Digest 142, *1735*.

G

(5) *Plymouth Mutual Co-operative and Industrial Society, Ltd.* v. *Traders' Publishing Association, Ltd.*, [1906] 1 K.B. 403; 75 L.J.K.B. 259; 94 L.T. 258; 54 W.R. 319; 22 T.L.R. 266, C.A.; 32 Digest 161, *1953*.

(6) *Elliott* v. *Garrett*, [1902] 1 K.B. 870; 71 L.J.K.B. 415; 86 L.T. 441; 50 W.R. 504; 18 T.L.R. 498, C.A.; 18 Digest (Repl.) 191, *1645*.

H

Also referred to in argument:

Joynt v. *Cycle Trade Publishing Co.*, [1904] 2 K.B. 292; 73 L.J.K.B. 752; 91 L.T. 155; 32 Digest 149, *1805*.

Wason v. *Walter* (1868), L.R. 4 Q.B. 73; 8 B. & S. 671; 38 L.J.Q.B. 34; 19 L.T. 409; 33 J.P. 149; 17 W.R. 169; 32 Digest 144, *1754*.

I

Tabart v. *Tipper* (1808), 1 Camp. 350, N.P.; 32 Digest 20, *114*.

Application by the defendants for judgment or a new trial in an action in respect of an alleged libel tried before DARLING, J., with a jury.

The plaintiff had written a book called "Fifty Years of Fleet Street; being the Life and Recollections of Sir John R. Robinson." The first-named defendants were the publishers and proprietors of a newspaper called "Punch," and the other defendant, H. W. Lucy, wrote, under the name of "Toby, M.P.," an article which was published in "Punch" criticising the plaintiff's book. It was in respect of

this article that the action was brought. The defence was that the article was fair comment on a matter of public interest. The article was as follows:

"Mangled Remains. Extract from the Recess Diary of Toby, M.P. Been reading 'Fifty Years of Fleet Street,' just issued by Macmillan. Purports to be the Life and Recollections of Sir John Robinson, the man who made and for a quarter of a century maintained at a high level the 'Daily News.' The story is written by Mr. F. M. Thomas, who has added a new terror to death. There are biographies of sorts ranging in value with the personality of the subject and the skill of the compiler. The former occasionally suffers from the incapacity of the latter. But at least his individuality is scrupulously observed. Like Don José, what he has said he has said, his observations and written memoranda not being mixed up with what his biographer thinks he himself thought, uttered, and recorded. Mr. Thomas goes about the biographer's business in fresh fashion, complacently announced by way of introduction to the volume.

> 'I have not thought it necessary or desirable' [he writes] 'to indicate in all cases what is his [Sir John Robinson's] and what is my own. If there is anything amusing or entertaining in these pages, I am quite content that my dear old chief should have the credit of it. The dullness I take upon myself.'

Here be generosity! Here magnanimity! It is true that in the performance of his task Mr. Thomas occasionally falls from this high estate. More than once he airily alludes to 'our diary' and 'our notes' as if he had prepared them in collaboration with his chief. Possibly conscious for a moment of this indiscretion, and reverting to a more generous mood, he, approaching a particular narrative, introduces it with the remark, 'the incident may be given in the diarist's own words.' The procedure is perhaps not unusual with earlier biographers. With Mr. Thomas the lapse is rare. When he does let the hapless subject speak for himself, he is relegated to small type. For the rest, it is Mr. Thomas who loquitur, retelling poor Robinson's cherished stories as if they were his own, sometimes with heavy hand brushing off the bloom. Even in these depressing circumstances there is no mistaking Robinson's sly humour, his gift of graphic characterisation. The worst of it is that, happening in the very same page upon some banal remark, some pompous platitude, the alarmed reader, recognising Mr. Thomas, hastily turns over half a dozen pages, and possibly misses a handful of the genuine ore. These are hard lines, unjust to Robinson, unfair to the public. It is plain to see from the few unmutilated extracts from Robinson's manuscript which illuminate the book that the materials at hand for a delightful biography were abundant. For nearly forty years the manager of the 'Daily News' lived in the very heart of things. He was behind most scenes of public life, was more or less intimately acquainted with the principal personages figuring in it. His sympathies were bountifully wide, his observation alert, his sense of humour keen. He loved his newspaper work with almost passionate affection. For him fifty years of Fleet Street were worth a cycle of Cathay. That he habitually made notes of what he saw and heard with the view to publication in biographical form is undoubted. Mr. Thomas, impregnable in the chain armour of complacency, positively admits it. Robinson, he says,

> 'did leave some diaries—our diaries—more or less fragmentary, and a number of thick, closely-written volumes of jottings in his own handwriting, descriptive of events of which he had been an eye-witness and people he had seen and known.'

Where is this treasure trove? Presumably portions the biographer was good enough to regard as worth adapting are filtered through the wordy pages of

larger type. Happily the material is so good, its original literary form so excellent, that even this unparalleled atrocity cannot quite spoil the book. We who knew Robinson on his throne in Bouverie Street and at the well-known table in the dining-room of the Reform Club, rich in recollections of William Black, Payn, and Sala, who watched him enjoying himself like a boy at theatre first nights; who recognised his rare capacity as a newspaper man; who knew the kind heart hidden behind a studiously cultured severity of manner in business relations—we perhaps jealously cherish his memory, and regret the surprising chance that has made possible this slight upon it."

At the trial of the action before DARLING, J., with a jury, there was some evidence of malice on the part of the writer of this criticism, and the defendants' counsel, at the close of the plaintiff's case, asked the learned judge to withdraw the case from the jury on the ground that there was no evidence in support of the plaintiff's case. The learned judge refused this application and left the case to the jury, who returned a verdict for the plaintiff for £300 damages, and the learned judge gave judgment accordingly. The defendants now applied for judgment or a new trial.

Scrutton, *K.C.*, and *J. R. Atkin* for the defendants.
Dickens, *K.C.*, and *E. F. Spence* for the plaintiff.

Cur. adv. vult.

June 25, 1906. **SIR RICHARD HENN COLLINS, M.R.,** read the following judgment:—This is an appeal by the defendants from the verdict and judgment for the plaintiff in an action of libel tried before DARLING, J., and a special jury based on a critique of a book written by the plaintiff. The critique was written by the defendant Lucy, and appeared in "Punch," of which the first defendants are the publishers. The defence was fair comment. The learned judge refused to withdraw the case from the jury, who found for the plaintiff, with £300 damages.

The defendants do not complain of misdirection other than that involved in holding that there was any evidence fit for the consideration of a jury. They ask for judgment on the ground that there was nothing in the article which any reasonable jury could find to fall outside the limits of fair comment, or in the alternative they ask for a new trial on the ground that the verdict was against the weight of evidence. They pressed us strongly with *McQuire* v. *Western Morning News Co.* (1), a decision of this court in an action for libel in respect of an article criticising adversely a play of which the plaintiff was the author, where the court set aside a verdict and judgment for the plaintiff on the ground that there was no evidence on which a rational verdict for the plaintiff could be founded. There were, however, two distinctions between that case and the present. There was admittedly in that case no evidence of actual malice unless it could be inferred from the terms of the article itself, and there was some reason for supposing that the direction was misleading. In the present case the plaintiff's counsel strenuously contended that there was extrinsic evidence of malice in the proved relations of the parties before the action, the special manner in which the particular article appeared in "Punch," and in the expressions which fell from the defendant Lucy, coupled with his demeanour in the witness-box, and they relied also on the terms of an apology subsequently printed as fortifying their contention. They urged besides that the language of the article itself raised a question for the jury as to its meaning, and that upon their view of its meaning would depend the question whether it exceeded the bounds of fair comment or not. The question, therefore, for our decision is whether there was any evidence upon which a rational verdict for the plaintiff could be founded. If so, the learned judge was bound to leave it to the jury.

I have already said that extrinsic evidence of malice, which I have attempted to summarise, was allowed to go to the jury. The defendants contended that this evidence amounted to nothing, and that no reasonable jury could act upon it, but

they also raised a contention, which alone, as it seems to me, gives any importance to this case. Their point was that if the article itself, apart from the extrinsic evidence, did not raise a case for the jury that the bounds of fair comment had been overstepped, proof of actual malice on the part of the writer could not affect the question or disturb his immunity. This is a formidable contention. It involves the assertion that fair comment is absolute, not relative, and must be measured by an abstract standard; that it is a thing quite apart from the opinions and motives of its author and his personal relations towards the writer of the thing criticised. It involves the position also that an action based on a criticism is wholly outside the ordinary law of libel, of which malice, express or implied, has always been considered to be the gist.

The basis of this contention, such as it is, appears to be a misconception of the effect of the gloss, if I may so phrase it, first put upon the law of libel in relation to fair comment in the dicta of COMPTON, J., and BLACKBURN, J., in *Campbell* v. *Spottiswoode* (2), decided in 1863, and subsequently approved in *Merivale* v. *Carson* (3), decided in 1887. I have already had occasion to examine the effect of these views upon the law of libel in *McQuire* v. *Western Morning News Co.* (1). In my opinion the substance of the matter remains unchanged and malice remains exactly where it did. The dicta no doubt assert the etymological inexactitude of the word privilege as connoting a right common to the public at large, and the limits of the right itself are pointed out which, whether it be called privilege or by any other name, does not extend to cover mis-statements of fact however bona fide; but they in no degree affect the standard by which the fairness of the comment is to be judged or relieve the commentator from liability, if the comment be malicious, if indeed it can then be described as comment at all. The right, though shared by the public, is the right of every individual who asserts it, and is, qua him, an individual right whatever name it be called by, and comment by him which is coloured by malice cannot from his standpoint be deemed fair. He and he only is the person in whose motives the plaintiff in the libel action is concerned, and if he, the person sued, is proved to have allowed his view to be distorted by malice it is quite immaterial that somebody else might without malice have written an equally damnatory criticism. The defendant, and not that other person, is the party sued.

This seems to me quite clear in point of principle; but as already pointed out in *McQuire* v. *Western Morning News Co.* (1) the law continued to be administered after *Campbell* v. *Spottiswoode* (2) just as it always had been before, down to and since *Merivale* v. *Carson* (3). That case decided nothing inconsistent with the law of libel as thus administered, though each of the learned judges expressed an opinion in favour of the view taken in the dicta I have referred to of CROMPTON and BLACKBURN, JJ., in preference to that of WILLES, J., in *Henwood* v. *Harrison* (4). But as already pointed out in *McQuire* v. *Western Morning News Co.* (1) the difference between the two views is, in the language of BOWEN, L.J., in *Merivale* v. *Carson* (3) (20 Q.B.D. at pp. 282, 283), a difference in the "metaphysical exposition" of the right and "is rather academical than practical." I think the headnote in the case is to some extent the cause of what seems to me an erroneous impression as to the effect of the decision. The words of that note seem to suggest a difference of right, under the general law of libel, in respect of communications made on a privileged occasion and communication made in the shape of criticism on a matter of public interest. In cases of privilege, properly so called, nothing that falls outside the privilege is protected by it, and if defamatory must be otherwise justified. The occasion being privileged, the extent of the privilege may vary according to the nature of the case and the limits of the right or duty which is the basis of the privilege. But this is precisely the position in the case where the right exercised is one shared by the rest of the public and not one limited to an individual or a class. The extent of the right has to be ascertained, and in respect of any communication which falls within it the immunity, if it be not absolute, can be

displaced only by proof of malice. In the case of comment on literary works the occasion is created by the publication, and a right then arises to criticise honestly, however adversely. No such occasion would arise in respect of a private unpublished letter. If a writer were to get hold of a private letter of a well-known author and publish a damnatory article on the author's literary style and taste, as evidenced by the letter, it seems to me that he would have no immunity from the ordinary law in respect of defamatory writings.

The only difference, then, in the legal incidents of ordinary privilege, limited to individuals, on the one hand, and the right in the public to criticise, on the other, would seem to be that the one might, with somewhat less latitude than the other, though not perhaps with perfect accuracy, be described as "privilege." The headnote might possibly suggest, at first sight at all events, particularly when it adds, *Henwood* v. *Harrison* (4), "dissented from" that not merely an academical difference in the analysis of rights had been expressed, but that there was a difference of substance in the bearing of malice in the two cases in respect of communications or criticisms falling primâ facie within the right or privilege. The limits of the right, as I have already pointed out, may be, and are, different, but the law with respect to communications that primâ facie fall within them is the same. Proof of malice may take a criticism primâ facie fair outside the right of fair comment, just as it takes a communication primâ facie privileged outside the privilege. The particular allegation which was unprotected in *Merivale* v. *Carson* (3) was never within the "right" when the facts were ascertained by the jury in interpreting the passage impugned. Proof of bona fide belief was therefore irrelevant; nothing but proof of the truth could justify the allegation. If the analysis be strictly carried out it will be found that the two rights, whatever name they are called by, are governed by precisely the same rules. The only practical difference is that in an action based on a criticism of a published work the transaction begins by the admission, on the part of the plaintiff, implied from the averment by him of publication of the work criticised, that the comment came into existence on a protected occasion. He is placed, therefore, in precisely the same position as he would have been in had he sued in respect of a defamatory writing primâ facie unprotected and therefore actionable, but had gone on to aver facts which created a privilege strictly so called. Beginning thus at this stage in the transaction, he would have accepted the onus of proving malice in fact. If he had veiled the fact that the writing criticised had become matter of public interest by publication it would have been primâ facie libellous, and the defendant would have had to plead such a publication as would let in the right to comment on a matter of public interest in order to bring himself within the protection. This shows that acceptance of the dicta under discussion does not in the slightest degree affect the place of malice in the law of libel, and that it is only by leaving out one step in the analysis that the public right, as distinguished from the privilege, may appear to carry with it different incidents. There is not even any decision that the word "privilege" as used in *Henwood* v. *Harrison* (4), to which Lord Esher was himself a party, is not as good a word as any substitute that can be suggested to express the right by which, in certain circumstances, writings defamatory of another person may be published with impunity, because the presumption of malice is negatived. For the reasons I have given, the difference is one of words only and could not be a matter of legal decision.

I have thought it worth while to sift this contention somewhat elaborately, as it is apparently based upon a misconception which seems to have a tendency to repeat itself as to the effect of *Merivale* v. *Carson* (3) on the law of libel. But the contention of the defendants can be met not by reference to principle only, but also by direct authority. To go back to the source itself of the supposed new departure, *Campbell* v. *Spottiswoode* (2), Blackburn, J., says (3 B. & S. at p. 781):

"Honest belief may be an ingredient to be taken into consideration by the jury

in determining whether the publication is a libel, that is, whether it exceeds the limits of fair and proper comment."

In *Merivale* v. *Carson* (3) itself, LORD ESHER, M.R., deals with the question. He says (20 Q.B.D. at pp. 281, 282):

> "It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, and it could be shown that the defendant was not really criticising the work, but was writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think that it would, and for this reason, that the comment would not then really be a criticism of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author."

Though the learned judge in this passage expresses only an inclination of opinion, the reason given seems to me to be conclusive. But, in a very recent case in this court, the point is actually decided—*Plymouth Mutual Co-operative and Industrial Society, Ltd.* v. *Traders' Publishing Association, Ltd.* (5). The question there was whether an interrogatory addressed to the state of mind of the defendant, who had pleaded fair comment in an action of libel, was admissible. The court decided that it was, following a previous decision of this court in a case of privilege strictly so called. VAUGHAN WILLIAMS, L.J., referring to *Elliott* v. *Garrett* (6), says ([1906] 1 K.B. at pp. 413, 414):

> "It seems to me that that case shows that an interrogatory of this kind is just as relevant and admissible in a case where the defence is fair comment as in one where it is privilege. In either case the question raised is really as to the state of mind of the defendant when he published the alleged libel, the question being in the one case whether he published it in the spirit of malice, in the other whether he published it in the spirit of unfairness. In either case I think such an interrogatory as the one now in question is admissible."

FLETCHER MOULTON, L.J., says (ibid. at p. 418):

> "I am clear that, both in cases in which the defence of privilege and in those in which the defence of fair comment is set up, the state of mind of the defendant when he published the alleged libel is a matter directly in issue."

It is, of course, possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice it must be for the jury to say whether it has warped his judgment. Comment distorted by malice cannot in my opinion be fair on the part of the person who makes it. I am of opinion, therefore, that evidence of malice actuating the defendant was admissible, and that the learned judge was right in letting the evidence in this case go to the jury. But I am also of opinion on a close examination of the alleged libel that, apart from the extrinsic evidence of malice, the learned judge could not have withdrawn the case from the jury. One point made by the plaintiff would, I think, of itself suffice to establish this position. The defendant Lucy says in the alleged libel

> "it is plain to see from the few mutilated extracts . . . that the materials at hand for a delightful biography were abundant."

This statement was described by the plaintiff in a letter to the editor of "Punch" as "simply untrue." A short statement was thereupon published in the issue of Dec. 7, in which the defendant, while accepting the plaintiff's statement as to the paucity of materials, quotes a passage from the preface to the book dealing with the existence of materials, and concludes thus:

> "Toby, M.P., had at the time of writing no knowledge of the subject beyond the definite statements quoted in the biographer's own words. He regrets that,

accepting them in their ordinary sense, he received and conveyed an impression of Mr. Thomas's literary methods which turns out to have been erroneous."

He is thus in the difficulty of having to admit a mis-statement of fact in respect of which, to put it at the lowest, a question must arise for the jury whether the passage he relied upon justifies the statement. I think also that the learned judge could not have properly held that there was no evidence fit for the consideration of the jury as to some of the innuendoes averring imputations of discreditable motives.

I am of opinion, therefore, that we could not direct judgment for the defendants without usurping the functions of the jury. Neither can we say that the evidence is so slight as to justify us in ordering a new trial on the ground that the verdict is against the weight of the evidence. A point was made by the defendants' counsel that the plaintiff had admitted that he did not rely upon evidence of malice outside that which was to be inferred from the article itself. Something to this effect certainly appears in the "Times" report, but it has not found its way into the judge's note, and the point of personal spite was forcibly put by the plaintiff's counsel throughout the whole case, which the judge refused to withdraw from the jury without any limitation as to any of the evidence given. I think, therefore, that we should not be justified in treating this answer as excluding all extrinsic evidence of malice from the discussion. Libel or no libel, I need hardly add, is pre-eminently a question for the jury where there is any evidence fit for their consideration.

COZENS-HARDY, L.J.—I agree.

SIR GORELL BARNES, P.—I have had an opportunity of reading the judgment of the MASTER OF THE ROLLS, and I agree with it.

Application dismissed.

Solicitors: *Smiles & Co.*; *Lee & Pembertons.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

PRICE & CO. *v.* UNION LIGHTERAGE CO.

[Court of Appeal (Lord Alverstone, C.J., Sir Richard Henn Collins, M.R., and Romer, L.J.), January 22, 1904]

[Reported [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 3 Com. Cas. 120]

Carriage of Goods—Contract—Special contract—Carrier exempted from liability—Need for clear and unambiguous language—Carriers not to be liable for "loss or damage covered by insurance."

If a carrier of goods wishes to protect himself from liability for the loss of or damage to the goods carried which may be caused by the negligence of his servants, he must do so in express and unambiguous words.

A contract by which the owners of a barge agreed to carry a cargo of oil from one wharf in the Thames to another wharf further up river contained a clause that the barge owners were not to be liable for "any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman." Owing to the negligence of the barge owners' servants the gunwale of the barge caught under a jetty at low tide and later it was sunk. In an action for damages for breach of the contract of carriage,

Held: the clause in the contract was not wide enough to exempt the barge owners from liability for the loss of cargo brought about by the negligence of their servants.

Per Lord Alverstone, C.J.: It has been a well-established principle that in clauses of the kind we have to deal with in the present case, which are introduced for the purpose of relieving carriers from some of their liabilities and which are sometimes drawn in such general words as to be capable of two constructions—one exempting the carrier from liability for loss caused by the negligence of his servants, and the other not so exempting him—special words are necessary in order to exempt him from liability.

Notes. Followed: *The Pearlmoor*, [1904] P. 286. Applied: *Nelson* v. *Nelson Line (Liverpool) (No. 2)*, [1907] 1 K.B. 769. Considered: *Rosin and Turpentine Import Co.* v. *Jacob* (1909), 101 L.T. 56; *The Modena* (1911), 27 T.L.R. 529; *Pyman Steamship Co.* v. *Hull and Barnsley Rail.*, [1914] 2 K.B. 788; *Joseph Travers & Sons, Ltd.* v. *Cooper*, [1914–15] All E.R.Rep. 104; *Turner* v. *Civil Service Supply Association*, [1926] 1 K.B. 50; *Forbes, Abbott and Lennard* v. *Great Western Rail. Co.* (1927), 44 T.L.R. 97; *Calico Printers' Association* v. *Barclays Bank and the Anglo-Palestine Co., Ltd.*, [1931] All E.R.Rep. 350. Referred to: *Nelson Line (Liverpool) Ltd.* v. *Nelson and Sons, Ltd.*, post. p. 244; *Denholm* v. *Shipping Controller* (1920), 124 L.T. 378; *Lebeaupin* v. *Richard Crippen & Co.*, [1920] All E.R.Rep. 353; *Rutter* v. *Palmer*, [1922] All E.R.Rep. 367; *Fagan* v. *Green and Edwards, Ltd.*, [1925] All E.R.Rep. 266; *C. Wilh. Svenssons Travaruaktie Bolag* v. *Cliffe Steamship Co.*, [1931] All E.R.Rep. 37; *Beaumont-Thomas* v. *Blue Star Line, Ltd.*, [1939] 3 All E.R. 127.

As to variation by a carrier of common law duties and liabilities, see 4 Halsbury's Laws (3rd Edn.) 154 et seq.; and for cases see 8 Digest (Repl.) 45 et seq.

Cases referred to:

(1) *Phillips* v. *Clark* (1857), 2 C.B.N.S. 156; 26 L.J.C.P. 168; 29 L.T.O.S. 181; 3 Jur.N.S. 467; 5 W.R. 582; 140 E.R. 372; 41 Digest 424, *2664*.

(2) *Taubman* v. *Pacific Steam Navigation Co.* (1872), 26 L.T. 704; 1 Asp.M.L.C. 336; 8 Digest (Repl.) 138, *894*.

(3) *Sutton & Co.* v. *Ciceri & Co.* (1890), 15 App. Cas. 144; 62 L.T. 742, H.L.; 8 Digest (Repl.) 47, *282*.

Also referred to in argument:

Thomas & Co. v. *Brown* (1899), 4 Com. Cas. 186; 8 Digest (Repl.) 10, *39*.

Ashendon v. *London, Brighton and South Coast Rail. Co.* (1880), 5 Ex.D. 190; 42 L.T. 586; 44 J.P. 203; 28 W.R. 511; 2 Digest (Repl.) 368, *474.*

Burton v. *English* (1883), 12 Q.B.D. 218; 53 L.J.Q.B. 133; 49 L.T. 768; 32 W.R. 655; 5 Asp.M.L.C. 187, C.A.; 41 Digest 596, *4218.*

Steinman & Co. v. *Angier Line*, [1891] 1 Q.B. 619; 60 L.J.Q.B. 425; 64 L.T. 613; 39 W.R. 392; 7 T.L.R. 398; 7 Asp.M.L.C. 46, C.A.; 41 Digest 421, *2639.*

Taylor v. *Liverpool and Great Western Steam Co.* (1874), L.R. 9 Q.B. 546; 43 L.J.Q.B. 205; 30 L.T. 714; 22 W.R. 752; 2 Asp.M.L.C. 275; 41 Digest 420, *2638.*

Czech v. *General Steam Navigation Co.* (1867), L.R. 3 C.P. 14; 37 L.J.C.P. 3; 17 L.T. 246; 16 W.R. 130; 3 Mar.L.C. 5; 41 Digest 425, *2667.*

Grill v. *General Iron Screw Collier Co.* (1866), L.R. 1 C.P. 600; Har. & Ruth. 654; 35 L.J.C.P. 321; 14 L.T. 711; 12 Jur.N.S. 727; 14 W.R. 893; 2 Mar.L.C. 362; on appeal (1868), L.R. 3 C.P. 476; 37 L.J.C.P. 205; 18 L.T. 485; 16 W.R. 796; 3 Mar.L.C. 77, Ex. Ch.; 41 Digest 422, *2647.*

Appeal by the defendants from a decision of WALTON, J., reported [1903] 1 K.B. 750, at the trial of the action without a jury.

The plaintiffs claimed damages for breach of a contract for the carriage by the defendants in their barge *Iron King* of a cargo of oil from the Roumanian Oil Trust Co.'s wharf at Thames Haven to Belvedere up the river Thames. The oil was shipped on the barge at a jetty about high water, and the barge when loaded was allowed to remain moored to the jetty until after low water. As the barge rose with the rising tide, its gunwale caught under a projecting part of the face of the jetty; and as the tide rose, the barge was held down and so was sunk, whereby the oil, which was of the value of £371, was lost.

The plaintiffs alleged that the loss was caused by the negligence of the defendants' lightermen in leaving the barge unattended during the rising of the tide. The defendants contended that by the terms of the contract of carriage they were exempted from liability for a loss caused by the negligence of themselves or their servants. There was no written contract for the carriage of the oil, but it was admitted that the lighterage was subject to a clause which was on a printed form used by the defendants, and was as follows:

> "The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman."

WALTON, J., at the trial, assuming that the loss was brought about by the negligence of the defendants' lightermen, held that the clause in question did not exempt the defendants from liability for loss brought about by the negligence of their servants. The defendants appealed.

Carver, K.C., and *A. M. Talbot* (*Loehnis* with them) for the plaintiffs.

J. A. Hamilton, K.C. (*Bailhache* with him) for the defendants.

LORD ALVERSTONE, C.J.—Upon full consideration, I have come to the conclusion that the judgment of WALTON, J., was right. Since *Phillips* v. *Clark* (1) it has been a well-established principle that in clauses of the kind we have to deal with in the present case, which are introduced for the purpose of relieving carriers from some of their liabilities and which are sometimes drawn in such general words as to be capable of two constructions—one exempting the carrier from liability for loss caused by the negligence of his servants, and the other not so exempting him—special words are necessary in order to exempt him from liability for the negligence of his servants. That is the ground of the decision of WALTON, J.

The principle is to be deduced from the judgments that have been given in several cases upon the meaning of a variety of expressions that have been used

in bills of lading, such as losses caused by "thieves," by "breakage and leakage," and by "accidents or damage of navigation," in the cases which have been cited in the course of the argument. The words in the clause now before us may be construed in more than one way, and, therefore, there is no occasion to consider cases such as *Taubman* v. *Pacific Steam Navigation Co.* (2) where the words in dispute were capable of only one construction. That is not the class of case arising here. The question before us is whether the words of this clause bring the case within the class of cases in which it has been held that negligence by the carrier's servants has been so clearly referred to that the contract shows a clear intention to exempt the carrier from liability for loss occasioned thereby.

With regard to the expression "without recourse to lighterman," I think that counsel for the plaintiffs acted wisely in declining to adopt a suggestion which I threw out in the course of the argument as to the light which might be thrown by that expression upon the meaning of the clause. There are many grounds of liability of a carrier which would give underwriters recourse against the lighterman apart from any question of negligence, such as perils of the sea, for which a carrier is liable. Therefore the expression "without recourse to lighterman" can have a meaning apart from any loss by negligence. That being so, we have to see what the clause in question really includes. As the MASTER OF THE ROLLS pointed out, it is possible to construe the words as covering everything, and as wide as are many policies of insurance. But the question is: Do the words of this contract admit of a reasonable construction, not including exemption of the carrier from liability for loss by negligence? CARVER in s. 105 of his book on CARRIAGE OF GOODS BY SEA (3rd Edn.) gives authorities for the proposition that a clause excluding responsibility of a shipowner for any insurable damage will not generally relieve the shipowner from liability for the consequences of negligence on the part of his crew; and *Sutton & Co.* v. *Ciceri & Co.* (3) seems to be authority for that. The court must take this into consideration—viz., that the words in this clause will cover risks other than the risk of loss through the negligence of the carriers' servants. The words may receive a business construction without including the liability of the carrier for loss by negligence. That being so, the principle applied by WALTON, J., is, in my opinion, the right one to be applied, and the defendants are liable in the present case, because there is nothing in the clause which specially exempts them from liability for negligence.

SIR RICHARD HENN COLLINS, M.R.—I am of the same opinion.

ROMER, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *J. A. & H. E. Farnfield*; *Charles E. Harvey.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

Re CHAYTOR. CHAYTOR *v.* HORN

[CHANCERY DIVISION (Warrington, J.), November 16, 1904]

[Reported [1905] 1 Ch. 233; 74 L.J.Ch. 106; 92 L.T. 290; 53 W.R. 251]

B

Will—Tenant for life and remaindermen—Unauthorised securities—Right of tenant for life to income therefrom pending conversion.

Where in a will there is an express trust for the conversion of residue and a power given to the trustees to retain securities of any kind, whether authorised or unauthorised, the tenant for life is not entitled to the income of unauthorised securities pending conversion unless there is an express or implied gift to him of the income in specie. He is only entitled to interest at a certain rate on the value of those securities at the testator's death and any surplus income will be invested as capital. There is no distinction for these purposes between unauthorised securities which are of a wasting nature and those which are not.

Bulkeley v. *Stephens* (1) (1863), 3 New Rep. 105, not followed.

C

D

Notes. The rate of interest on the value of unauthorised securities calculated according to their value at the testator's death is now generally taken to be 4 per cent.

Distinguished: *Re Wilson, Moore* v. *Wilson*, [1907] 1 Ch. 394; *Re Inman, Inman* v. *Inman*, [1915] 1 Ch. 187; *Re Beech, Saint* v. *Beech*, [1920] 1 Ch. 40. Considered: *Re Parry, Brown* v. *Parry*, [1946] 2 All E.R. 412. Referred to: *Re Bates, Hodgson* v. *Bates* (1906), 23 T.L.R. 15; *Re Hall, Hall* v. *Hall*, [1916] 2 Ch. 488; *Re Rudd's Will Trusts, Wort* v. *Rudd*, [1952] 1 All E.R. 254.

E

As to income of unauthorised investments pending sale, see 34 HALSBURY'S LAWS (3rd Edn.) 625–627; and for cases see 40 DIGEST (Repl.) 733 et seq.

Cases referred to:

F

(1) *Bulkeley* v. *Stephens* (1863), 3 New Rep. 105; 10 L.T. 225; 40 Digest (Repl.) 739, *2267*.

(2) *Re Thomas, Wood* v. *Thomas*, [1891] 3 Ch. 482; 60 L.J.Ch. 781; 65 L.T. 142; 40 W.R. 75; 40 Digest (Repl.) 731, *2199*.

(3) *Re Woods, Gabellini* v. *Woods*, [1904] 2 Ch. 4; 73 L.J.Ch. 204; 90 L.T. 8; 48 Sol. Jo. 207; 40 Digest (Repl.) 708, *2042*.

G

(4) *Howe* v. *Earl Dartmouth, Howe* v. *Countess Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 43 Digest 869, *3142*.

(5) *Brown* v. *Gellatly* (1867), 2 Ch. App. 751; 17 L.T. 131; 15 W.R. 1188, L.J.; 43 Digest 619, *596*.

(6) *Dimes* v. *Scott* (1828), 4 Russ. 195; 38 E.R. 778, L.C.; 40 Digest (Repl.) 730, *2192*.

H

Also referred to in argument:

Re Sharp, Rickett v. *Sharp* (1890), 45 Ch.D. 286; 60 L.J.Ch. 38; 62 L.T. 777, C.A.; 43 Digest 935, *3732*.

Re Sheldon, Nixon v. *Sheldon* (1888), 39 Ch.D. 50; 58 L.J.Ch. 25; 59 L.T. 133; 37 W.R. 26; 40 Digest (Repl.) 731, *2198*.

Porter v. *Baddeley* (1877), 5 Ch.D. 542; 44 Digest 207, *361*.

I

Hope v. *D'Hédouville*, [1893] 2 Ch. 361; 62 L.J.Ch. 589; 68 L.T. 516; 41 W.R. 330; 3 R. 348; 20 Digest 376, *1136*.

Casamajor v. *Strode* (1809), 19 Ves. 390, n.; 34 E.R. 564; 20 Digest 376, *1134*.

Spencer v. *Harrison* (1879), 5 C.P.D. 97; Colt. 61; 49 L.J.Q.B. 188; 41 L.T. 676; 44 J.P. 235; 20 Digest 393, *1305*.

Vigor v. *Harwood* (1841), 12 Sim. 172; 59 E.R. 1097; 44 Digest 1055, *9076*.

Adjourned Summons.

By his will, dated July 23, 1895, D'Arcy Chaytor appointed executors and trustees

and gave certain legacies. Clause 5 of the will was as follows:

"I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto and to the use of my trustees upon trust to sell and convert into money the same, with power to postpone such sale and conversion as long as my trustees shall think proper, and to retain any investments subsisting at my death whether of the kind hereinafter authorised or not and out of the moneys produced by such sale and conversion and out of such part of my estate as shall consist of money to pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto, and at the discretion of my trustees to invest the residue of the said moneys, with power for my trustees from time to time at their discretion to vary such investments and to stand possessed of the residuary trust moneys, and the investments for the time being representing the same (hereinafter called 'the residuary trust funds') upon the trusts following—that is to say, in trust to pay the income thereof to my said wife during her life if she shall so long continue my widow."

After her second marriage or death the trustees were to stand possessed of the residuary trust funds upon trusts for the benefit of the testator's children. Clause 11 was as follows:

"All moneys liable to be invested under this my will may be invested in or upon any stocks, funds, or securities of or guaranteed by the government of the United Kingdom or India, or any British colony or dependency, or the United States of America, or in or upon the bonds, debentures, or other securities, or the debenture stock or preference, or guaranteed or preferred stock of any railway or other public company in the United Kingdom, or in India, or in any British colony or dependency, or in the United States of America, or at interest upon the securities of any municipal or other corporation or public body in the United Kingdom, or in any British colony or dependency, or in the purchase or upon mortgage of any freehold, copyhold, or leasehold property in the United Kingdom."

The testator died on July 23, 1903. Among other shares he possessed 2,670 ordinary shares of £10 each fully paid of the South Hetton Coal Co., which were officially quoted at the date of the testator's death at £20 10s.; and also 1,602 preference shares of £10 each fully paid quoted at £10 15s. The trustees, alleging that the shares were of a speculative character, were of opinion that they ought to realise them as opportunity offered for the best prices obtainable. Accordingly they had sold 349 of the ordinary shares and 459 of the preference shares, and proposed to sell the rest up to one-half of the number held by the testator by degrees. The capital of the South Hetton Coal Co. was £1,000,000, divided into 50,000 ordinary shares of £10 each and 50,000 preference shares of £10 each. The company paid large dividends, held freehold and leasehold mines and other property, and had reserve funds amounting to £167,564. The trustees did not pay to the widow the full dividends received in respect of the shares which they retained, but only paid to her such an amount as corresponded with what would have been produced by an investment in Consols of the sum which would have been realised if the shares had been sold at the testator's death. This summons was taken out by the widow to determine the question whether the shares were such as the trustees were authorised to retain, and whether she was entitled to receive the dividends in full until conversion.

T. H. Carson, K.C., and *Waggett* for the widow, the tenant for life.
Rowden, K.C., and *Christopher James* for the remaindermen.

WARRINGTON, J.—The only question I have to decide is whether the tenant for life in this case is entitled in specie to the income of certain securities which the trustees are retaining at present until an opportunity of conversion arises, or

whether, under the trusts of the will which I have to deal with, she is only entitled to interest at a certain rate on the value of those securities. [His Lordship stated the facts, and continued:] I will get rid of one point at once. Some of the shares are preference shares, and it has been conceded that preference shares of a company registered under the Companies Acts come within the definition "preferred stock of any . . . public company" in cl. 11 of the will. Therefore they are authorised securities, and it is well settled that under such provisions as those in this will the interest on them is properly payable to the tenant for life. So far the contention of the tenant for life is right.

As regards the unauthorised securities, there is no express gift of the income of the funds or items of property forming part of the testator's estate during postponement of conversion; but I am invited by counsel for the widow to find such a gift by construction in the will. In the first place, what is the general principle which is applied to such a case as this, where there is an express trust for conversion, and a power to retain securities of every kind, authorised and unauthorised, and there is no express gift of the income pending conversion? As I understand it, the general rule is that the tenant for life is entitled to the income of authorised securities, but not entitled to the income of unauthorised securities. In the latter case he is only entitled to a rate of interest which is now fixed at 3 per cent. on their value at the testator's death. That certainly was the rule adopted by Kekewich, J., in *Re Thomas, Wood* v. *Thomas* (2). In his judgment he says ([1891] 3 Ch. at p. 486):

> "I am not prepared to hold that where there is a direction for conversion of personal estate, followed by a power of retention of existing securities in the absolute discretion of the trustees, and then there are trusts for tenants for life, and afterwards for remaindermen, the power of retention necessarily gives the tenants for life the enjoyment in specie of the securities retained by the trustees in the exercise of their discretion."

The rule is expressed in terms to the same effect in Theobald on Wills (5th Edn.), pp. 480, 481, and in the most recent case on the subject, *Re Woods, Gabellini* v. *Woods* (3), it is assumed to be the rule. The only point in which *Re Woods* (3) is distinguishable from the present case is that in *Re Woods* (3) the securities were wasting securities. That is the general rule. Is there anything to take this case out of that rule?

In my judgment, so far from that, the words of this will are adverse to the contention of the tenant for life. The trustees are to sell and convert the real and personal estate. They may retain any investments subsisting at the testator's death as long as they think proper. The only trusts in favour of beneficiaries are trusts of the "residuary trust funds," which are defined to be the "residuary trust moneys," that is, the proceeds of conversion, "and the investments for the time being representing the same"—that is, representing the proceeds of conversion. I take that to mean that the tenant for life is entitled to the income of the trust moneys—that is, the proceeds of conversion and the income of the investments made with those moneys. That, of course, includes the income of any authorised investments which are retained (for that is the same as if the trustees had sold them and re-invested the proceeds of sale in the same securities), but does not include the income of investments which do not represent "trust funds" at all, but are items of property which were retained by the trustees until they could realise them. In order that the tenant for life should not lose income altogether, the court steps in and says for the proper administration of the estate, the value of these investments at the testator's death shall be taken as the proceeds of sale. As these unauthorised securities cannot be kept as part of the estate, the tenant for life gets the income of them as nominally converted at the testator's death. That seems to be the rule laid down with the object of preventing the discretion of the trustees from operating to the prejudice of the tenant for life or the remainderman. It is applied in both ways. That, in my opinion, is the true construction of the will.

Then I am asked, if I cannot find an express gift, to find an implied gift of this income to the tenant for life. That argument will not do. There is no express gift—that is, there is no gift in terms of the income of these unauthorised securities. I am asked to find an implied gift, but I fail to do so. But, whether I find a gift or not, it is said that the rule to be applied is a rule which distinguishes between unauthorised securities which are of a wasting nature, and unauthorised securities which are not wasting. Many cases have been cited, but in reality I do not think any case supports that distinction except *Bulkeley* v. *Stephens* (1). In all the other cases, in one form or another, what was given was the income of the estate, and not, as in the words of this will, the income of the residuary trust funds. It seems that the distinction is that the question in those cases was whether the doctrine of *Howe* v. *Earl of Dartmouth* (4) (7 Ves. 137; 6 R.R. 96) ought to be applied.

There is certainly one case, *Bulkeley* v. *Stephens* (1), which has caused me some difficulty, and, if properly reported, that decision would seem to depart from the principle covering the point. The case is not satisfactorily reported. The will is not set out at length, and, according to the facts, the precise question was not raised; the question was only as to part of the income, and for the first year after the testator's death.* The case is not mentioned in any of the text-books, except in SETON'S JUDGMENTS AND ORDERS (6th Edn.), pp. 1688, 1689. It is not cited in any of the recent authorities, certainly not in *Re Thomas* (2). It was decided before *Brown* v. *Gellatly* (5), but was not referred to in that case. It seems to me, therefore, that I am not bound to treat it as a binding authority, or one which would force me to say that a different principle to that which I have stated is applicable. The headnote to *Bulkeley* v. *Stephens* (1) is as follows (3 New Rep. at pp. 105, 106):

> "Where a testator left his residuary real and personal estate to trustees upon trust, to convert and invest upon government or real securities, and the will authorised the trustees to postpone conversion as long as they should think fit: Held (the estate consisting of unauthorised but not wasting securities), that the tenant for life was entitled to the income of the fund in specie from the testator's death. Held, also, under the circumstances, that the tenant for life of a sum of £300,000 directed to be set apart by the trustees, but which had not been set apart by them when the bill was filed, was entitled to interest on such sum from the testator's death. *Dimes* v. *Scott* (6) explained. Where, under orders given in chambers, a sum of stock was sold shortly before a dividend was due: Held, that the tenant for life of such sum was entitled to receive out of the proceeds of the sale, a sum equal to the apportioned part of such dividend from the last dividend day up to the day of sale."

The report only gives a short summary of the will, and does not state whether there was anything in the will to explain what the "trust fund" should consist of. It does not purport to give the true terms of the will, but only sets out a statement of facts. In that case on behalf of the tenant for life it was argued that the power to postpone conversion took the case out of the operation of the rule in *Dimes* v. *Scott* (6). However, that decision is not consistent with the result of the other authorities which is stated in THEOBALD ON WILLS (5th Edn.), p. 480, and in my view correctly stated. The author says:

> "Where a residue is given upon trust for sale and investment, and the income is then given to a tenant for life, the tenant for life is, in the absence of proper directions, only entitled to such income as the estate would produce when converted and invested in accordance with the directions of the will."

And ibid. at p. 481:

> "Power conferred upon trustees to postpone a sale or to retain securities unconverted will not alter the rights of tenant for life and remainderman."

* His Lordship was only referred to the report of *Bulkeley* v. *Stephens* in 3 New Rep., and not to the report in 10 L.T.Rep. 225, where the will is set out at length.

I understand that to correctly represent the law. *Bulkeley* v. *Stephens* (1) does not appear to be consistent with that statement, and I am not bound by it, for the question I have to determine is one of construction, and I decline to follow it. It is now, I think, settled by the recent case of *Re Woods* (3) that the widow must have interest at the rate of 3 per cent. out of the actual income received in respect of these unauthorised securities calculated according to their value at the testator's death. The rest of the dividends will have to be invested as capital, and she will have the income of those investments as well as the actual dividends on the preference shares.

Solicitors: *Bompas, Bischoff, Dodgson, Coxe & Bompas*; *Stibbard, Gibson & Co.*

[*Reported by* E. L. Hopkins, Esq., *Barrister-at-Law.*]

CHEMISCHE FABRIK VORMALS SANDOZ *v.* BADISCHE ANILIN UND SODA FABRIKS

[House of Lords (Lord Macnaghten, Lord Davey, Lord James of Hereford and Lord Robertson), April 28, 29, May 19, 1904]

[Reported 90 L.T. 733; 20 T.L.R. 552]

Practice—Service out of the jurisdiction—Need to show primâ facie evidence of breach within jurisdiction—R.S.C., Ord. 11, rr. 1, 4.

Where application is made for leave to serve a writ out of the jurisdiction, the court is not called upon to try the merits of the action, but the affidavits should show a primâ facie cause of action within the jurisdiction, and disclose a substantial legal question arising out of the facts alleged which the plaintiff bona fide desires to try. Sufficient information should be given to make clear the ground on which the court is asked to proceed.

Notes. Referred to: *Korner* v. *Witkowitzer Bergbau Und Eisenhuetten Gewerkschaft*, [1950] 1 All E.R. 558; *Vitkovice Horni a Hutni Tezirstvo* v. *Korner*, [1951] 2 All E.R. 334.

As to service out of the Jurisdiction, see 30 Halsbury's Laws (3rd Edn.) 323 et seq.; and for cases see Digest (Practice) 336 et seq.

Appeal from an order of the Court of Appeal (Sir Richard Henn Collins, M.R., Romer and Cozens-Hardy, L.JJ.), who had affirmed an order of Joyce, J., refusing a motion on behalf of the appellants to discharge an order giving the respondents leave to issue a writ in the action, and to serve the appellants with notice of it out of the jurisdiction.

The respondents were the owners of letters patent in this country for an invention for "the manufacture and production of new basic dye-stuffs." The appellants carried on business at Basle, in Switzerland, as manufacturers of various chemical substances, including, as the respondents alleged, amongst others, dyes made according to the patented invention of the respondents. The respondents commenced the present action to restrain the appellants from infringing their letters patent, and an affidavit was filed by the solicitor for the respondents setting out the grounds on which it was alleged and believed that the appellants were infringing the letters patent. On reading this affidavit Joyce, J., gave leave to the respondents to serve notice of the writ on the appellants outside the jurisdiction, and service was accordingly made on the appellants at their place of business in Basle. On Feb. 3, 1903, the appellants caused a conditional appearance to be entered for

them, but subsequently moved to set aside the writ and service. It was from the dismissal of this motion that the present appeal was brought.

Order 11, r. 4, is in the following terms:

"Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this Order."

Asquith, *K.C.*, *Upjohn*, *K.C.*, and *Colefax* for the appellants.
Fletcher Moulton, *K.C.*, *Cripps*, *K.C.*, and *J. C. Graham* for the respondents.

Their Lordships took time for consideration.

May 19, 1904. The following opinions were read.

LORD MACNAGHTEN.—As your Lordships, after a full discussion, have come to the conclusion that the appellants have not made out a case for disturbing the order under appeal, it seems to me that the less said about the matter the better. The learned counsel for the appellants admitted that the evidence on their side did not completely displace all the grounds upon which permission to serve the writ abroad was sought. If the case be reduced to a consideration of the effect of the way in which the appellants' samples and pattern cards have been used in this country there would still remain a nice and difficult question of law, and one which it is conceded has never yet been brought forward for decision. Whether the appellants can do without the use of these samples and pattern cards—which hitherto they have used largely—whether the question is of as little importance to their trade as they represent it to be, or whether it is really of vital importance, as alleged on the other side—that is a matter which it is impossible to determine on the materials now before the House. It is at least conceivable that it may be of great importance. I think that the respondents are entitled to have this question tried, and tried in the usual manner. And on that ground, even if it stood alone, I think that they would be entitled to maintain the order of which they are in possession. Of course, the court is bound to be careful in allowing a step to be taken which will expose foreigners to the inconvenience and annoyance of litigation in this country. But, after all, the foreigners are not so much to be pitied in the present case. They have invaded this country, and it is on account of what they are alleged to have done in England that they are impleaded.

Having said so much I should say no more, but that I think that the evidence adduced calls for some observation. [His Lordship reviewed the evidence and continued:] The respondents' case was that their letters patent had been infringed by the appellants in no fewer than six instances, and on a large scale, and that they had at last obtained definite proof of infringement, and yet they do not give the court a single instance in proof of their assertion. I think, that under the circumstances, sufficient information ought to have been given to make it clear that the court was asked to proceed on sure ground. This unwillingness on the part of the respondents to show their hand has led to a great deal of unnecessary expense and delay. On the whole, however, I do not think that it would be right to interfere with the order of the Court of Appeal. It is a matter of discretion, and the court appears to have exercised its discretion with great care and consideration. The learned judges of the Court of Appeal made their order with some hesitation and reluctance, and, with some reluctance, I move your Lordships that the order appealed from be affirmed, and the appeal dismissed with costs.

LORD DAVEY.—The jurisdiction which has been exercised by the High Court in the present case is always one of some delicacy and difficulty, and the condi-

tions prescribed by the orders of the court do not diminish the difficulty. Rule 1 of Ord. 11 enumerates the cases in which the court may give leave to serve a writ out of the jurisdiction. The present case is alleged to come under the head lettered (f). An injunction is sought to restrain the appellants from doing some act within the jurisdiction. Rule 4 of the same order prescribes that the application is to be supported by evidence stating that in the belief of the deponent the plaintiff has a good cause of action, and no such leave is to be granted unless it be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this order. This does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient. On the other hand, the court is not, on an application for leave to serve out of the jurisdiction, or on a motion made to discharge an order for such service, called upon to try the action or express a premature opinion on its merits, and where there are conflicting statements as to material facts, any such opinion must necessarily be based on insufficient materials. But I think that the application should be supported by an affidavit stating facts which, if proved, would be a sufficient foundation for the alleged cause of action, and, as a rule, the affidavit should be by some person acquainted with the facts, or, at any rate, should specify the sources or persons from whom the deponent derives his information.

A more difficult question is where it is in dispute whether the alleged or admitted facts will, as a matter of law, entitle the plaintiff to the relief which he seeks. If the court is judicially satisfied that the alleged facts, if proved, will not support the action, I think the court ought to say so, and dismiss the application or discharge the order. But where there is a substantial legal question arising on the facts disclosed by the affidavits which the plaintiff bona fide desires to try, I think that the court should, as a rule, allow the service of the writ. The words at the end of the order do not, I think, mean more than that the court is to be satisfied that the case comes within the class of cases in which service abroad may be made under the first rule of the order. In the present case, if I had been in JOYCE, J.'s place, I am not sure that I should have granted the leave for service abroad on Mr. Johnson's affidavit alone, but on the affidavits filed by the present appellants I think that there was enough to justify the learned judge in refusing to discharge the order. I designedly say nothing as to either the facts or the law, lest I should be misunderstood or supposed to express a premature opinion on the merits. I am therefore of opinion that the appeal should be dismissed.

LORD JAMES OF HEREFORD.—It is impossible to lay down any general rule as to the measure of proof required by Ord. 11, r. 4, to justify the summoning of a person resident abroad to come within the jurisdiction and here answer to process. In my view that power ought not to be lightly exercised. To bring those who may be foreigners from far away—without knowledge of our language or procedure—without possible means of proof at hand, imposes a burden and difficulty which ought not to be lightly inflicted. But this power does exist, and the conditions under which it is to be exercised are to be found in Ord. 11, rr. 1 and 4. I quite agree that the court to which the application is made for service abroad has not to try the question whether a suit can in the result be successfully maintained. Such a determination might involve a consideration of complicated facts, of credibility of witnesses, or of the application of legal principles. But, on the other hand, the court ought, I think, to be convinced by the proof brought before it that the applicant is in a position to present to the tribunals of the country a substantial case for their determination. I think, also, that before granting the application the court should afford the proposed defendant an opportunity of denying categorically the statements relied upon by the applicant. [HIS LORDSHIP discussed the evidence, and continued:] Without expressing any opinion as to what my judgment would have been if I had had to determine this case in the court of first instance, I have, after great doubt, come to the conclusion that the appellant has

not sufficiently established that the discretion of that court, and of the Court of Appeal, has in either instance been so erroneously exercised as to justify your Lordships in reversing those judgments. I, therefore, concur in the view that this appeal should be dismissed.

LORD ROBERTSON.—The question before your Lordships is whether the decision of the Court of Appeal should stand. That decision was pronounced on different materials from those which were before Joyce, J., and I think that the decision can be supported. My view is that the net result of the affidavits on both sides is to disclose, primâ facie, a question or questions to be tried about the samples and the specimen cards. This conclusion is derived from the special circumstances of the case. From the tone of the lords justices' judgments, I infer that there is no danger of the courts encouraging vagueness and laxity in the statements upon which they will proceed to exercise this exceptional jurisdiction against foreigners. The reserve which is appropriate enough in the early stages of a suit brought by right must be abandoned when the plaintiff is asking the court for leave to serve a foreigner. And I agree in the view indicated in the Court of Appeal that mere generalities given from second-hand knowledge ought not to be considered adequate to satisfy the court.

Appeal dismissed.

Solicitors: *George B. Ellis*; *J. H. & J. Y. Johnson.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

Re GARRARD. GORDON *v.* CRAIGIE

[Chancery Division (Joyce, J.), January 11, 19, 1907]

[Reported [1907] 1 Ch. 382; 76 L.J.Ch. 240; 96 L.T. 357; 23 T.L.R. 256; 51 Sol. Jo. 209]

Charity—Uncertainty—Gift to "vicar and churchwardens" of named parish "to be applied by them in such manner as they shall in their sole discretion think fit."

A testatrix bequeathed £400 "to the vicar and churchwardens for the time being of Kington, to be applied by them in such manner as they shall in their sole discretion think fit."

Held: the gift was not void for uncertainty, but was a good and valid charitable gift to the parish for ecclesiastical purposes.

Thornber v. *Wilson* (1) (1858), 4 Drew, 350, followed.

Notes. Explained and distinguished: *Re Davidson, Minty* v. *Bourne*, [1908–10] All E.R.Rep. 140. Distinguished: *Re Friends' Free School, Clibborn* v. *O'Brien*, [1909] 2 Ch. 675. Applied: *Re Bain, Public Trustee* v. *Ross*, [1929] All E.R.Rep. 387. Distinguished: *Re Stratton, Stratton* v. *A.-G.*, [1930] 2 Ch. 151. Considered: *Re Ashton's Estate, Westminster Bank, Ltd.* v. *Farley*, [1938] 1 All E.R. 707; *Re Simson, Fowler* v. *Tinley*, [1946] 2 All E.R. 220. Applied: *Re Norman, Andrew* v. *Vine*, [1947] 1 All E.R. 400; *Re Eastes, Pain* v. *Paxon*, [1948] 1 All E.R. 536; *Re Flinn, Public Trustee* v. *Griffin*, [1948] 1 All E.R. 541. Referred to: *Re Tetley, National Provincial and Union Bank of England* v. *Tetley*, [1923] 1 Ch. 258; *Re Lawton, Lloyds Bank, Ltd.* v. *Longfleet St. Mary's Parochial Church Council*, [1940] Ch. 984; *Re Spensley's Will Trusts, Barclays Bank, Ltd.* v.

Staughton, [1954] 1 All E.R. 178; *Re Rumball, Sherlock* v. *Allan*, [1955] 3 All E.R. 71.

As to charitable purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 213 et seq.; and for cases see 8 DIGEST (Repl.) 390 et seq.

Cases referred to:

(1) *Thornber* v. *Wilson* (1855), 3 Drew. 245; 24 L.J.Ch. 667; 25 L.T.O.S. 309; 19 J.P. 675; 3 W.R. 388; 61 E.R. 897; subsequent proceedings (1858), 4 Drew. 350; 28 L.J.Ch. 145; 32 L.T.O.S. 115; 22 J.P. 769; 4 Jur.N.S. 1268; 7 W.R. 24; 62 E.R. 135; 8 Digest (Repl.) 428, *1179, 1180.*

(2) *Re Delany, Conoley* v. *Quick*, [1902] 2 Ch. 642; 71 L.J.Ch. 811; 87 L.T. 46; 51 W.R. 27; 18 T.L.R. 741; 8 Digest (Repl.) 326, *89.*

Also referred to in argument:

Gibbs v. *Rumsey* (1813), 2 Ves. & B. 294; 35 E.R. 331; 8 Digest (Repl.) 391, *838*

Morice v. *Bishop of Durham* (1804), 9 Ves. 399; on appeal (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836.*

Doe d. Toone v. *Copestake* (1805), 6 East, 328; 2 Smith, K.B. 495; 102 E.R. 1313; 8 Digest (Repl.) 391, *837.*

Grimond v. *Grimond*, [1905] A.C. 124; 74 L.J.P.C. 35; 92 L.T. 477; 21 T.L.R. 323, H.L.; 8 Digest (Repl.) 396, *882.*

Re Allen, Hargreaves v. *Taylor*, [1905] 2 Ch. 400; 74 L.J.Ch. 593; 93 L.T. 597; 54 W.R. 91; 21 T.L.R. 662; 49 Sol. Jo. 671; 8 Digest (Repl.) 344, *258.*

Re Pardoe, McLaughlin v. *A.-G.*, [1906] 2 Ch. 184; 75 L.J.Ch. 455; 94 L.T. 567; 54 W.R. 561; 22 T.L.R. 452; 8 Digest (Repl.) 333, *142.*

Aston v. *Wood* (1868), L.R. 6 Eq. 419; 8 Digest (Repl.) 388, *810.*

Adjourned Summons to determine the validity of a bequest to "the vicar and churchwardens of Kington."

By her will, dated June 6, 1904, Dorothy Garrard made the following bequests:

"I give £400 to the vicar and churchwardens of Kington aforesaid, to be applied by them in such manner as they shall in their sole discretion think fit. £100 to the Kington Cottage Hospital, to be applied by the manager thereof in the like manner."

The testatrix gave the residue to be divided between Jane Horner and "the sick and poor fund of the parish church of Cheltenham." The testatrix died in December, 1905, and it was then found that there was no hospital of the name of the Kington Cottage Hospital, but that there was a hospital at Kington known as the Victoria Cottage Hospital, and there was only this one cottage hospital in Kington; this hospital had a treasurer, but no manager. It was also found that there was no fund answering the description of "the sick and poor fund of the parish church of Cheltenham," but that there was a fund administered in connection with the said church at Cheltenham for the relief of the sick and poor of the ecclesiastical parish known as the "parish church district visiting fund," which was commonly spoken of as the sick and poor fund. This summons was taken out by the executor of the will to have it determined whether the above bequests were valid or void for uncertainty or otherwise. It was, however, conceded on the hearing that the gift to the cottage hospital and to the sick and poor fund were good charitable bequests, and his Lordship directed that the legacy of £100 should be paid to the treasurer of the Kington Cottage Hospital, and the moiety of the residue to the official trustee of charitable funds, who must pay the income to the vicar of Cheltenham till further order. On the question of the validity of the bequest to the vicar and churchwardens:

A. J. Spencer for the executors.

E. H. C. Wethered for the rector of Cheltenham.

J. Rolt for the vicar and churchwardens of Kington.

George Lawrence for the Attorney-General.
J. G. Wood for the next-of-kin.
Edward Ford for Jane Horner, one of the residuary legatees.

Cur. adv. vult.

Jan. 19, 1907. **JOYCE, J.**—The matter with regard to which I reserved judgment in this case was with reference to a legacy of £400 bequeathed to the vicar and churchwardens for the time being of Kington, to be applied by them in such manner as they shall in their sole discretion think fit. Having regard to the decision of KINDERSLEY, V.-C., in *Thornber* v. *Wilson* (1), and see *Re Delany*, *Conoley* v. *Quick* (2), it is quite clear that a legacy to the vicar for the time being of a parish is a charitable gift for the benefit of the parish for ecclesiastical purposes. I should have said that it was originally suggested, though not seriously argued, that the gift was for the individuals beneficially, but that contention could not possibly be made out. The churchwardens are the officers of the parish in ecclesiastical matters, so that a mere gift or legacy to the vicar and churchwardens for the time being of a certain parish, without more, is, I do not hesitate to hold, a gift or charitable legacy to them for ecclesiastical purposes in the parish. The will goes on to say,

> "to be applied by them in such manner as they shall in their sole discretion think fit."

It was suggested, and, indeed, I may say argued, that these words were inconsistent with this being a charitable gift, and that they implied that the vicar and churchwardens were to take beneficially. In my opinion there is no contradiction or inconsistency in the words of the will whatever. The words

> "to be applied by them in such manner as they shall in their sole discretion think fit,"

to my mind, merely direct that the particular mode of application within the charitable purposes of the legacy is to be settled by those individuals, or rather that there is power given to them to do it, subject always, of course, to the jurisdiction of the court. Therefore I declare this to be a good and valid charitable legacy for the benefit of the parish of Kington for ecclesiastical purposes.

Solicitors: *Holloway, Blount & Co.*, for *H. Birch*, Thame; *Field, Roscoe & Co.*, for *Temple & Philpin*, Kington; *Helder, Roberts & Co.*; *Treasury Solicitor*; *Andrew Wood, Purves & Sutton*, for *T. E. Rickaby*, Cheltenham.

[*Reported by* C. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

R. *v.* BRAILSFORD AND ANOTHER

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Lawrance and Ridley, JJ.), July 31, August 1, 4, 1905]

[Reported [1905] 2 K.B. 730; 75 L.J.K.B. 64; 93 L.T. 401; 69 J.P. 370; 54 W.R. 283; 21 T.L.R. 727; 49 Sol. Jo. 701; 21 Cox, C.C. 16] B

Criminal Law—Conspiracy—Public mischief—Combination to obtain passport in name of one person to be used by another person—Whether act charged tended to public mischief question for judge—Direction to jury.

A combination of persons to obtain, and the obtaining from the Foreign Office of, a passport by the false statement or representation that it is intended for the use and protection of a certain named person while travelling in a foreign country whereas in fact it is intended to be used by a different person not recommended to the Foreign Office, is a conspiracy to effect a public mischief and so an indictable misdemeanour at common law. It is for the court to direct the jury whether such an act may tend to the public mischief and that it is not in such a case an issue of fact on which evidence can be given. C D

Notes. Applied: *R.* v. *Porter*, [1908–10] All E.R.Rep. 78. Considered: *R.* v. *Manley*, [1932] All E.R.Rep. 565. Followed and Applied: *R.* v. *Young* (1944), 30 Cr. App. Rep. 57. Considered: *Joyce* v. *D.P.P.*, [1946] 1 All E.R. 186; *Joshua* v. *R.*, [1955] 1 All E.R. 22. Referred to: *R.* v. *Berg*, *Britt*, *Carré and Lummies* (1927), 20 Cr. App. Rep. 38; *R.* v. *Newland*, [1953] 2 All E.R. 1067. E

As to conspiring to effect a public mischief, see 10 HALSBURY'S LAWS (3rd Edn.) 678; and for cases see 14 DIGEST (Repl.) 129.

Cases referred to:

(1) *R.* v. *Higgins* (1801), 2 East, 5; 102 E.R. 269; 14 Digest (Repl.) 119, *822*.
(2) *R.* v. *Wheatly* (1761), 2 Burr. 1125; 1 Wm. Bl. 273; 97 E.R. 746; 14 Digest (Repl.) 234, *1989*. F
(3) *Young* v. *Regem* (1789), 3 Term Rep. 98; 100 E.R. 475; sub nom. *R.* v. *Young*, 1 Leach, 505; 2 East, P.C. 828; 14 Digest (Repl.) 102, *654*.
(4) *R.* v. *De Berenger* (1814), 3 M. & S. 67; 105 E.R. 536; 15 Digest (Repl.) 1201, *12,196*.
(5) *R.* v. *Dixon* (1814), 4 Camp. 12; 3 M. & S. 11; 105 E.R. 516, N.P.; 14 Digest (Repl.) 35, *55*. G
(6) *R.* v. *Treeve* (1796), 2 East, P.C. 821, C.C.R.; 15 Digest (Repl.) 912, *8776*.
(7) *Mulcahy* v. *R.* (1868), L.R. 3 H.L. 306, H.L.; 14 Digest (Repl.) 123, *856*.
(8) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 14 Digest (Repl.) 123, *860*.
(9) *R.* v. *Vaughan* (1769), 4 Burr. 2494; 98 E.R. 1121; 14 Digest (Repl.) 120, *836*. H

Also referred to in argument:

O'Connell v. *R.* (1844), 11 Cl. & Fin. 155; 5 State Tr.N.S. 1; 3 L.T.O.S. 429; 9 Jur. 25; 1 Cox, C.C. 413; 8 E.R. 1061, H.L.; 14 Digest (Repl.) 356, *3448*.
R. v. *Jameson*, [1896] 2 Q.B. 425; 65 L.J.M.C. 218; 75 L.T. 77; 60 J.P. 662; 12 T.L.R. 551; 18 Cox, C.C. 392; 14 Digest (Repl.) 145, *1082*. I
Jefferys v. *Boosey* (1854), 4 H.L.Cas. 815; 3 C.L.R. 625; 24 L.J.Ex. 81; 23 L.T.O.S. 273; 1 Jur.N.S. 615; 10 E.R. 681, H.L.; 2 Digest (Repl.) 174, *46*.
Millar v. *Taylor* (1769), 4 Burr. 2303; 98 E.R. 201; 42 Digest 612, *126*.
R. v. *Closs* (1857), Dears. & B. 460; 27 L.J.M.C. 54; 30 L.T.O.S. 235; 21 J.P. 805; 3 Jur.N.S. 1309; 6 W.R. 109; 7 Cox, C.C. 494, C.C.R.; 15 Digest (Repl.) 1162, *11,737*.
R. v. *Warburton* (1870), L.R. 1 C.C.R. 274; 40 L.J.M.C. 22; 23 L.T. 473; 35 J.P. 116; 19 W.R. 165; 11 Cox, C.C. 584, C.C.R.; 14 Digest (Repl.) 125, *868*.

A *R.* v. *Aspinall* (1876), 2 Q.B.D. 48; 46 L.J.M.C. 145; 36 L.T. 297; 42 J.P. 52; 13 Cox, C.C. 563; sub nom. *Aspinall* v. *R.*, 25 W.R. 283, C.A.; 14 Digest (Repl.) 121, *853*.

R. v. *Mawbey* (1796), 6 Term Rep. 619; 101 E.R. 736; 15 Digest (Repl.) 844, *8087*.

R. v. *Parnell* (1881), 14 Cox, C.C. 508; 14 Digest (Repl.) 125, **486*.

B *R.* v. *Bunn* (1872), 12 Cox, C.C. 316; 14 Digest (Repl.) 128, *892*.

Motion in arrest of judgment upon an indictment for conspiracy against the defendants, Henry Noel Brailsford and Arthur Henry Muir McCulloch, who were tried before LORD ALVERSTONE, C.J., and a special jury in the King's Bench Division, the indictment having been removed into the High Court from the Central Criminal Court, and were found guilty on the first count of the indictment C for conspiring to obtain from the Foreign Office a passport in the name of the defendant McCulloch, on the false representation that he intended to use it himself for travelling in Russia, whereas in fact it was intended to be used by another person. There was a second count in the indictment alleging that the defendants obtained the passport by similar false and fraudulent pretences and misrepresentations, but without any allegation of conspiracy. At the trial before LORD ALVERSTONE, C.J., D and a special jury, in the King's Bench Division, Mr. Bertram Christian was called as a witness, and explained the circumstances under which he signed the application form for the passport for the defendant McCulloch; that he did not personally know McCulloch, and that, as the form did not seem to imply that personal knowledge was necessary before signing the application form, he signed it at the request and upon the representation of the defendant Brailsford, whom he had known for E several years as a man of high character, that the application was a bona fide application for the defendant McCulloch whom he (Brailsford) had known as an old friend. The manager of the Hotel Bristol in St. Petersburg was called and stated that in January, 1905, a man, who stated that he came there from Riga on private business, came to the hotel and stayed about a month; that this man handed witness the passport and witness took it to the police and received it back viséd; F after a few days the man asked to have it returned to him, and it was returned to him; that on the night of Feb. 25 an explosion took place in this man's room, and it was found that the man was killed as a result of the explosion, and the passport was found upon his body by the police. He had passed under the name of McCulloch, and the passport bore that signature. In a statement made and signed by the defendant McCulloch, and admitted in evidence, he stated that about the G end of October, 1904, Brailsford wrote to him and asked him if he would fill up a form of application for a passport for the purpose of helping someone to get literature into Russia, and he consented to do so to oblige him, and he filled up the form, but he himself had no intention of going to Russia; the signature "McCulloch" to the application was in his handwriting, but the signature "McCulloch" to the passport was not in his handwriting. Evidence was given that both the defendants were H men of high character and standing. LORD ALVERSTONE, C.J., directed the jury that, if persons agreed together to obtain a document of the character of a passport, knowing that it would be used by another person than the person for whom it was obtained, that would be an offence that would bring the persons guilty of it within the criminal law, and, if the jury were satisfied that the defendants had combined to obtain the passport in the way described, they ought to find a verdict against I them. The jury found the defendants guilty of conspiracy. They said that they had not considered the second count, and the learned judge directed a verdict of Not Guilty on the second count in the indictment. Sentence was postponed, in order to give the defendants an opportunity of raising before the Divisional Court certain objections to the indictment on legal grounds.

Sir Robert T. Reid, K.C. (*J. A. Simon* with him), for the defendants.

The *Attorney-General* (*Sir Robert Finlay, K.C.*), the *Solicitor-General* (*Sir Edward Carson, K.C.*), *H. Sutton, C. W. Mathews* and *Bodkin* for the Crown.

Cur. adv. vult. A

Aug. 4, 1905.—The judgment of the court was read by

LORD ALVERSTONE, C.J.—This was a motion in arrest of judgment upon an indictment against Henry Noel Brailsford and Arthur Henry Muir McCulloch, against whom a jury found a verdict of guilty on the first count of an indictment in B respect of a conspiracy to obtain a passport from the Foreign Office in the name of McCulloch to be used by another person. It is not necessary to repeat at length the allegations in the indictment; its scheme may be summarised as follows. It sets out the practice with regard to passports and the conditions upon which they are issued; it alleges a conspiracy between the defendants and other persons not known to obtain by false and fraudulent pretences and misrepresentations a pass- C port in the name of Arthur Henry Muir McCulloch; it alleges the sending in of the necessary documents by Brailsford and McCulloch in the name of McCulloch, and the issuing of the passport thereon. It then alleges the use of the passport by other persons not known, and concludes with the following averment:

> "And the said other persons whose names are unknown, in further pursuance of the said conspiracy, combination, confederacy, and agreement, did send and D cause and procure to be sent the said passport lastly hereinbefore set forth, having then thereon the visé and signature of the said Russian Consul-General, out of the United Kingdom to a certain person or persons unknown, for use when in Russia by a certain person whose name is unknown other than the said Arthur Henry Muir McCulloch, with the intent and purpose that the said passport should be so used in the dominions of the Czar of Russia by the said E person whose name is unknown as aforesaid to the evil example of all others in the like case offending in contempt of our said lord the King and his laws in fraud of the said regulations issued by and with the authority of the said Principal Secretary of State for Foreign Affairs, to the injury and prejudice and disturbance of the lawful, free, and customary intercourse existing between the liege subjects of our said lord the King and the subjects of the said Czar of F Russia, to the public mischief of the said liege subjects, and to the endangerment of the continuance of the peaceful relations between our said lord the King and the said Czar of Russia and their subjects respectively, and against the peace of our said lord the King, his Crown and dignity."

The indictment contained a second count alleging as an offence the obtaining of a G passport by similar false pretences, but without any allegation of conspiracy. The jury, as already stated, found both defendants guilty on the first count and said that they had not considered the second count, and I discharged them without their finding a verdict thereon.

It was argued in arrest of judgment by counsel for the defendants that the count of the indictment upon which the defendants were found guilty was bad in law, as H disclosing no indictable offence, and also on the ground that the act done—namely, the obtaining of a passport by a false representation—although an improper act, was not a criminal act or an indictable misdemeanour at common law, and that the conspiracy to obtain such passport was not an indictable misdemeanour. We are clearly of opinion that the count is good and that the conviction must stand; but in I deference to the arguments of counsel, and as the point has never arisen directly before, we think it right to state the reasons for our decision. It is not necessary for us to decide whether apart from conspiracy the obtaining of a passport by false pretences—namely, by alleging that it was required for the use and protection of A. B., whereas it is in fact intended to be used by some third person, not known to or recommended by the Foreign Office—is of itself a misdemeanour; but as the question has some bearing on the validity of the conviction on the first count we desire to make a few observations thereon.

A It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign, on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the governments of foreign nations, and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office, in an official document, vouches the respectability of the person named. Passports B have been known and recognised as official documents for more than three centuries, and in the event of war breaking out become documents which may be necessary for the protection of the bearer, if the subject of a neutral State, as against the officials of the belligerents, and in time of peace in some countries, as in Russia, they are required to be carried by all travellers. It is not necessary to do more than to remember certain incidents in the nineteenth century to see what grave C international questions might arise in the event of a person who holds a passport receiving ill-treatment in a foreign country.

It cannot, of course, be maintained that every fraud and cheat constitute an offence against the criminal law; but the distinction between acts which are merely improper or immoral and those which tend to produce a public mischief has long been recognised; the cases cited by the learned Attorney-General, *R.* v. *Higgins* (1), D *R.* v. *Wheatly* (2), *Young* v. *Regem* (3) are authorities for this view. They are supported by the reasoning in the judgment in *R.* v. *De Berenger* (4), *R.* v. *Dixon* (5) and *R.* v. *Treeve* (6), and a reference to the original record of the decisions of the judges, which is in the possession of the Lord Chief Justice, shows that *Treeve's Case* (6) did not depend upon the ground given at p. 822 of East. The whole chapter under the title of "Cheats" in that work is worthy of perusal. E It is, however, unnecessary to consider this point further, because we are clearly of opinion that the act done—viz., the obtaining of a passport by a false pretence—is an act of the kind which would render a conspiracy to carry it into effect unlawful, and we think that both defendants have been rightly convicted of criminal conspiracy. Whatever attempts may have been made from time to time to strain the law of conspiracy or bring within its purview combinations to perform acts to F which no objection can be taken, when done by a single individual, no question of the kind arises in this case. For a great many years it has been the law of England that conspiracy consists

> "in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not G indictable. When two agree to carry it into effect the very plot is an act in itself and the act of each of the parties . . . punishable, if for a criminal object, or for the use of criminal means":

Mulcahy v. *R.* (7) (L.R. 3 H.L. at p. 317). This definition is expressly approved by the House of Lords in *Quinn* v. *Leathem* (8) ([1901] A.C. at p. 529). It cannot be seriously disputed that the obtaining a passport from the Foreign Office, by the H false statement that it was required for a person named therein and recommended to the Foreign Office, with the intent that it should be used by another and different person who has not been recommended, is a cheat and conspiracy to deceive the Foreign Office, and obtaining the document by means thereof is a criminal conspiracy. We are, therefore, clearly of opinion that the first count of the indictment upon which the defendants were found guilty is good, and the conviction stands.

I In addition to the objection taken on motion in arrest of judgment, a motion was made by counsel for the defendants on Tuesday last for a new trial upon the ground that there was no sufficient evidence in support of the indictment, and that the jury had been misdirected, in that it had not been left to them to find that the act done might tend to public mischief. Without saying there cannot be acts upon which an innocent construction might be put or that in some cases it might not be for the jury to find as a fact whether the act was innocent or not, we are clearly of opinion that no such argument can possibly be urged in this case. In criminal as well as in civil cases persons are responsible for the natural consequences of their acts. It

was not disputed that there was abundant evidence that the defendants did combine to obtain a passport in the name of McCulloch with the intent that it should be used in Russia by some other individual, and that in fact it was so used with their knowledge and consent. We are of opinion that it is for the court to direct the jury whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given. Assuming the matter to relate to the issue of a public document by a public Department of State, and it is obtained by a false representation for an improper purpose—that is, for use by a different person passing himself off as the bona fide holder—we are of opinion that it is injurious to the public and tends to bring about a public mischief. It is scarcely necessary to cite authority, but we would call attention to the reasoning of LORD MANSFIELD in *R.* v. *Vaughan* (9) (4 Burr. at p. 2499).

Judgment for the Crown.

The sentence upon the defendants was that each of them should be fined in the sum of £100 and should be imprisoned until the fines were paid.

Solicitors: *Treasury Solicitor*; *Radford & Frankland.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

NELSON LINE (LIVERPOOL), LTD. *v.* NELSON & SONS, LTD.

[HOUSE OF LORDS (Lord Loreburn, L.C., the Earl of Halsbury, Lord Macnaghten and Lord Atkinson), November 4, 6, 21, 1907]

[Reported [1908] A.C. 16; 77 L.J.K.B. 82; 97 L.T. 812; 24 T.L.R. 114; 52 Sol. Jo. 170; 10 Asp.M.L.C. 581; 13 Com. Cas. 104]

Shipping—Charterparty—Unseaworthiness—Exception of liability on certain conditions—Obscure charter—Liability of shipowner.

A cargo of frozen meat was shipped under a charterparty which provided that the shipowner should not be liable for unseaworthiness, provided all reasonable means had been taken to provide against it, nor for any damage or detriment to the goods which was capable of being covered by insurance or had been wholly or in part paid for by insurance. The meat arrived damaged at its destination owing to the unseaworthiness of the ship due to the shipowner's negligence. The cargo-owner was paid by his insurers.

Held: the charter was so ill thought out and expressed that it was not possible to feel sure what the parties intended; accordingly, the shipowner was not relieved of his duty to provide a seaworthy ship and to take reasonable care, and was liable for the damage to the meat.

Decision of Court of Appeal ([1907] 1 K.B. 769) affirmed.

Notes. Distinguished: *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Co.*, [1909] A.C. 369. Applied: *Rosin and Turpentine Import Co.* v. *Jacobs* (1909), 25 T.L.R. 345; *South American Export Syndicate* v. *Federal Steam Navigation Co.* (1909), 100 L.T. 270. Followed: *Ingram and Royle* v. *Services Maritimes du Trépont*, [1913] 1 K.B. 538. Applied: *Bank of Australasia* v. *Clan Line Steamers*, [1916] 1 K.B. 39; *Lebeaupin* v. *Crispin & Co.*, [1920] All E.R.Rep. 354; *Layton* v. *General Steam Navigation Co.* (1923), 130 L.T. 662. Considered: *The Hayle*, [1929] P. 275; *Adamastos Shipping Co.* v. *Anglo-Saxon Petroleum Co.*, [1958] 1 All E.R. 725. Referred to: *The West Cock*,

[1911] P. 208; *Pyman Steamship Co.* v. *Hull and Barnsley Railway* (1914), 83 L.J.K.B. 1321; *Travers* v. *Cooper*, [1915] 1 K.B. 73; *Denholm* v. *Shipping Controller* (1920), 124 L.T. 378; *Paterson, Zochonis* v. *Elder Dempster*, [1923] 1 K.B. 420; *Lake* v. *Simmons* (1926), 95 L.J.K.B. 586; *Cosmopolitan Shipping Co. (Inc.)* v. *Hatton and Cookson, Ltd. (Liverpool)* (1929), 143 L.T. 296; *Calico Printers' Association, Ltd.* v. *Barclays Bank* (1931), 145 L.T. 51; *Tempus Shipping Co.* v. *Louis Dreyfus & Co.* (1930), 144 L.T. 13.

As to the construction of charterparties, see 35 HALSBURY'S LAWS (3rd Edn.) 255 et seq.; and for cases see 41 DIGEST 304 et seq.

Case referred to:

(1) *Elderslie Steamship Co.* v. *Borthwick*, [1905] A.C. 93; 74 L.J.K.B. 338; 92 L.T. 274; 53 W.R. 401; 21 T.L.R. 277; 10 Asp.M.L.C. 24; 10 Com. Cas. 109, H.L.; 41 Digest 446, *2800*.

Also referred to in argument:

Price & Co. v. *Union Lighterage Co.*, [1903] 1 K.B. 750; 72 L.J.K.B. 374; 88 L.T. 428; 19 T.L.R. 328; 8 Com. Cas. 155; affirmed, ante p. 227; [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C.A.; 41 Digest 426, *2677*.

Sutton & Co. v. *Ciceri & Co.* (1890), 15 App. Cas. 144; 62 L.T. 742, H.L.; 8 Digest (Repl.) 47, *282*.

Tattersall v. *National Steamship Co.* (1884), 12 Q.B.D. 297; 53 L.J.Q.B. 332; 50 L.T. 299; 32 W.R. 566; 5 Asp.M.L.C. 206; 41 Digest 496, *3245*.

Phillips v. *Clark* (1857), 2 C.B.N.S. 156; 26 L.J.C.P. 168; 29 L.T.O.S. 181; 3 Jur.N.S. 467; 5 W.R. 582; 140 E.R. 372; 41 Digest 424, *2664*.

Steinman & Co. v. *Angier Line*, [1891] 1 Q.B. 619; 60 L.J.Q.B. 425; 64 L.T. 613; 39 W.R. 392; 7 T.L.R. 398; 7 Asp.M.L.C. 46, C.A.; 41 Digest 421, *2639*.

The Maori King (Cargo Owners) v. *Hughes*, [1895] 2 Q.B. 550; 65 L.J.Q.B. 168; 73 L.T. 141; 44 W.R. 2; 11 T.L.R. 550; 39 Sol. Jo. 688; 8 Asp.M.L.C. 65; 14 R. 646, C.A.; 41 Digest 446, *2797*.

Appeal by shipowners, Nelson Line, Ltd., from a decision of the Court of Appeal (SIR RICHARD HENN COLLINS, M.R., COZENS-HARDY and FLETCHER MOULTON, L.JJ.), dated Feb. 6, 1907, and reported [1907] 1 K.B. 769, affirming a judgment of BRAY, J., sitting with a jury, dated Aug. 11, 1906, and reported [1906] 2 K.B. 804.

By a charterparty dated June 18, 1904, made between the respondents as charterers, and the appellants, the owners of the *Highland Chief*, the respondents shipped on board the *Highland Chief* a cargo of frozen meat for carriage from the River Plate to London. Clause 10 of the charterparty was in the following terms:

"The owners are not to be liable for any loss damage prejudice or delay wherever or whenever occurring caused by the act of God the King's enemies pirates robbers thieves whether on board or not by land or sea and whether in the employ of the owners or not barratry of master or mariners adverse claims restraint of princes rulers and people strikes or lock-outs or labour disturbances or hindrances whether afloat or ashore or from any of the following perils viz. insufficiency of wrappers rust vermin breakage evaporation decay sweating explosion heat fire before or after loading in the ship or after discharge and at any time or place whatever bursting of boilers nor for unseaworthiness or unfitness at any time of loading or of commencing or of resuming the voyage or otherwise and whether arising from breakage of shafts or any latent defect in hull boilers machinery equipment or appurtenances refrigerating or electric engines or machinery or in the chambers or any part thereof or their insulation or any of their appurtenances or from the consequences of any damage or injury thereto however such damage or injury be caused provided all reasonable means have been taken to provide against unseaworthiness collision stranding jettison or other perils of the sea rivers or navigation of whatever nature or kind and howsoever such collision stranding or other perils may be caused and the owners

not being liable for any damage or detriment to the goods which is capable of being covered by insurance or has been wholly or in part paid for by insurance nor for any claim of which written notice has not been given to the owners within forty-eight hours after date of final discharge of the steamer. The above mentioned exceptions shall apply whether the same be directly or indirectly caused or shall arise by reason of any act neglect or default of the stevedores master mariners pilots engineers refrigerating engineers tug-boats or their crews or other persons of whatsoever description or employment and whether employed ashore on board or otherwise for whose acts or defaults the owners would in anywise in connection with the execution of this charter otherwise be responsible. . . ."

Clause 18 contained the words:

"The protection given by this article to the owners is intended to be in addition to that given by art. 10 but is subject to the proviso as to taking means to prevent unseaworthiness therein contained."

The respondents brought an action against the appellants for damages on the ground that the meat was not carried safely due to the unseaworthiness of the ship. At the trial of the action, the jury found that the ship was, at the commencement of the voyage, unfit to carry the cargo of frozen meat to its destination, that all reasonable means were not taken by the appellants to prevent the unfitness, that the neglect was that of the appellants, their officers and agents, and that no damage was done during the period of loading or before the commencement of the voyage. They assessed the damages at £23,900. The respondents had insured the meat and had been paid by the underwriters. BRAY, J., gave judgment for the respondents.

J. A. Hamilton, *K.C.*, and *Bailhache* for the appellants.
R. Isaacs, *K.C.*, *Scrutton*, *K.C.*, and *Atkin*, *K.C.*, for the respondents.

The House took time for consideration.

Nov. 21, 1907. The following opinions were read.

LORD LOREBURN, L.C.—The respondents shipped a cargo of meat on the appellants' vessel under an agreement of June 18, 1904. The cargo was lost by reason of the vessel's unseaworthiness, which was due to the appellants' negligence, and in this action the sole question is whether or not they are freed from liability by certain words in the agreement. If the words are considered by themselves they seem to excuse the appellants not merely from this, but from any imaginable liability, except such as by law cannot be underwritten. They run as follows:

"the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance or has been wholly or in part paid for by insurance."

But the whole agreement must be regarded, and especially the context of the clause in which this alleged exemption occurs. The words in question do not stand by themselves; they are at the end of a very long sentence, the earlier part of which is wholly without effect if the last part means what the appellants maintain.

Beyond that, there are two potent considerations weighing heavily against the appellants. One is that, in this clause, the words in dispute are preceded by an express provision dealing with the very subject of unseaworthiness and negligence, which would be flatly contradicted and overruled by the appellants' interpretation; and yet there follows immediately another sentence which assumes that this express provision is still operative. The other consideration is that, in cl. 18, which is a later clause, the language again used shows that the parties supposed this same express provision still to be operative, whereas, on the appellants' construction, it had ceased to have any effect. I am aware that, on the alternative interpretation, there would also be some redundancy in this agreement, but there would not be irreconcilable stipulations in one and the same clause. If I were obliged to fix a definite meaning to the disputed language, I should prefer the

respondents' construction. But, in truth, I think that the clause, taken as a whole, is so ill thought out and expressed that it is not possible to feel sure what the parties intended to stipulate. The law imposes on shipowners the duty of providing a seaworthy ship and of using reasonable care. They may contract themselves out of those duties, but, unless they prove such a contract, the duties remain; and such a contract is not proved by producing language which may mean that, and may mean something different. As LORD MACNAGHTEN said in *Elderslie Steamship Co.* v. *Borthwick* (1) ([1905] A.C. at p. 96), "an ambiguous document is no protection." That is the ground on which I rest my opinion.

I wish to say, with the utmost respect for counsel's arguments, that I cannot agree in what I think was the contention, that there is a canon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the importance of the stipulation to be construed. I know of only one standard of construction, except where words have acquired a special conventional meaning, namely, what do the words mean on a fair reading, having regard to the whole document? I am afraid that it is useless to draw the attention of commercial men to the risks which they run by using confused and perplexing language in their business documents. Courts of law have no duty except to construe them when a question is raised; but it is often very difficult. And sometimes what the parties really intended fails to be carried out because ill-considered expressions find their way into a contract.

THE EARL OF HALSBURY.—I am entirely of the same opinion. The only observation which I wish to make is in reference to the language used by commercial men. LORD BLACKBURN used to say that the difference between commercial men and lawyers was that commercial men wished to write their documents short, and lawyers to write them long. But a mixture of the two renders the whole thing unintelligible. I can understand cases where the documents of commercial men acquire a particular meaning, and the courts will give effect to the common interpretation of such words. But here is a document where, apparently, the draughtsman has put every conceivable hypothesis into it. He was not content to put in a protective clause which might have had an effect. He has gone on, as if he were a lawyer, to endeavour to make the document as long as possible, and to deal with every part of the subject-matter. Not unnaturally, that sort of composition leads to the document contradicting itself. In one part it is said that the appellants should not be liable at all, and in another that they should be liable under certain circumstances. How is it possible for any court to give a construction to such a document? The result is that the draughtsman has only jumbled together a number of phrases to which no legal interpretation can be given, so that, in the result, the legal liability remains.

LORD MACNAGHTEN.—I concur.

LORD ATKINSON.—I also agree with my noble and learned friend on the woolsack.

Appeal dismissed.

Solicitors: *Rawle, Johnstone & Co.*, for *Hill, Dickinson & Co.*, Liverpool; *Parker, Garrett, Holman & Howden.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

NIBLETT *v.* MIDLAND RAIL. CO.

[KING'S BENCH DIVISION (Darling and Phillimore, JJ.), January 17, 1907]

[Reported 96 L.T. 462; 23 T.L.R. 240; 51 Sol. Jo. 211]

B

Master and Servant—Wages—Employee required to join friendly society—Right to sick pay from society during illness, but not if receiving wages—Right to wages when receiving sick pay.

C

On entering the defendants' service, the plaintiff signed an undertaking to abide by the defendants' rules and regulations, one of which required him to join a friendly society established by the defendants to the funds of which the defendants contributed. By the rules of the friendly society the plaintiff was entitled to sick pay during illness, but not if he was receiving wages from the defendants. The plaintiff became ill, and for a period of seven months he received sick pay from the friendly society. He was then discharged by the defendants. The plaintiff claimed to recover wages during the period of his incapacity.

D

Held: he was not entitled to recover the wages claimed.

Notes. Distinguished: *Marrison* v. *Bell*, [1939] 1 All E.R. 745. Considered: *Orman* v. *Saville Sportswear, Ltd.*, [1960] 3 All E.R. 105. Referred to: *Warburton* v. *Co-operative Wholesale Society*, [1917] 1 K.B. 663; *Littlejohn* v. *L.C.C.*, [1937] 3 All E.R. 43; *Lind* v. *Johnson*, [1937] 4 All E.R. 201; *Compton* v. *West Ham Borough Council*, [1939] 3 All E.R. 193; *Petrie* v. *MacFisheries, Ltd.*, [1939] 4 All E.R. 281.

E

As to an employee's remuneration and holidays, see 25 HALSBURY'S LAWS (3rd Edn.) 472 et seq.; and for cases see 34 DIGEST 82 et seq.

Cases referred to in argument:

Cuckson v. *Stones* (1858), 1 E. & E. 248; 28 L.J.Q.B. 25; 32 L.T.O.S. 242; 5 Jur.N.S. 337; 7 W.R. 134; 120 E.R. 902; 34 Digest 71, *483*.

F

K. ——— v. *Raschen* (1878), 38 L.T. 38; sub nom. *K.* v. *R.*, 42 J.P. 264, D.C.; 34 Digest 86, *638*.

Warren v. *Whittingham* (1902), 18 T.L.R. 508; 34 Digest 86, *634*.

Appeal by the plaintiff from a decision of His Honour JUDGE ELLICOTT, sitting at the Gloucester County Court.

G

The plaintiff had been for some years in the defendants' service, and had worked his way up to the position of point holder. On Nov. 14, 1893, he signed an undertaking to obey the defendants' rules and regulations. By r. 8 of these rules he was required to join, and did join, the Midland Railway Friendly Society, established by the defendants. The society appeared to be independent of the defendants, but some of the officials of the defendants were also officials of the society, and the defendants contributed to its funds. By r. 8 of the friendly society's rules, the plaintiff was entitled to sick pay during sickness, and, by r. 10 (14), he was disentitled to receive sick pay whilst receiving wages from the defendants. The sick pay was paid over at the offices of the defendants, and was entered in a column parallel to that in which the ordinary wages were entered. In August, 1904, the plaintiff had an attack of giddiness, and, as a result, he went on sick pay for a fortnight, during which time he neither asked for nor received his wages. On Feb. 11, 1905, he had another attack of giddiness, and was found lying insensible. He was again put on the club, and, after a time, the doctor certified that he had had a mild attack of epilepsy, and that he ought not to work among the moving trains. He remained on the sick club, and the defendants told him to retain his uniform, as they hoped to be able to find other work for him to do. In April, 1905, he was advised to send in his resignation, as a suitable position could not be found for him. This he declined to do. He remained on sick pay, and the defendants endeavoured to find a position for him. Eventually, on Sept. 28, the defendants

H

I

gave the plaintiff notice, and he left their service. The plaintiff claimed to recover £33 5s., the wages alleged to be due to him while he was incapacitated, on the ground that he had not been discharged until Sept. 28, and was ready and willing to undertake his duties. The learned county court judge gave judgment for the defendants.

S. T. Evans, K.C., and *Sturges* for the plaintiff.
Hugo Young, K.C., and *E. W. Cave* for the defendants.

DARLING, J.—This case is an important one, because it relates to contracts made between railway companies and the very large number of people employed by them in this country. The plaintiff was a man who held a very responsible position on the Midland Railway, in the sense that the thing he had to do was essential to the safety of persons travelling on the line, and it was absolutely necessary that it should be done by a man in possession of all his faculties and in the best of health. He was a pointsman, and on him it depended whether the train went along the right line or whether it was diverted and went wrong. While engaged in this duty, the plaintiff was seized with epileptic fits. It would not have been a hard thing on the part of the defendants if, when this happened, they had given him notice to leave, or had paid him what was due to him and let him go. They did not do that; they took a very kindly and considerate view of the plaintiff's position; and, if this appeal were to succeed, I am afraid that it would be disastrous to the interests of railway servants, because it might be taken for granted that, if we were to decide in favour of the plaintiff, never again would a railway company be disposed to treat a servant with the consideration which they have shown here. What they did was that they said: "You need not work"—in fact, they could not allow him to work—"but you have been some time in our service, so you may keep your uniform and you will go on the sick fund and we will do our best to find you some occupation which will not require you to endanger anybody, in case you have one of these epileptic fits." The plaintiff, therefore, remained on from February, 1905, until the expiration of the notice of September, 1905, drawing his sick pay from the benefit society all the time. It is now contended that, during the whole of this time, he was in the service of the defendants, and that he was entitled to draw his full weekly salary. I do not think that the cases cited as authorities for this proposition govern this case.

I agree with the statement of the county court judge when he said that this action was an attempt to apply general principles of law to a special contract which they would not fit. There was a special contract between the parties, and to find it we must look, not only at the terms of the plaintiff's engagement as pointsman by the defendants, but also at some of the rules and regulations of the defendants and of the benefit society. By r. 8 of the rules of the defendants, it is provided that every weekly servant in receipt of the prescribed rate of wages shall be required to join the friendly society in accordance with the regulations. In pursuance of this rule, the plaintiff duly became a member of the friendly society. It is important to notice that a very considerable contribution was made to the funds of that society by the defendants as employers as well as the contributions which were made by the workmen. If the plaintiff were to succeed in this action, the result would be that his employers, when he was ill, would be bound to pay him more than when he was well, because his contention was that they ought to pay his weekly wages, and that, at the same time, he should be allowed to come on a fund, a considerable proportion of which was contributed by the employers.

The case presents itself to me as being one of a special contract with the defendants. It is contained in the rules of the defendants, in the contract of Nov. 14, 1893, and in the rules of the benefit society, so far as applicable. The plaintiff must have understood this, because, during the time that he was drawing sick pay, he never claimed his wages. It is material to notice the way in which the sick pay was drawn. He went to the ordinary pay office where the wages were paid,

and an account was kept there which specified in different columns whether the pay was sick pay or ordinary wages. Rule 10 (14) of the friendly society's rules contains a provision that no one was entitled to sick pay while he was receiving wages. It does not, of course, say that no one would be entitled to wages from the defendants while receiving sick pay, because, these being the rules of the friendly society, that would be the wrong place to put in such a provision.

To my mind, the whole intention of the scheme is what the plaintiff understood it to be according to his evidence at the trial—namely, that, if he was in the service of the defendants undischarged and was incapacitated from work so as to be entitled to the benefit of sick pay, he should not be entitled to the benefit of whole pay. I cannot imagine a more reasonable bargain for a man to enter into. If he did not enter into such an agreement it is perfectly obvious what might happen. The moment he was unwell the defendants would discharge him and give him no chance of waiting until other work could be found for him. That the plaintiff understood this I cannot doubt. When he was ill once before, he was away for three weeks. He received sick pay, and he never asked for his full pay. When he was well, he went back to his work. He then had a second seizure and went on sick pay, and again never asked for his full pay. Week by week he took his sick pay and never asked for any other so long as he was kept on by the defendants in a kind of suspended service. He was a servant who was giving no value for what he received, and was, therefore, paid no wages except a proportion of the contribution made by the defendants to the sick fund. During this time he never asked for wages, but when he was finally dismissed from the defendants' service, simply because they could not find anything fit for him to do, then, and not until then, he put forward this claim which he might have put forward during his first illness or during any week of his second. In these circumstances, I think the decision of the county court judge was right, and the appeal must be dismissed.

PHILLIMORE, J.—I am of the same opinion. To my mind, the principle which governs this case is stated in two lines by the county court judge, when he said that the plaintiff's contention was an attempt to apply general principles of law to a special contract which they would not fit. It is, no doubt, a general principle of law that, in the absence of provisions to the contrary, a servant is entitled to his wages notwithstanding that he is unable to render the services due from him owing to illness. There are many contracts which contain special provisions to the contrary. One such is a contract made with an agricultural labourer. In such a case, it is recognised that, when the labourer is sick, the master is not liable to pay for the whole period.

The contract in the present case is contained in three documents, the declaration which the plaintiff signed on entering the service of the defendants, the book of rules and regulations of the defendants which that document refers to, and the rules of the friendly society to which the rules of the defendants make reference. Whether we look at these printed documents only, or whether we consider the course of business of the defendants, the result produced is a satisfactory and sensible one for the servant. If the ordinary rule of law applied, the defendants would be bound to dismiss the plaintiff at once, or at any rate at the end of a fortnight. He would be required to give up his uniform and he would be struck off the defendants' books, and his services would be rendered discontinuous so that he would not be entitled to the benefits given by the friendly society's rules, and in many cases it might be necessary for the defendants to require their servants to leave their houses. To avoid such consequences, a provision is inserted in the friendly society's rules, which forms part of the contract between the defendants and the servant and the servant and his fellow contributors to the friendly society's funds. Under this provision, the servant is suspended from his work and from his usual pay, and is given instead sick pay, which is provided partly by the funds contributed by himself and his fellow servants and partly by funds contributed by the defendants. He receives it from the officers of the defendants and it might be called

sick pay or wages, or partly one and partly the other. When this unfortunate young man ceased to be in the service of the defendants, and consequently ceased to receive his sick pay, as an afterthought he makes a claim for his wages during all these back weeks. I am of opinion that he is not entitled to recover the sum claimed, and that the decision of the county court judge was right.

Appeal dismissed.

Solicitors: *Courtney Lewis* for *Langley, Smith & Son*, Gloucester; *Beale & Co.*

[*Reported by* P. B. DURNFORD, ESQ., *Barrister-at-Law.*]

CLYDEBANK ENGINEERING AND SHIPBUILDING CO. *v.* CASTANEDA AND OTHERS

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Davey, and Lord Robertson), November 15, 17, 1904]

[Reported [1905] A.C. 6; 74 L.J.P.C. 1; 91 L.T. 666; 21 T.L.R. 58]

Contract—Breach—Damages—Liquidated damages—Agreement to build ships and deliver within specified periods—Penalty for late delivery "at rate of £500 a week for each vessel"—Waiver of right to damages—Acceptance of ships and payment of full price.

The appellants contracted to build four torpedo-boat destroyers for the Spanish government at an agreed price, delivery to be within specified periods. The contracts provided penalty for late delivery "should be at the rate of £500 a week for each vessel not delivered by the contractors in the contract time". The vessels were not delivered until after the agreed dates of delivery. The Spanish government paid the full price, but claimed from the appellants £500 for each week of late delivery.

Held: the sum of £500 a week was to be regarded as liquidated damages and not as a penalty; acceptance of the vessels after the date fixed for delivery and payment in full of the agreed price did not operate as a waiver of a claim for damages for late delivery; and, therefore, the Spanish government were entitled to recover.

Notes. Considered: *Public Works Commissioner* v. *Hills*, post. Applied: *Diestal* v. *Stevenson*, [1906] 2 K.B. 345. Considered: *Webster* v. *Bosanquet*, [1912] A.C. 394; *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, [1914–15] All E.R.Rep. 739. Applied: *Robert Stewart & Sons, Ltd.* v. *Carapanayoti & Co., Ltd.*, [1962] 1 All E.R. 418. Referred to: *Kilmer* v. *British Columbia Orchard Lands*, [1913] A.C. 319; *Admiralty Commissioners* v. *Chekiang (Owners)*, [1926] All E.R.Rep. 114; *Widnes Foundry (1925), Ltd.* v. *Cellulose Acetate Silk Co.* (1931), 47 T.L.R. 481; *Imperial Tobacco Co. (of Great Britain and Ireland), Ltd.* v. *Parslay*, [1936] 2 All E.R. 515; *Sunley & Co.* v. *Cunard White Star Line, Ltd.*, [1939] 3 All E.R. 641.

As to liquidated damages or penalty, see 11 HALSBURY'S LAWS (3rd Edn.) 298 et seq.; and for cases see 17 DIGEST (Repl.) 148 et seq.

Case referred to:

(1) *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332; 35 W.R. 17, H.L.; 17 Digest (Repl.) 158, *555*.

Appeal from a decision of the Second Division of the Court of Session (Lord Justice-Clerk (Lord Kingsburgh), Lord Young, Lord Trayner, and Lord Moncreiff), affirming a judgment of the Lord Ordinary (Lord Kyllachy), in favour of the respondents, the plaintiffs below.

The Spanish government, represented by the respondents, sought to recover from the appellants penalties alleged to have been incurred by them under a contract, dated June 4, 1896, for the construction of two torpedo-boat destroyers, afterwards named *Audaz* and *Osado*, and the penalties alleged to have been incurred under another contract, dated Nov. 24, 1896, for the construction of two torpedo-boat destroyers, afterwards named *Pluton* and *Proserpina*. The first of these contracts was entered into between representatives of the Spanish government, on the one part, and the appellants (inter alios) James and George Thomson, Ltd., engineers and shipbuilders, Clydebank, Scotland. The contract was for the building of two twin-screw torpedo-boat destroyers, each of about 380 tons load displacement, and the price of each was to be £67,180. The price was payable in four instalments—viz., one-fourth of the price of each ship on signing the contract, one-fourth when the vessel was in frame and other parts correspondingly advanced, one-fourth when the vessel was launched and the machinery ready to be put on board, and one-fourth after completion and satisfactory trial, and prior to delivery. The contract contained the following clause:

> "2. The contractors undertake that the said vessels shall be finished, complete and ready for sea, the first vessel in six and three-quarter months, and the second in seven and three-quarter months, from signing of this contract and accompanying specifications and plans."

The specification and plans were signed for the two vessels on Sept. 10, 1896. The contract also contained these clauses:

> "The penalty for later delivery shall be at the rate of £500 per week for each vessel not delivered by the contractors in the contract time. Should the delivery of either of the vessels be delayed by force majeure, the time shall be correspondingly extended, and no penalty shall be exacted for such delay."

The second contract was for the building of two twin-screw torpedo-boat destroyers, each of about 380 tons load displacement, and the price of each was to be £65,650. The price was payable in four instalments at defined periods. The contract contained a clause that

> "The first vessel shall be ready in six and a half months, and the second in seven and a half months, from signing of the contract and plans."

It also contained the same clauses as to penalty and force majeure as the first contract. The two vessels built under the first contract, viz., the *Audaz* and *Osado*, should, in terms of the contract, have been delivered on Mar. 23, 1897, and April 23, 1897, respectively. They were in point of fact both delivered on Mar. 7, 1898. The two vessels built under the other contract, viz., the *Pluton* and the *Proserpina*, should in terms of the contract have been delivered on June 14 and July 13, 1897, respectively. The *Pluton* was delivered on Nov. 30, 1897, and the *Proserpina* on Feb. 8, 1898. After receiving delivery of the vessels and paying their price, the respondents claimed under the penalty clause in respect of 151 weeks, the delay in the aggregate, a sum of £75,500. The Court of Session, affirming the interlocutor of the Lord Ordinary, awarded for 135 weeks the sum of £67,500.

The appellants maintained (i) that the penalty named in the contracts was not truly liquidated damages pre-estimated by the parties as the loss which might be sustained through a breach of the contract, but was a penalty in the strict sense of the word, and, therefore, recoverable only to the extent to which actual loss or damage was proved by the respondents; (ii) that in any event the respondents by payment without reservation of the whole contract prices and the extras incurred

for each of the vessels did, in the circumstances, waive all claims to penalties or damages.

Lawson Walton, K.C., Ure, K.C. (of the Scottish Bar), *Rufus Isaacs, K.C., J. Tait* (of the Scottish Bar) and *F. Cassel* for the appellants.

The Solicitor-General for Scotland (*Dundas, K.C.*), and *Blackburn* (both of the Scottish Bar) for the respondents.

THE EARL OF HALSBURY, L.C.—This is a case in which one party to an agreement has admittedly been guilty of a breach of that agreement. The action was brought by the Spanish government simply for the purpose of enforcing payment of a sum of money which, by agreement between the parties, was fixed as that which the appellants should pay in the events which have happened. Two objections have been made to the enforcement of that payment. The first objection is one which appears on the face of the instrument itself, namely, that it was a penalty, and, therefore, not recoverable without ascertaining the measure of damage resulting from the breach of contract. It was frankly admitted that not much reliance could be placed on the mere use of the words "penalty" on one side, or "damage" on the other. It is clear that neither is conclusive as to the rights of the parties. It was not denied that the law is the same both in Scotland and in England. There may be a difference in the mode of administering the jurisprudence which gave rise to the Act of William III (8 and 9 Will. 3, c. 11), but that arose only from the fact that the Scottish courts have full jurisdiction to administer the law according to both branches of jurisprudence.

Then comes the question whether, under the agreement, the damages are recoverable as an agreed sum, or whether it is simply a penalty to be held over in terrorem, or whether it is a penalty so extravagant that no court ought to enforce it. It is impossible to lay down any abstract rule as to what might or might not be extravagant without reference to the principal facts and circumstances of the particular case. A great deal must depend on the nature of the transaction. On the other hand, it is an established principle in both countries to agree that the damages should be so much in the event of breach of agreement. The very reason why the parties agreed to such a stipulation was that, sometimes, the nature of the damage was such that proof would be extremely difficult, complex and expensive. If I wanted an example of what might be done in this way, I need only refer to the argument of counsel as to the measure of damage sustained by Spain through the withholding of these vessels. Suppose there had been no agreement in the contract as to damages, and the Spanish government had to prove damages in the ordinary way, imagine the kind of cross-examination of every person connected with the Spanish administration. It is very obvious that what was intended by inserting these damages in the contract was to avoid a minute, difficult and complex system of examination which would be necessary if they had attempted to prove damage in the ordinary way.

It was also suggested that there could be no measure of damage in the case of a warship which had no commercial value at all. It is a strange and somewhat bold assertion to say that, in the case of a commercial ship, the damages could be easily ascertained, but that the same principle could not be applied to a warship as it earned nothing. The deprivation of a nation of its warships might mean very serious damage, although it might not be very easy to ascertain the amount. But is that a reason for saying they were to have no damages at all? It seems to me hopeless to advance such a contention. It is only necessary to state the assertion to show how absurd it is.

But there was a more startling suggestion still. It was argued for the appellants that, if they had acted up to their contract, and these vessels had been sent out at the specified date, they would have shared the same fate as the other Spanish warships at the hands of the American Navy. Therefore, the respondents, instead of

suffering damage, had, by the action of the appellants, been saved the loss of these ships, which otherwise would have been at the bottom of the Atlantic. After considerable experience, I do not think that I have ever heard such an argument before, nor do I think that I am likely to hear it again. Nothing could be more absurd, and to give effect to it would be a striking example of defective jurisprudence. If your Lordships look at the nature of the transaction, it is hopeless to contend that the penalty was intended merely to be in terrorem. Both parties recognised that the question was one in which time was the main element of the contract. I have come to the conclusion that the judgment of the court below was perfectly right. There is no ground for the contention that the sum in the contract was not the damages agreed on between the parties for very good and excellent reasons at the time at which the contract was entered into.

As to the doctrine of waiver, I do not understand its application to such a question as that with which your Lordships are now dealing. So far as I can see, there is nothing in the evidence on which anyone could rely that there was any agreement between the parties not to press for damages. The mere fact of payment of the contract price may be dealt with very shortly. Assuming that the Spanish government was anxious to get these vessels, it would have been a very extraordinary thing if they had risked the delay which would have resulted in respect of the claim now put forward. The litigation might have gone on until the war had come to an end. Under those circumstances, it appears to me perfectly natural that the claim was not insisted on in the first instance. As to the delay which afterwards occurred, considering the mode of Spanish administration, I can well imagine that some time must elapse before the relations between London and Madrid were ascertained and the rights of the parties established. I repeat that there is absolutely no evidence in favour of waiver, and, therefore, I move your Lordships that the appeal be dismissed with costs.

LORD DAVEY.—I am of the same opinion. The question is one not of words, but of substance—whether the intention of the parties was, in case of breach of the contract, to fix a sum by way of liquidated damages or to impose a penalty, the extent of which would depend on the actual loss incurred. If I may say so with respect, a useful rule has been laid down in your Lordships' House in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1). LORD WATSON said (11 App. Cas. at pp. 342, 343):

> "The payments . . . are made proportionate to the extent to which the respondent company may fail to implement their obligations, and they are to bear interest from the date of the failure. I can find neither principle nor authority for holding that payments so adjusted by the contracting parties with reference to the actual amount of damage ought to be regarded as penalties."

LORD HERSCHELL said (ibid. at p. 345):

> "I know of no authority for holding that a payment agreed to be made under such conditions as these is to be regarded as a penalty only; and I see no sound reason or principle or even convenience for so holding."

In the law of Scotland, if a sum is fixed in case of the breach in a stipulation in an agreement, and that sum is proportioned to the amount or weight of non-performance—for example, so much an acre in mining operations, or so much a week, as in the present case—the sum so fixed is to be regarded as liquidated damages and not penalty; although, of course, in certain circumstances a different conclusion might be reached if the amount were so exorbitant as to make it impossible to think that it could be regarded as a liquidated sum. But here the sum was suggested by the appellants themselves. Nor is there any evidence of waiver; payments made by the Spanish government are not evidence, and it is for the

appellants to show an actual release of a vested cause of action. This they have not done.

LORD ROBERTSON concurred.

Appeal dismissed.

Solicitors: *Ashurst, Morris, Crisp & Co.*, for *Forrester & Davidson*, Edinburgh, and *M'Grigor, Donald & Co., Glasgow*; *J. T. Davies*, for *Macandrew, Wright & Murray*, Edinburgh.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

S. PEARSON & SON, LTD. *v.* DUBLIN CORPN.

[HOUSE OF LORDS (Lord Loreburn, L.C., the Earl of Halsbury, Lord Ashbourne, Lord Macnaghten, Lord James of Hereford, Lord Robertson, Lord Atkinson and Lord Collins), April 16, 17, 18, May 30, 1907]

[Reported [1907] A.C. 351; 77 L.J.P.C. 1; 97 L.T. 645]

Contract—Avoidance—Clause disclaiming liability for representations made to other party—Fraudulent misrepresentation by agent.

A party to a contract cannot escape liability for fraudulent statements made by himself or his agent by inserting in the contract a clause that the other party shall not rely upon them.

The respondents wished to have certain works executed, and to enable contractors to tender for the work they instructed engineers to prepare plans of the site where the work was to be done. These plans, when prepared, owing to the engineers not taking proper steps to obtain information, showed a wall as existing which did not in fact exist, and thereby the appellants were induced to tender for the work at a lower price than they would otherwise have done. The tender of the appellants having been accepted, the contract between the parties contained a clause providing that "the contractor is to satisfy himself as to . . . all . . . things so far as they may have any connection with the works in the contract, and is to obtain his own information on all matters which can in any way influence his tender." After the appellants had begun the work they discovered the absence of the wall, which they had proposed to incorporate in their construction, and as a result they had to revise their plans whereby they incurred additional expense and suffered damage. In an action by the appellants against the respondents for damages for fraudulent representation,

Held: while the clause in the contract might fairly apply to protect the respondents against liability in the case of errors, mistakes, and miscalculations made by them or their agents, it did not so apply to a case of fraud such as the present, and, therefore, the appellants were entitled to succeed.

Notes. Considered: *Armstrong* v. *Strain*, [1952] 1 All E.R. 139.

As to void and illegal contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 125 et seq.; and for cases see 12 DIGEST (Repl.) 263 et seq.

Cases referred to:

(1) *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358; 9 L.J.Ex. 297; 4 Jur. 919; 151 E.R. 450; 1 Digest (Repl.) 683, *2435*.

(2) *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 1 Digest (Repl.) 681, *2425*.

(3) *Udell* v. *Atherton* (1861), 7 H. & N. 172; 30 L.J.Ex. 337; 4 L.T. 797; 7 Jur.N.S. 777; 1 Digest (Repl.) 683, *2433*.

(4) *Hern* v. *Nicholls* (1701), Holt, K.B. 462; 1 Salk. 289; 90 E.R. 1154; 1 Digest (Repl.) 682, *2427*.

(5) *Smith* v. *Chadwick* (1884), 9 App. Cas. 187; 53 L.J.Ch. 873; 50 L.T. 697; 48 J.P. 644; 32 W.R. 687, H.L.; 35 Digest 18, *106*.

(6) *Tullis* v. *Jacson*, [1892] 3 Ch. 441; 61 L.J.Ch. 655; 67 L.T. 340; 41 W.R. 11; 8 T.L.R. 691; 36 Sol. Jo. 646; 7 Digest (Repl.) 451, *438*.

(7) *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, H.L.; 35 Digest 9, *24*.

(8) *Thorn* v. *London Corpn.* (1876), 1 App. Cas. 120; 45 L.J.Q.B. 487; 34 L.T. 545; 40 J.P. 468; 24 W.R. 932, H.L.; 12 Digest (Repl.) 416, *3231*.

Appeal by the plaintiffs in the action from a decision of the Court of Appeal in Ireland (Walker C. FitzGibbon and Holmes, L.JJ.), who had reversed a decision of the King's Bench Division (Gibson, Boyd and Wright, JJ., Lord O'Brien, C.J., dissenting) setting aside a judgment of Palles, C.B., in favour of the respondents (the defendants below) at the trial of the action before him with a special jury, and ordering a new trial.

The action was brought by the appellants, a firm of contractors, against the corporation of Dublin for damages for fraudulent misrepresentation, whereby they had been induced to enter into a contract to their detriment. The appellants had contracted with the corporation to construct sewage works for a fixed price, and their contention was that the corporation had represented that an existing wall extended 9 ft. below the Ordnance datum line, and could be utilised for the purposes of the proposed works, whereby the appellants were induced to enter into the contract at a lower price than they otherwise would have done while, in fact, the wall did not exist as shown on the plans prepared by the engineer of the corporation, and, consequently, the appellants' plans had to be altered, and they incurred great additional expense. The contract contained the following clause:

> "43. The contractor is to satisfy himself as to the dimensions, levels, character, and nature of all existing works, buildings, roads, lands, waterways, sewers, pipes, the nature of the strata through which the excavations are to be made, and all other things, so far as they may have any connection with the works in the contract, and is to obtain his own information on all matters which can in any way influence his tender. He is also to check the estimate of quantities, and satisfy himself as to its accuracy and sufficiency, and the contractor is at liberty to alter or add to the same, if he consider necessary, before sending in his bill of quantities. Any alteration, however, made to the specification or to the schedule of prices will vitiate the tender. No charges for extra work or otherwise will be allowed in consequence of any incorrect information or inaccuracies which may appear in the drawings, specifications, or estimate of quantities. No allowance will be made on account of excavating in rock or other difficult ground, or of unforeseen difficulties of any kind."

At the trial Palles, C.B., directed a verdict for the defendants and entered judgment for them on the ground that under the above clause of the contract the plaintiffs were not intended to act upon the representations made in the plans of the defendants, but were to obtain all necessary information for themselves. As mentioned, the King's Bench Division set aside the verdict and ordered a new trial, but this decision was reversed by the Court of Appeal.

Campbell, *K.C.* (of the Irish Bar), *Danckwerts*, *K.C.*, and *E. A. Collins* (of the Irish Bar) appeared for the appellants.

C. A. O'Connor, *K.C.*, *Ronan*, *K.C.*, *I. J. O'Brien*, *K.C.*, and *P. A. O'C. White* (all of the Irish Bar) for the respondents.

Their Lordships took time for consideration.

May 30, 1907. The following opinions were read.

LORD LOREBURN, L.C.—This is an action for deceit brought by Messrs. Pearson & Son, contractors, against the Dublin Corporation. Inasmuch as I am about to propose that the case be remitted for a new trial, it is desirable that I should say no more than is necessary to explain my view. The plaintiffs' case is that they were induced to enter into a contract for the construction of certain sewage works by statements made by and on behalf of the defendants as to the existence to a depth of 9 ft. below Ordnance datum of an old wall. Undoubtedly evidence was adduced at the trial from which the jury might, if they thought right, conclude that the plaintiffs were so induced by statements made on the behalf of the defendants. Also, there was evidence for the jury that those statements were made either with a knowledge of their falsity, or (which is the same thing) with a reckless indifference whether they were true or false, on the part of the engineers employed by the defendants to make the plans which were submitted to plaintiffs as the basis of the tender. Had the case rested there, I gather that PALLES, C.B., would have left the case to the jury, and that the learned judges who subsequently had this litigation before them would have approved this course. But another feature of the case was considered fatal to the plaintiffs' claim. The contract contained provisions, which I need not cite at length, to the effect that the contractors must not rely on any representation made in plans or elsewhere, but must ascertain and judge of the facts for themselves. Therefore, the Chief Baron withdrew the case from the jury. As I understand it, the view which he held, in substance confirmed by the Court of Appeal, was that the plaintiffs, so forewarned, had no right to rely on any representation, and could not be heard to say they were induced to act on statements on which by contract they were not to rely. Or, at all events, it was said that the defendants, being themselves innocent, are protected by such clauses against the consequence of contractors acting on false statements made by defendants' agents, however fraudulent those agents might be.

It seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them. I will not say that a man, himself innocent, may not under any circumstances, however peculiar, guard himself by apt and express clauses from liability for the fraud of his own agents. It suffices to say that, in my opinion, the clauses before us do not admit of such a construction. They contemplate honesty on both sides and protect only against honest mistakes.

Counsel for the Dublin Corporation make a further point. They say that, though a principal is liable for the fraudulent representation of his agent, yet that rule only applies where the representation has in fact been made by the agent. I cannot accept that contention. The principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge. I respectfully recommend to your Lordships that this case be sent for a new trial, and that the respondents pay the costs of this appeal and the costs in the Court of Appeal, the costs of the first trial to abide the event.

THE EARL OF HALSBURY.—I concur in thinking that in this case there must be a new trial, and for that reason I wish to say as little as possible on the merits of this case. The Chief Baron refused to leave the case to the jury upon grounds to be presently examined, but in the course of what I have to say I wish to point out at once that all that I wish to affirm is that there was evidence produced by the plaintiffs which they had a right to have submitted to the jury. I do not assume that the jury would have found that fraud had been committed by anyone. Still less do I propose myself to find fraud proved as a fact, but simply that it was a question which ought to have been submitted to the jury. The sole question here appears to me to be that question. It was an ordinary action for fraud causing damage to the plaintiff. Tenders were invited for a contract to execute certain work, and certain plans and specifications were held out to intending contractors as what I will at present call notices of what the work was intended to be. A contract was ultimately concluded upon the terms thus held out; and I may say

at once that, apart from the question of fraud, there was nothing proved which could have called for an answer from the defendants.

It is not necessary to go far in reciting the questions of fact. PALLES, C.B., pointed out with great clearness how the question of fact is raised and it turns upon the existence or non-existence of a certain wall. It is not denied that the wall was represented on the plan as going 9 ft. below the datum line, and the Chief Baron himself states that this statement was acted upon by the contractors so as to induce them to send in the tender at a less sum than they would otherwise have done for the execution of that contract. It is better, perhaps, to quote the Chief Baron's own words. His Lordship says:

> "In the result, then (and, as I have said, I have arrived at the conclusion with regret), I think that there was a statement contained in these plans which was, in fact, an incorrect statement; I think the result of that incorrect statement was that the plaintiffs here sent in the tender which was accepted, and which was for a sum much less than that for which they would have tendered if they had known the truth. But I am obliged to hold upon this 43rd clause of the contract, together with the 46th, 47th, and 48th, which I will not occupy public time in reading, that, taken as a whole, or, rather, taking the plans as controlled by the specification, they do not contain a representation, intended to be acted upon, that this structure penetrated 9 ft. below ordnance datum."

It will be observed that the Chief Baron affirms both propositions—that the statement was inaccurate in fact, and that the tender was for a less sum than the contractor would otherwise have offered if he had known the truth. The one point which led to the Chief Baron's judgment was, to use his own words, that the statement which he finds as a fact to be inaccurate does not contain a representation "intended to be acted on that the structure penetrated 9 ft. below datum line." With the sincere respect that I have for anything said by the Chief Baron, I cannot help saying that there is some confusion here. The words may be the subject of contract, and they may be so qualified or cut down by other words as to alter their primary meaning, but the intention with which words are used is the condition of mind of the person using them, and that is a question of fact to be ascertained by a jury. If one assumes that the statement is false, and that it has caused a person to act upon it to his prejudice, the question whether it was fraudulently made by the person who made it may, and ought to be, decided by a jury. But the learned judge seems to think that the 43rd clause of the contract removes it from being a question of fact for a jury, and that it becomes thereby a question of law for the judge.

I must say, notwithstanding my great respect for the learned judge, that I entirely differ from that view. The action is based on the allegation of fraud, and no subtlety of language, no craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact submitted to a jury. I assume, of course, that there is evidence proper to be submitted to a jury, as in this case I think that there was; and, if I rightly understand the Chief Baron, he would have submitted it to the jury but for the operation of that 43rd clause. I am wholly unable to understand why it was not proper to submit to the jury the question whether the answer given by the defendants' agents in respect of this very matter did or did not prove that the false statements contained in the plans were or were not fraudulently made, and if they were not intended to be acted on by the persons to whom they were made. [HIS LORDSHIP referred to the evidence.] I do not understand the learned judge to express any doubt as to the liability of the principals for the fraud of their agent, if there was fraud. If *Cornfoot* v. *Fowke* (1) was supposed to decide that the principal and the agent could be so divided in responsibility that the united principal and agent might commit fraud with impunity, it would be quite new to our jurisprudence. One of the learned judges who decided *Cornfoot* v. *Fowke* (1) explained it by saying that it was only decided on a point of pleading, and another by saying that it was

attempted to add a term to a written contract which was not in it. Whether these were satisfactory reasons I do not care to inquire. It is enough to say that the case is not law if it is supposed to affirm the proposition to which I have referred. WILLES, J., said that he would be very sorry to suppose that the case ever decided anything but a point of pleading; and added in *Barwick* v. *English Joint Stock Bank* (2) (L.R. 2 Exch. at p. 265), in delivering the judgment of himself and BLACKBURN, KEATING, MELLOR, MONTAGUE-SMITH, and LUSH, JJ., that the division of opinion in *Udell* v. *Atherton* (3) arose not so much upon

> "the question whether the principal is answerable for the act of an agent in the course of his business—a question which was settled as early as LORD HOLT'S time [*Hern* v. *Nicholls* (4)]—but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is. But with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

We have, of course, nothing to do here with the question of damages, which could not be treated of till the questions now in debate have all been decided. The sole question before your Lordships is, Was the Chief Baron right in withholding the question from the jury? I cannot conclude without saying that I desire to associate myself entirely with the observations which have been made by the Lord Chancellor, that it matters not in respect of principal and agent (who represents but one person) which of them possess the guilty knowledge or which of them makes the incriminating statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation or which is the person who has the guilty knowledge. I concur in the motion of the Lord Chancellor.

LORD ASHBOURNE.—I concur in the opinion of the Lord Chancellor that the appeal should be allowed, and as that involves the grant of a new trial I shall say as little as possible upon the merits of the case. With the highest deference for the opinions of PALLES, C.B., and the learned judges of the Court of Appeal in Ireland, I am of opinion that the case should not have been withdrawn from the jury. I think that there was evidence given at the trial upon which a jury might reasonably, if they thought proper, act in finding that the plaintiffs had suffered serious damage in consequence of the acts of the defendants or of their agents. The evidence went to indicate—first, that the plaintiffs were influenced in making the contract referred to in the case by statements for which the defendants were liable as to the existence of an old wall in an important position to the depth of 9 ft.; and, secondly, that those statements so made were false in fact, and were made by the engineers of the defendants recklessly and without any real belief in the existence of the facts represented. It may be inferred from the evidence that the false representations were of the highest importance, were calculated to deceive, and were intended to be acted on. But the decisions of the Chief Baron and of the learned judges in the Court of Appeal were not founded upon the opinion that there was no evidence fit to be submitted to the jury. They rested mainly upon the construction of the contract, the 43rd clause of which provided that the contractors must not rely on any representations made in the plans, but must ascertain and judge of the facts themselves. The Chief Baron laid it down that the contractor was

> "not entitled, in point of law, to say he acted to the extent of a hair's breadth upon the statement contained in the plans."

I am entirely unable to concur in this view, and, with much deference to the opinions of the Chief Baron and the learned judges of the Court of Appeal, I cannot

think that in face of the evidence in the case this cl. 43 can be regarded as establishing a defence. Such a clause might in some cases be part of a fraud, and might advance and disguise a fraud, and I cannot think that on the facts and circumstances of this case it can have such a wide and perilous application as was contended for. Such a clause may be appropriate and fairly apply to errors, inaccuracies, and mistakes, but not to cases like the present. The respondents' counsel argued their case with great acuteness, but they could not overcome the broad contentions which they had to face—that there was evidence for the jury, and nothing in the contract to prevent the jury fully considering that evidence. I think that the order suggested by the Lord Chancellor is correct.

LORD MACNAGHTEN.—I entirely agree in the motion proposed.

LORD JAMES OF HEREFORD.—I fully concur in the view expressed that it is expedient not to give any opinion upon the merits of this case which might influence a decision hereafter to be arrived at by another tribunal. The question before your Lordships, whether the Chief Baron rightly removed the case from the decision of the jury, depends upon the answers to be given to one or two propositions. Principally your Lordships have to determine whether evidence was given at the trial upon which a jury might reasonably act in finding that the plaintiffs had suffered damage in consequence of the deceit of the defendants or their agents. With the most sincere respect for the judgment of the learned Chief Baron, I am of opinion that such evidence was given, and that the defendants were not relieved from the consequence of such deceit.

The defendants, being desirous of carrying out some sewage works, had to invite tenders for the necessary contracts. Certain information had to be afforded to intending tenderers. With this object engineers, nominated and employed by the corporation, prepared certain plans. As I understand, these plans were furnished by the engineers to the corporation and by the latter issued to applicants, of whom the plaintiff company was one. Upon those plans a very important wall was made to appear as existing 9 ft. below Ordnance datum. It did not in fact run to such depth, and the defendants' engineers had no knowledge or reason to believe that it did. The representation appears to have been founded only on surmise. There is no doubt about the object of these false representations. In the arguments employed at your Lordships' Bar by counsel for the corporation, it was not, in face of the evidence, contended that, if the action had been brought against the engineers, there would not have been evidence of deceit, but certain replies were made to the primâ facie case against the defendants. In the first place, it was said that the plans were furnished by the engineers to the defendants, who are innocent of personal deceit. They passed the plans on, and so they innocently made the representation, not knowing of its untruth. The engineers, who knew of the nature of the representation, made no communication to the tenderers. I cannot admit the soundness of this argument. The engineers were employed by the corporation as their agents to make the plans for the purpose of their being communicated to the plaintiffs and others. In the course of this agency the alleged deceit was committed. Of course the defendants did not personally test the accuracy of the plans, but when they passed them on they surely must bear the burthen of their agents' conduct, and cannot repudiate the wrongful representation upon which they to a certain extent invited the tenderers to rely. In the courts below this argument on behalf of the defendants was not accepted, and I concur in thinking that it cannot be maintained.

PALLES, C.B., however, while accepting the view that the plaintiffs had produced primâ facie evidence of deceit, removed the case from the jury apparently upon the ground that cl. 43 of the specification protected the defendants from liability. The learned Chief Baron in respect of this clause expressed the opinion that the contractor was not entitled in point of law to say he acted upon the statement contained in the plans. He was told to act upon his own judgment, and

A ought to have done so. If this dictum be read as general in its terms, and so applied, it may be read as conferring considerable advantage upon the designers of fraud. At any rate, by inserting such a clause those who framed it would run a fair chance of the contractors saying, "I assume that those with whom I deal are honest and honourable men. I scout the idea of their being guilty of fraud. An inquiry testing the plan will be expensive and difficult, and so I will not make it." B The protecting clause might be inserted fraudulently, with the purpose and hope that, notwithstanding its terms, no test would take place. When the fraud succeeds, surely those who designed the fraudulent protection cannot take advantage of it. Such a clause would be good protection against any mistake or miscalculation, but fraud vitiates every contract and every clause in it. As a general principle I incline to the view that an express term that fraud shall not vitiate a C contract would be bad in law, but it is unnecessary in this case to determine whether special circumstances may not create an exception to that rule. I, therefore, think that the appeal must be allowed, and the case sent for a new trial, costs being allowed in accordance with the Lord Chancellor's opinion.

D **LORD ROBERTSON.**—I concur in the order proposed.

LORD ATKINSON.—I, like the noble and learned Lords who have preceded me, wish to guard myself against being supposed to express any opinion on the merits of this case or upon the weight or credibility of the evidence to the existence of which I shall have to refer. I think that there was abundant evidence given on behalf of the plaintiffs proper to be submitted to the jury with a view to establish E —first, that several of the maps and plans prepared by the defendants' engineers contained a representation that the North Harbour wall, the backbone of the scheme as it is styled, went down to a depth of 9 ft. below Ordnance datum; secondly, that this representation as to a most material matter was false in fact; thirdly, that it was acted upon by the plaintiffs; fourthly, that it was made by these F engineers recklessly, without any real belief in the existence of the fact represented. I assume for the present, as was held by PALLES, C.B., and both the Irish courts, that the defendants are responsible for the acts of these officers of theirs. In this state of facts it was the province of the jury to determine with what intent the representation was made. They would, from the fact that the representation was false, have been entitled to draw the inference that the persons who made it in- G tended that it should be acted upon. But in addition there is, in my opinion, substantive evidence to show that these engineers intended that the representation should be acted upon. And it is difficult, if not impossible, to see how the representation could induce the contractor to moderate his estimate unless he trusted in that representation and acted upon it.

As I understand the Chief Baron's decision, he withdrew from the jury the H questions which it would primâ facie have been the right of the plaintiffs to have left to them—not because there was not evidence given upon each proper for their consideration, but because he thought that the plaintiffs had by their contract deprived themselves of the right to have the question as to the intention with which the representation was made submitted to the jury at all—had in effect contracted that they would not allege that any representation such as that in fact made I was made with the intent that it should be acted upon, or that it had in fact been acted upon. In commenting on cl. 43 he expresses himself as follows:

> "My clear opinion is that, with that statement in the specification, upon which the contractor was to make his tender, he is not entitled, in point of law, to say, 'I acted to the extent of a hair's breadth upon the statement contained in these plans.' He was told that he should act upon his own judgment, and satisfy himself as to the dimensions, levels, character, and nature of the existing works, and, I regret to say, that if he has not done that, but on the con-

trary has acted upon their statement, he is not entitled to recover upon that as a representation made with intent to be acted upon."

The rule of law thus laid down by the Chief Baron would apply to any action for deceit founded upon plans and specifications. He makes no distinction between conscious and unconscious fraud, such as is made by the Court of Appeal—a distinction which, if sound, would appear to me to amount to this—that the contractor should be held to have a cause of action for deceit if he was deceived by a deliberate lie, but no cause of action if he was deceived by a false and reckless statement not really believed in by those who made it, though in law equally fraudulent and equally valid as the ground of such an action. With all respect for the learned judges presiding in the Court of Appeal, I think this distinction unsound, and, as I understood it, it was not insisted upon before your Lordships by the defendants' counsel.

It would appear to me that a clause such as cl. 43, deliberately introduced into a contract by a party to the contract, designed beforehand to save him from all liability for a false representation made recklessly and without any real belief in its truth, is as much "conceived in fraud" and as much "part of the fraud" as if the representation had been false to the knowledge of the person who made it, because, to use LORD BRAMWELL'S words in *Smith* v. *Chadwick* (5) (9 App. Cas. at p. 203):

> "An untrue statement as to the truth or falsity of which the man who makes it has no belief is fraudulent; for in making it, he affirms that he believes it, which is false."

If, therefore, the direction given to the jury is to be upheld on the grounds upon which it was purported to be based, it must, in my opinion, be because these several articles of the specification, on their true construction, are to be held to embody a contract by the plaintiffs that they in effect are not, under any circumstances, to have a remedy by action for deceit for any fraud which may be practised upon them by the defendants or by those acting on their behalf in the nature of a false representation—that is, a contract to submit to a fraud. As at present advised, I am inclined to think, on the authority of *Tullis* v. *Jacson* (6) and *Brownlie* v. *Campbell* (7), that such a contract would be illegal in point of law. And, with the most profound respect for the Chief Baron, I do not think that the articles of the specification relied upon can, on their true construction, be held to have had fraud, whether conscious or unconscious, within their purview or contemplation, or to apply at all to such a case of fraud as the present is alleged to be. They were, I think, intended to apply, and do apply, to inaccuracies, errors, and mistakes or matters of that sort, but not to fraud, whether of principal or agent or of both combined.

I observe that the Chief Baron refers to *Thorn* v. *London Corpn.* (8) as an authority for holding, to use his own words,

> "that the object and effect of this cl. 43 is to render the contractor a person who must depend upon his own knowledge, acquired by his own engineers";

but the action in that case was an action for breach of warranty, not for deceit. The contention of the plaintiff there was that, if a man "stipulates that work shall be done in a certain manner, he undertakes that it can be done in that manner," and the decision in effect was that no such undertaking is given by a stipulation of this kind. If the present action were founded on a warranty, expressed or implied, that the information given by the plans was accurate, or the works feasible, it may well be that cl. 43 would furnish a complete answer to the plaintiffs' claim; but that is an entirely different matter. As I understand the argument addressed to your Lordships by counsel for the defendants, they rested their case on grounds totally different from those on which the decision of the Court of Appeal was based. They did not rely upon the distinction between conscious and unconscious fraud at all, but contended that on a true construction of the contract,

incorporating as it does the plans and specifications, it was plain that the only representations made to the plaintiffs were made by the defendants themselves, not by their engineers; that it was admitted that they themselves gave to the plaintiffs such information as they had; that they did so innocently believing it to be true; that they did not warrant this information to be accurate; that they were, therefore, not responsible for the fraud of their engineers, if fraud there was; and that it was perfectly legitimate for them to protect themselves, as they contended that they had protected themselves, by this cl. 43 and the other articles referred to; and that they were, therefore, in point of law entitled to the direction which their counsel had asked for and obtained.

I do not think that this contention is sound. Indeed, counsel for the defendants was obliged to admit that, if the defendants had authorised their engineers to communicate directly to the contractor the plans, and, therefore, the representation appearing on the face of them, his clients would, within the authority of *Barwick* v. *English Joint Stock Bank* (2) and the cases following it, have been responsible for the fraud of the engineers thus made their agents, but that, inasmuch as the plans had been supplied to the contractor by the defendants themselves, the engineers were not their agents to make any communications to the plaintiffs concerning them. But by the terms of the contract the engineers are expressly named as the persons to prepare the plans for the "use" of the contractor. The tender was to be based upon them. The work was to be carried out in accordance with them. The engineers were, therefore, by the express terms of the contract, constituted the agents of the defendants to draw up the plans which must of necessity be communicated to or supplied to the contractor. Both the engineers and the defendants must, I think, be held to have intended that the plans should be so communicated or supplied. The engineers were admittedly acting within the scope of their authority in preparing the plans and forwarding them to the defendants or to their committee or their town clerk for transmission to the contractor. The committee was simply the medium through which the plans were to be transmitted; they had no power to alter them in any way. And it would appear to me that the representations contained in these plans might under these circumstances be held, as a matter of fact, to have been made by the engineers to the contractors as truly as if the documents had been sent by the engineers to them through the post or by the hand of a messenger. I think, therefore, that the defendants are responsible for the fraud of their engineers in framing the plans, if fraud there were.

On the whole, I am of opinion that the decision of the Court of Appeal in Ireland was wrong and should be reversed, and the judgment of the King's Bench Division affirmed, and that this appeal should be allowed and the order as to costs suggested by my noble friend on the woolsack made.

LORD COLLINS.—I agree.

Appeal allowed.

Solicitors: *Le Brasseur & Oakley*, for *Casey & Clay*, Dublin; *R. Leslie S. Badham*, for *Ignatius John Rice*, Dublin.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re BLEW. BLEW *v.* GUNNER

[CHANCERY DIVISION (Warrington, J.), February 24, 1906]

[Reported [1906] 1 Ch. 624; 75 L.J.Ch. 373; 95 L.T. 382; 54 W.R. 481]

Perpetuities—Will—Discretionary trust—Maintenance of son and dependants—Limitation—Remoteness.

A testator by his will devised and bequeathed real and personal estate to trustees upon trust to apply the income thereof in such proportions and generally in such manner as to them, in their absolute discretion, should seem best for the support of his "son W. and his wife and children, or any of them," or to accumulate the same or any part thereof, at their like discretion, for the benefit of the children of his son who should become entitled to the corpus of the property under the trust thereinafter contained, and subject to such discretionary trust he directed his trustees to pay the income to his son during his life and after his decease to his widow during her life or widowhood, and after the death of the survivor to stand possessed of as well the corpus as the income upon trust for the children of his son who should attain twenty-one.

Held: the discretionary trust for maintenance was limited to the life of W., for, if not so limited, it was void for remoteness.

Re Wise (1), [1896] 1 Ch. 281 and *Re Watson* (2), [1892] W.N. 192, not followed.

Notes. Distinguished: *Re Cassel, Public Trustee* v. *Mountbatten*, [1926] Ch. 358. Followed: *Re Coleman's Will Trusts, Public Trustee* v. *Coleman*, [1936] 2 All E.R. 225: Referred to: *Kennedy* v. *Kennedy*, [1914] A.C. 215.

As to equitable interests subject to the rule against perpetuities, see 29 HALSBURY'S LAWS (3rd Edn.) 294–296; and for cases see 37 DIGEST 76–79.

Cases referred to:

(1) *Re Wise, Jackson* v. *Parrott*, [1896] 1 Ch. 281; 65 L.J.Ch. 281; 73 L.T. 743; 44 W.R. 310; 37 Digest 78, *191*.

(2) *Re Watson, Cox* v. *Watson*, [1892] W.N. 192; 27 L.J.N.C. 174; 37 Digest 118, *501*.

(3) *Gooding* v. *Read* (1853), 4 De G.M. 510; 43 E.R. 606, L.JJ.; 37 Digest 118, *500*.

Also referred to in argument:

Re Veale's Trusts (1876), 4 Ch.D. 61; on appeal (1877), 5 Ch.D. 622; 37 Digest 112, *443*.

Originating Summons to decide whether a trust for maintenance was limited to a lifetime or void for remoteness.

William John Blew by his will, dated Oct. 19, 1887, appointed G. B. Mason and N. H. Walker executors and trustees thereof, and gave and devised unto them his freehold messuage No. 17, Cockspur Street, together with the goodwill of the business carried on thereon, and known by the name of "Bayleys," and his house No. 13, Warwick Street, used as a warehouse for "Bayleys," together with all the stock, furniture, fittings, and contents whatsoever in or about the several messuages or premises or either of them, upon trust that his trustees should, so long as they should in their absolute discretion deem fit or advantageous for his estate, carry on the business called "Bayleys," and apply the net income arising from the same in manner thereinafter provided. And the testator gave to his trustees a power of sale over the messuages and premises

and goodwill, all of which were thereinafter included in the term "Bayleys." And he directed his trustees

> "To apply the said net annual income of 'Bayleys' aforesaid, and the dividends or annual income of the securities for the time being representing the proceeds of the sale thereof, or of any part thereof, in such proportions and generally in such manner as to my said trustees in their absolute discretion shall seem best, for the support of my son William Charles Arlington Blew and his wife and children, or any of them, or to accumulate the same or any part thereof at their like discretion for the benefit of the children of my said son who shall become entitled to the capital of 'Bayleys' under the trust hereinafter contained; and, subject to such discretionary trust, I direct my said trustees to pay the said net annual income and the dividends or annual income aforesaid to my said son during his life, and from and after his decease to his widow (if any) during her life and so long as she shall remain his widow, and from and after the death of the survivor of them, or the marriage of his widow, I declare that my said trustees shall stand possessed of 'Bayleys' aforesaid and of the securities and investments by which the proceeds of sale thereof or any part thereof may for the time being be represented, as well the capital as the income, upon trust for the child or children of my said son who being sons attain the age of twenty-one years or being daughters attain that age or marry under it, if more than one in equal shares as tenants in common."

The testator died on Dec. 27, 1894. William Charles Arlington Blew married Martha Blew on Mar. 1, 1883, and died on June 28, 1904, leaving his widow and a son, William Walker Humphreys Blew, who was born on Sept. 7, 1883, and attained the age of twenty-one on Sept. 6, 1904. On Oct. 6, 1905, Martha Blew, who had not remarried, and W. W. H. Blew, claiming to be sole beneficiaries, signed a request to the trustees of the will to hand over the fund representing the proceeds of the sale of "Bayleys" to their nominees. W. W. H. Blew had recently mortgaged his reversionary interest under the will to the Century Insurance Company, Ltd., as security for a loan. The present summons was taken out by the widow and her son against the trustees of the will and the Century Insurance Co., Ltd., for the determination of the question whether, upon the plaintiffs executing (if necessary) a proper release, and subject to the payment of the costs, charges, and expenses of the defendant trustees, and any death duties (if any) for which they might remain liable, the defendant trustees were bound at the request of the plaintiffs and the defendant company to transfer the property representing the proceeds of the sale of "Bayleys" and the accumulations of income thereof respectively in their hands or under their control into the joint names of the plaintiffs' nominees.

Norton, K.C., and *Van Neck* for the plaintiffs.
Howland Jackson, for the Century Insurance Co.
Rowden, K.C., and *Gordon Fellowes* for the trustees.

WARRINGTON, J.—The question in this case is whether a certain discretionary trust for maintenance contained in the will of William John Blew is still exercisable by trustees or not. [HIS LORDSHIP stated the facts, and continued:] It is said in the first place that on the construction of the will the discretionary trust is confined to the life of W. C. A. Blew. The trust is to apply to the income "for the support of my son W. C. A. Blew and his wife and children or any of them." It is contended that that trust is limited to the life of W. C. A. Blew by reason of the use of the word "wife" showing that the very object of the power is to be the person who, while the power is exercisable, fulfils the description of the wife of W. C. A. Blew, and therefore, that the power is not

exercisable after the death of W. C. A. Blew when the person who had been his wife would not be properly so described. Support is given to the contention by the trusts of the income subject to the discretionary trust, in which the testator refers not to the wife but to the widow of his son when he is referring to her after the death of his son. On the whole, I think, on the construction of the trust, that the plaintiffs are right, and that this trust is limited to the life of W. C. A. Blew. That is my view of the construction, but, of course, anybody else might take a different view.

It has, however, been argued that if that view is not the correct one, and that if the trust is continued beyond the life of W. C. A. Blew, it is void for remoteness. I think, therefore, it is desirable to see whether that is so or not. In the first place how long is the trust to continue? If it is not limited to the life of W. C. A. Blew, plainly I think it must continue during the lives of all his children and the life of the survivor of them. It is "for the support of W. C. A. Blew and his wife and children, or any of them." It seems to me that, if that is the true construction of the trust, it would be exercisable so long as any child of W. C. A. Blew is living. If that is so, it is necessary to see whether that involves any breach of the rule against perpetuities. In that view of it the trust might continue for a period exceeding twenty-one years after the death of W. C. A. Blew. It would be exercisable during the life of any child of W. C. A. Blew whose life might last more than twenty-one years after the death of W. C. A. Blew. That is quite clear. Accordingly, it is a trust which might be exercisable beyond the period allowed by the rule against perpetuities.

It might further be exercised in regard to yearly or half-yearly payments of income—that is to say, in respect of a fund which might not come into existence for more than twenty-one years after the death of W. C. A. Blew. Further, with regard to the shares into which that fund would be distributable, those shares might not be ascertainable until more than twenty-one years after the death of W. C. A. Blew, and the persons who were to benefit by the exercise of the power might not be ascertained or ascertainable until more than twenty-one years after the death of W. C. A. Blew. It seems to me, therefore, on these considerations, that the trust, assuming the construction which would not confine it to the lifetime of W. C. A. Blew is the correct one, would be one which would infringe the rule against perpetuities.

So far I have dealt with the matter independently of authority. But it is said that *Re Wise* (1) is a case directly in point and against the view that I have expressed. It is quite true that the decision in that case is directly in point. The testator there bequeathed to trustees the residue of his personal estate upon trust for investment, and to apply the whole income or such part thereof as his trustees or trustee for the time being in their absolute discretion should think fit in or towards the maintenance, education, apprenticeship, or in any other manner for the benefit of the child or children of the testator's sister until they should respectively attain the age of twenty-three, and to accumulate and invest as capital any unapplied portion of the income. Then there was a trust of the capital and income of investments for the children of the testator's sister who should attain twenty-three, which was void as infringing the rule against perpetuities. It was there contended that the trust for the application of the fund for maintenance was separable from the trust of the capital and was not void as infringing the rule against perpetuities. The only point with which the learned judge dealt in his judgment was whether that trust for maintenance was separable. It was not argued that, if it was separable, it was void as infringing the rule against perpetuities. It was contended on behalf of the plaintiffs that the trust for maintenance out of the income could be separated from the gift of the capital, which had been held void for remoteness, and was perfectly valid; that it was an immediate gift, and was, at any rate, valid for the period of twenty-one years from the death of the testator, and for that *Gooding* v. *Read* (3) and *Re*

Watson (2) were cited. The learned judge in giving his decision said ([1896] 1 Ch. at p. 285):

> "As regards the question of construction I thought on reading the will that it was reasonably clear that the trust for the maintenance out of the income of a fund up to the age of twenty-three of persons who are described was an entirely different and separate trust from the trust of the capital of the fund for the same persons on their attaining the age of twenty-three. And two cases have been cited which show that my opinion, arrived at independently on this will, is identical with the view which has been taken by the court in other similar cases. One of these cases (*Gooding* v. *Read* (3)), in the Court of Appeal, was very like the present case; and the other (*Re Watson* (2)), before CHITTY, J., was even stronger. In my opinion, therefore, this trust for maintenance is good."

The learned judge, therefore, finding that the trust for maintenance was separable, said that in his opinion the trust was good.

He did not discuss, nor was it discussed before him as it was discussed before me, whether, assuming the trust to be separable, there was anything in it, taking it as a separate trust, to infringe the law against perpetuities. I cannot help thinking that the learned judge was misled by the headnote in *Gooding* v. *Read* (3), which is clearly inaccurate. It is this (4 De G.M. 510):

> "A testator devised lands upon trust to pay the rents and profits to a tenant for life, and, after her decease and until her youngest child should attain twenty-five, to pay the rents and profits for the maintenance of her children, and, on the youngest child attaining twenty-five, to sell and divide the proceeds among all the children of the tenant for life then living, and the issue of such as should be dead: Held, that the trust for maintenance was separable from the rest, and was not bad for remoteness, whether the trust for sale was so or not."

There, as in *Re Wise* (1), the gift of the capital was void for remoteness, and from the headnote it would appear that the trust for maintenance was actually the same, as we have here—namely, for all or any of the children, and if I am right in the conclusion to which I have come as to the true effect of this will, the trust for maintenance in that case, as stated in the headnote, would also have been void for remoteness. But when one comes to look at the quotation from the will in *Gooding* v. *Read* (3) it is seen that the headnote is inaccurate. The trust for maintenance, as stated in the body of the report, is this:

> "To pay and apply such rents, issues, and profits equally to or for the benefit of the children of my said daughters living at her decease until the youngest of such children shall have attained the age of twenty-five years."

That was, therefore, simply a gift of life interests to each of the children in equal shares until the youngest attained twenty-five. There was no discretion given to the trustees as to the application of the fund. It was simply a trust to apply the income in equal shares, and there was obviously nothing infringing the rule against perpetuities. The lords justices gave no reasons in their judgment, but merely said in their opinion the good was separable from the bad. I cannot help thinking that when that case was cited to NORTH, J., he read the headnote only, and, the case being cited to him only on the question whether the trust was separable or not, his attention was not drawn to the fact that the question of infringement of the rule against perpetuities never really arose as to the trust of the income in that case, although it did arise in the case before him.

It seems, therefore, that I am not compelled to decide the present case on the footing that I am bound by in *Re Wise* (1). Then there is *Re Watson* (2), which is very unsatisfactory, because no reasons for the judgment are given in the report. There a testator devised his real estate to trustees upon trust for sale

and to invest £3,000 and pay the income to his wife for life, and after her death to hold the whole in trust for all the children or any the child of his son George who should attain the age of twenty-four share and share alike, with benefit of survivorship in case any should die under that age without issue. There, be it observed, the trust was for all the children that should attain twenty-four and in equal shares, which is the material point. That trust was, of course, void for remoteness. Then there was a direction that the trustees should, after the death of his wife, apply the whole or such part as they should in their discretion think fit, of the income of the £3,000 for, or towards the maintenance or education of all or any of such children. It was held that the gift of the £3,000 to the children of George was void for remoteness, but that the maintenance clause was separable from the rest of the gift and was valid, and that such of the children only who were under twenty-one took the benefit of that trust; and it was stated that *Gooding* v. *Read* (3) was followed. There, again, one does not know what were the other provisions of the will, or what were the reasons of the learned judge. All one knows is that *Gooding* v. *Read* (3), with the defect I have mentioned, was cited to the learned judge and was followed by him. It seems to me, therefore, that neither *Re Watson* (2) nor *Re Wise* (1) is a satisfactory authority upon which to act, and that I must, therefore, follow my own view, which is that the trust for maintenance in the present case is altogether void for remoteness. The result is that it is not now exercisable, and that the widow and child take absolutely.

Solicitors: *Wingfield & Blew*; *Munby & Nevile*; *Fladgate & Co.*

[*Reported by* D. R. Chalmers-Hunt, Esq., *Barrister-at-Law.*]

WOODALL *v.* CLIFTON

[Court of Appeal (Vaughan Williams, Romer and Stirling, L.JJ.), May 12, 15, 16, June 6, 1905]

[Reported [1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257; 54 W.R. 7; 21 T.L.R. 581]

Landlord and Tenant—Lease—Option to purchase reversion—Covenant not running with the land—Provision to purchase land leased at specified price during term—Stat. 32 *Hen.* 8, *c.* 34.

A lease of land for ninety-nine years gave an option to the lessee to purchase the freehold at a fixed price at any time during the term. In an action brought against the successor in title of the lessor by an assignee of the lease who claimed the right to exercise the option and have a conveyance of the land,

Held: the statute 32 Hen. 8, c. 34, did not apply to such a provision so as to make the liability to perform it run with the reversion, and the option could not be enforced against the assigns of the lessor.

Notes. The statute 32 Hen. 8, c. 34 (1540), has been replaced by ss. 141 and 142 of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 730, 734.)

Applied: *Re Leeds and Batley Breweries and Bradbury's Lease*, *Bradbury* v. *Grimble & Co., Ltd.*, [1920] All E.R. 270; *Sherwood* v. *Tucker*, [1924] All E.R.Rep. 354. Considered: *Re Hunter's Lease*, *Giles* v. *Hutchings*, [1942]

All E.R. 27; *Re Johnston's Application, Johnston* v. *Shobrook*, [1950] 1 All E.R. 613. Followed: *Weg Motors, Ltd.* v. *Hales* [1961] 3 All E.R. 181. Referred to: *Worthing Corpn.* v. *Heather*, [1906] 2 Ch. 532; *Dewar* v. *Goodman*, [1908] 1 K.B. 94; *Hutton* v. *Watling*, [1947] 2 All E.R. 641; *Stromdale and Ball, Ltd.* v. *Burden*, [1952] 1 All E.R. 59.

As to options in a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 470–475; and for cases see 30 DIGEST (Repl.) 495–502.

Cases referred to:

(1) *London and South Western Rail. Co.* v. *Gomm* (1881), 20 Ch.D. 562; 51 L.J.Ch. 193; 45 L.T. 505; 30 W.R. 321; on appeal (1882), 20 Ch.D., at p. 576, C.A.; 37 Digest 89, *259*.

(2) *Re Adams and Kensington Vestry* (1883), 24 Ch.D. 199; 52 L.J.Ch. 758; 48 L.T. 958; 32 W.R. 120; affirmed (1884), 27 Ch.D. 394; 54 L.J.Ch. 87; 51 L.T. 382; 32 W.R. 883, C.A.; 20 Digest 357, *961*.

Also referred to in argument:

Spencer's Case (1583), 5 Co. Rep. 16a; 77 E.R. 72; 31 Digest (Repl.) 153, *2907*.

Webb v. *Russell* (1789), 3 Term Rep. 393; 100 E.R. 639; 31 Digest (Repl.) 240, *3744*.

Roe d. Bamford v. *Hayley* (1810), 12 East, 464; 104 E.R. 181; 31 Digest (Repl.) 67, *2240*.

Sampson v. *Easterby* (1829), 9 B. & C. 505; affirmed sub nom. *Easterby* v. *Sampson* (1830), 6 Bing. 644; 1 Cr. & J. 105; 4 Moo. & P. 601; 130 E.R. 1429, Ex. Ch.; 31 Digest (Repl.) 154, *2920*.

Congleton Corpn. v. *Pattison* (1808), 10 East, 130; 103 E.R. 725; 31 Digest (Repl.) 152, *2903*.

Bally v. *Wells* (1769), Wilm. 341; 3 Wils. 25; 97 E.R. 130; 31 Digest (Repl.) 154, *2919*.

Isteed v. *Stoneley* (1580), 1 And. 82; 123 E.R. 365; 31 Digest (Repl.) 69, *2250*.

Simpson v. *Clayton* (1838), 4 Bing.N.C. 758; 1 Arn. 299; 6 Scott, 469; 8 L.J.C.P. 59; 2 Jur. 892; 132 E.R. 981; 31 Digest (Repl.) 67, *2241*.

Williams v. *Earle* (1868), L.R. 3 Q.B. 739; 9 B. & S. 740; 37 L.J.Q.B. 231; 19 L.T. 238; 33 J.P. 86; 16 W.R. 1041; 31 Digest (Repl.) 410, *5399*.

Vernon v. *Smith* (1821), 5 B. & Ald. 1; 106 E.R. 1094; 31 Digest (Repl.) 400, *5295*.

Hyde v. *Skinner* (1723), 2 P. Wms. 196; 24 E.R. 697, L.C.; 31 Digest (Repl.) 77, *2313*.

Horsey Estate, Ltd. v. *Steiger*, [1899] 2 Q.B. 79; 68 L.J.Q.B. 743; 80 L.T. 857; 47 W.R. 644; 15 T.L.R. 367, C.A.; 31 Digest (Repl.) 413, *5422*.

Manchester Ship Canal Co. v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352; 69 L.J.Ch. 850; 83 L.T. 274; 16 T.L.R. 429; 44 Sol. Jo. 515; affirmed [1901] 2 Ch. 37; 70 L.J.Ch. 468; 84 L.T. 436; 49 W.R. 418; 17 T.L.R. 410; 45 Sol. Jo. 394, C.A.; 37 Digest 81, *210*.

Hare v. *Burgess* (1857), 4 K. & J. 45; 27 L.J.Ch. 86; 30 L.T.O.S. 255; 22 J.P. 84; 3 Jur.N.S. 1294; 6 W.R. 144; 70 E.R. 19; 31 Digest (Repl.) 80, *2333*.

Walsh v. *Secretary of State for India* (1863), 10 H.L.Cas. 367; 2 New Rep. 339; 32 L.J.Ch. 585; 8 L.T. 839; 9 Jur.N.S. 757; 11 W.R. 823; 11 E.R. 1068, H.L.; 42 Digest 706, *1232*.

Witham v. *Vane* (1883), Challis's Real Property, App. V., H.L.; 37 Digest 80, *201*.

Borland's Trustee v. *Steel Bros. & Co., Ltd.*, [1901] 1 Ch. 279; 70 L.J.Ch. 51; 49 W.R. 120; 17 T.L.R. 45; 37 Digest 80, *199*.

Lord Ranelagh v. *Melton* (1864), 2 Drew. & Sm. 278; 5 New Rep. 101; 34 L.J.Ch. 227; 11 L.T. 409; 28 J.P. 820; 10 Jur.N.S. 1141, 13 W.R. 150; 62 E.R. 627; 30 Digest (Repl.) 499, *1419*.

Weston v. *Collins* (1865), 5 New Rep. 345; 34 L.J.Ch. 353; 12 L.T. 4; 29 J.P. 409; 11 Jur.N.S. 190; 13 W.R. 510, L.C.; 30 Digest (Repl.) 499, *1420*.

Nicholson v. *Smith* (1882), 22 Ch.D. 640; 52 L.J.Ch. 191; 47 L.T. 650; 31 W.R. 471; 31 Digest (Repl.) 75, *2297*.

Collison v. *Lettsom* (1815), 6 Taunt. 224; 2 Marsh. 1; 128 E.R. 1020; 31 Digest (Repl.) 152, *2904*.

Rose v. *Watson* (1864), 10 H.L.Cas. 672; 3 New Rep. 673; 33 L.J.Ch. 385; 10 L.T. 106; 10 Jur.N.S. 297; 12 W.R. 585; 11 E.R. 1187, H.L.; 40 Digest (Repl.) 193, *1561*.

Re Hollis' Hospital Trustees and Hague's Contract, [1899] 2 Ch. 540; 68 L.J.Ch. 673; 81 L.T. 90; 47 W.R. 691; 43 Sol. Jo. 644; 37 Digest 72, *133*.

Re Ashforth, *Sibley* v. *Ashforth*, post p. 275; [1905] 1 Ch. 535; sub nom. *Re Ashforth's Trusts*, *Ashforth* v. *Sibley*, 74 L.J.Ch. 361; 92 L.T. 534; 53 W.R. 328; 21 T.L.R. 329; 49 Sol. Jo. 350; 37 Digest 98, *336*.

Edwards v. *West* (1878), 7 Ch.D. 858; 47 L.J.Ch. 463; 38 L.T. 481; 26 W.R. 507; 30 Digest (Repl.) 497, *1410*.

Green v. *Low* (*No. 1*) (1856), 22 Beav. 625; 27 L.T.O.S. 269; 20 J.P. 564; 2 Jur.N.S. 848; 4 W.R. 669, 52 E.R. 1249; 30 Digest (Repl.) 497, *1407*.

Thomas v. *Hayward* (1869), L.R. 4 Exch. 311; 38 L.J.Ex. 175; 20 L.T. 814; 31 Digest (Repl.) 165, *3007*.

Doughty v. *Bowman* (1848), 11 Q.B. 444; 17 L.J.Q.B. 111; 12 Jur. 182; 116 E.R. 543; 31 Digest (Repl.) 150, *2890*.

Moore v. *Clench* (1875), 1 Ch.D. 447; 45 L.J.Ch. 80; 34 L.T. 13; 24 W.R. 169; 40 Digest (Repl.) 778, *2616*.

Hope v. *Gloucester Corpn.* (1855), 7 De G.M. & G. 647; 25 L.J.Ch. 145; 26 L.T.O.S. 144; 2 Jur.N.S. 27; 4 W.R. 138; 44 E.R. 252, L.JJ.; 38 Digest (Repl.) 850, *655*.

Redington v. *Browne* (1893), 32 L.R.Ir. 347; 37 Digest 82, *216i*.

Roe d. Hunter v. *Galliers* (1787), 2 Term Rep. 133; 100 E.R. 72; 37 Digest 73, *135*.

Chandos v. *Brownlow* (1791), 2 Ridg. Parl. Rep. 345; 31 Digest (Repl.) 68, **719*.

Egerton v. *Earl Brownlow* (1853), 4 H.L.Cas. 1; 8 State Tr.N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 12 Digest (Repl.) 269, *2072*.

Townley v. *Bedwell* (1808), 14 Ves. 591; 33 E.R. 648, L.C.; 40 Digest (Repl.) 211, *1716*.

Lawes v. *Bennett* (1785), 1 Cox, Eq. Cas. 167; 29 E.R. 1111; 20 Digest 338, *807*.

Re Oliver's Settlement, *Evered* v. *Leigh*, [1905] 1 Ch. 191; 74 L.J.Ch. 62; 53 W.R. 215; 21 T.L.R. 61; 40 Digest (Repl.) 687, *1833*.

Appeal from a declaration of WARRINGTON, J., raising the question whether an option given to a lessee by the lessor to purchase the freehold at any time during the term of ninety-nine years at a fixed price was valid, or was void as creating an executory interest in land to arise on a future event which might not happen within the limits of the rule against perpetuities.

By a lease dated July 6, 1867, about six acres of land at Chislehurst were demised by the then owner, N. W. J. Strode, to Viscount Walden for a term of ninety-nine years at the yearly rent of £142. This lease contained the following clause:

"Provided always and it is hereby agreed and declared that in case the said Viscount Walden, his heirs or assigns, shall at any time during the said term become desirous of purchasing the fee simple of and in the said lands and premises hereby demised, or any portion thereof not being less than one acre . . . at and after the rate of £500 per acre, and such further sum for the timber thereon as shall be ascertained by a fair valuation thereof, and upon receipt of the amount of the purchase money for the same, the said N. W. J. Strode, his heirs or assigns, shall and will execute a conveyance or other assurance of the said land and premises with the timber thereon in

favour of the said Viscount Walden, his heirs and assigns, upon the same terms as to title and otherwise as the said Viscount Walden and other purchasers of portions of the Camden Park estate have hitherto completed their purchases."

By a lease dated July 14, 1869, about four acres of land in Chislehurst and Bromley were demised by the same lessor to the same lessee for a term of ninety-nine years at the yearly rent of £112, with an option to purchase similar in its terms to that contained in the lease of 1867, except that the option was reserved to the lessee, his "executors, administrators, and assigns," instead of to his "heirs and assigns," and that the price per acre was to be £600. The lands and premises comprised in and demised by these two leases were now vested in the plaintiff for the respective residues now unexpired of the terms thereby granted, and he claimed that as assignee of these terms he was entitled to the benefit of both of the options if the same were valid and subsisting options. Subject to the leases and the options therein contained, the defendants were the owners in fee simple of the lands comprised in the leases. Notice to purchase the whole of the premises demised by the two leases, in pursuance of the terms of the options, had been given by the plaintiff to the defendants, but the defendants, who were trustees, having been advised that the options were invalid as against them, declined to complete the purchase. The plaintiff thereupon commenced the present action against the defendants, and by his writ claimed a declaration that the two options to purchase were valid and subsisting options which had been duly exercised by the plaintiff, and that the plaintiff was entitled to the benefit thereof and to enforce the same against the defendants.

WARRINGTON, J., held that the proviso in question did in terms create an estate or executory interest in land which might arise on an event which might occur after the period allowed by the rule against perpetuities; and, if so, it was void as abnoxious to the rule, on the authority of *London and South Western Rail. Co.* v. *Gomm* (1); also that the circumstance of the covenant being contained in a lease, and not in a conveyance, did not make the case an exception to that rule. His Lordship accordingly made a declaration that the two options were not valid and subsisting options to purchase which could be enforced against the defendants by way of specific performance. The plaintiff appealed.

Upjohn, K.C., Cave, K.C., and *H. W. Marigold* for the plaintiff.
Rowden, K.C., and *E. Beaumont* for the defendants.

Cur. adv. vult.

June 6, 1905. **ROMER, L.J.**, read the following judgment of the court.—A contract in a lease giving an option of purchase might be good, without regard to the provisions of the statute 32 Hen. 8, c. 34, as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease. But in the present case it is clear that the plaintiff cannot succeed on such a ground. Unless the covenant or proviso giving the option of purchase could be said to run with the land by virtue of the provision of the statute, then the plaintiff must fail. Undoubtedly the statute is in its wording very wide, but it has long been held that some limitations must be implied; as, for example, that the statute does not apply to covenants which do not touch or affect the land demised, or to assigns where the covenants relate to things not in esse, and "assigns" are not purported to be bound.

The question in the present case is whether the statute was intended to cover, or can be construed as covering, such a covenant or provision as we have now to consider, so as to make the liability to perform it run with the reversion. We have come to the conclusion that that question must be answered in the negative. The covenant is one aimed at creating, at a future time, the position of vendor

and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy, or its terms. Properly regarded, it cannot, in our opinion, be said to directly affect or concern the land, regarded as the subject-matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so. It is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion, though the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify. An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option, if exercised, would or might be to destroy the tenancy. It is concerned with something wholly outside the relations of landlord and tenant with which the statute of Hen. 8 was dealing.

The results of allowing such a provision to come within the purview of the statute, and to be enforced as running with the land, would lead to very anomalous and most undesirable results as to perpetuities, conversion, and otherwise, which this court should not validate unless it is obliged to do so. And we cannot think that the court is so obliged on the true construction and effect of the statute. It is strange that there is no direct authority on the point. There are cases where the option has been exercised by the tenant and accepted by the landlord, and subsidiary questions have had to be decided which naturally would be dealt with on the footing that what had already been done could not or need not be questioned by the court; as, for example, *Re Adams and Kensington Vestry* (2). But such cases are really of no assistance for the decision of the present case. In our judgment the appeal should be dismissed.

Solicitors: *Preston, Stow & Preston*; *Fladgate & Co.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

Re PERKINS. BROWN *v.* PERKINS

[Chancery Division (Swinfen Eady, J.), October 24, 25, 1907]

[Reported [1907] 2 Ch. 596; 77 L.J.Ch. 16; 97 L.T. 706]

Annuity—Annuity charged on residue—Capital and income—Apportionment.

A testator, who had covenanted by deed to pay an annuity to his wife during her life, by will gave half his residue to trustees upon trust for his daughter for life if and when she attained the age of twenty-five, with remainders over. While the daughter was under twenty-five the income, subject to a sum for maintenance, was to be added to capital. The residue was earning three per cent. interest. The daughter having attained the age of twenty-five,

Held: the payment of each instalment of the annuity must be dealt with as it accrued; there must be ascertained what sum set aside at the testator's death and accumulated at three per cent. simple interest from the date when the daughter attained the age of twenty-five would answer the moiety of the instalment of the annuity charged on her share; that sum must then be attributed to capital and the rest of the payment to income.

Principle of *Allhusen* v. *Whittell* (1) (1867), L.R. 4 Eq. 295, applied.

Notes. Followed: *Re Thompson, Thompson* v. *Watkins*, [1908] W.N. 195; *Re Poyser, Landon* v. *Poyser*, [1908–10] All E.R.Rep. 374. Considered: *Re Fenwick, Fenwick* v. *Stewart*, [1936] 2 All E.R. 1096; *Re Darby, Russell* v. *Macgregor*, [1939] 3 All E.R. 6. Referred to: *Re Popham, Buller* v. *Popham* (1914), 58 Sol. Jo. 673; *Carlish* v. *I.R.Comrs.*, [1958] 38 Tax Cas. 37.

As to the payments of annuities charged on residue, see 16 Halsbury's Laws (3rd Edn.) 380; and for cases see 23 Digest (Repl.) 470–480.

Cases referred to:

(1) *Allhusen* v. *Whittell* (1867), L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695; 23 Digest (Repl.) 475, *5450*.

(2) *Re Harrison, Townson* v. *Harrison* (1889), 43 Ch.D. 55; 59 L.J.Ch. 169; 61 L.T. 762; 38 W.R. 265; 23 Digest (Repl.) 478, *5466*.

(3) *Re Bacon, Grissel* v. *Leathes* (1893), 62 L.J.Ch. 445; 68 L.T. 522; 41 W.R. 478; 37 Sol. Jo. 340; 3 R. 459; 23 Digest (Repl.) 478, *5467*.

Also referred to in argument:

Re Henry, Gordon v. *Gordon*, [1907] 1 Ch. 30; 76 L.J.Ch. 74; 95 L.T. 776; 23 Digest (Repl.) 479, *5472*.

Re Dawson, Arathoon v. *Dawson*, [1906] 2 Ch. 211; 75 L.J.Ch. 604; 94 L.T. 817; 54 W.R. 556; 23 Digest (Repl.) 478, *5468*.

Re Muffett, Jones v. *Mason* (1888), 39 Ch.D. 534; 57 L.J.Ch. 1017; 59 L.T. 499; 37 W.R. 9; 4 T.L.R. 738; 23 Digest (Repl.) 478, *5465*.

Adjourned Summons to ascertain the apportionment of an annuity between capital and income.

By deed in 1886 Perkins, the testator, gave his wife an annuity for life payable annually in advance. By his will the testator settled £10,000 upon his sister and her children, and gave his residuary estate upon trust as to one moiety for his son and as to the other moiety for his daughter, the income of these shares to be paid to them for life, or (in the case of the son) until bankruptcy, if and when they should respectively attain the age of twenty-five years, and the capital was directed to be held in trust for their children with gifts over in default of issue. There was a power of maintenance, and surplus income was directed to be accumulated and added to capital. The testator died in 1888, and since his death the annuity had been paid out of the general income of the residuary estate.

The daughter attained twenty-five on Oct. 8, 1907, and it was now desired to ascertain the amount of the moiety to the income of which she was entitled. The son had not attained the age of 25 at the material time. A

Farrer for the trustees.
Micklem, K.C., and *Waggett* for the tenant for life.

B

SWINFEN EADY, J.—The question is how best to apply the principle of *Allhusen* v. *Whittell* (1). In *Re Harrison* (2) NORTH, J., has pointed out (43 Ch.D. at p. 61) that the decision in *Allhusen* v. *Whittell* (1) was

> "based on the principle that the tenant for life of the residue of a testator's estate is not tenant for life of the whole estate, but of the whole estate minus something, and that something must be ascertained before it can be said of what he is tenant for life." C

If in the present case I were to hold that all the instalments of the annuity should be paid out of capital, I should not be applying the principle of *Allhusen* v. *Whittell* (1), and should be throwing a greater burden upon the remainderman than if the principle was properly applied. Thus in the case of an estate of £3,000 and an annuity of £300 paid wholly out of capital, the estate would be exhausted in ten years, during which the tenant for life would be enjoying the whole income of what was left for the time being. This would be absolutely unfair as between the tenant for life and remainderman. The true rule is that contended for by the tenant for life in *Re Bacon* (3), that is, to deal with each payment as it accrues, to ascertain what sum set aside at the testator's death and accumulated at a certain rate of interest, would have met the particular payment, and to attribute that sum to capital, and the rest of the payment to income. That will be an exact application of *Allhusen* v. *Whittell* (1), and in that way each part of the estate will bear its proper share. In the present case it must be ascertained in respect of each instalment as it became payable what sum at 3 per cent. simple interest from the date when the daughter attained twenty-five would answer the moiety of the instalment charged on her share, and such part of the moiety must be attributed to capital and the remaining part to income. D E F

Solicitors: *Frank Richardson & Sadlers*; *Laytons*.

[*Reported by* G. B. HAMILTON, ESQ., *Barrister-at-Law*.]

A

Re ASHFORTH. SIBLEY *v.* ASHFORTH

[CHANCERY DIVISION (Farwell, J.), February 24, March 10, 1904]

[Reported [1905] 1 Ch. 535; 74 L.J.Ch. 361; 92 L.T. 534;
B 53 W.R. 328; 21 T.L.R. 329; 49 Sol. Jo. 350]

Perpetuities—Will—Application of rule—Application to legal contingent remainders.

Will—Contingent interest—Abrogation of contingency—Avoidance of devise of estate tail to survivor.

A testatrix devised real estate to trustees and their heirs upon trust to
C receive the rents and profits, and divide and pay the same to her three children, A., B., and C., and the survivors or survivor of them, for life, and upon the death of the survivor of A., B., and C., she directed her trustees to pay and divide the said sums unto and equally among such of the children of A., B., and C. (such children to be born in her lifetime or within twenty-one years of her death) who should be living on the Lady Day or Michaelmas Day pre-
D ceding such payment or division, and after the death of all the children of A., B., and C. except one, she devised her realty to such surviving child in tail.

Held: (i) the rule against perpetuities applied to legal contingent remainders as well as to equitable limitations; (ii) as one or other of the children of A., B., and C. would necessarily become entitled to the estate tail, they could combine together to destroy the contingency and take the property at once;
E (iii) the devise of such estate tail to the survivor of the children of A., B., and C. was void for remoteness.

Notes. The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or issue of an unborn person was abolished as to instruments coming into operation after 1926 by the
F Law of Property Act, 1925, s. 161 (20 HALSBURY'S STATUTES (2nd Edn.) 768) and is now only applicable to limitations or trusts created by an instrument coming into operation before 1926. Since 1925 only estates in fee simple absolute in possession, terms of years absolute and certain interests and charges can exist as legal estates or interests in or over land. All other estates or interests take effect in equity. See the Law of Property Act, 1925, s. 1 (ibid. p. 432).

G Referred to: *Woodall* v. *Clifton*, ante p. 268; *Re Nash*, [1909] 2 Ch. 450; *Re Stamford and Warrington*, [1912] 1 Ch. 343; *Re Coleman, Public Trustee* v. *Coleman*, [1936] Ch. 528; *Re Legh's Resettlement Trusts, Public Trustee* v. *Legh*, [1937] 3 All E.R. 823; *Knightsbridge Estates Trust, Ltd.* v. *Byrne*, [1938] 2 All E.R. 444.

As to the rule against perpetuities, see 29 HALSBURY'S LAWS (3rd Edn.) 281 et
H seq.; and for cases see 37 DIGEST 55 et seq.

Cases referred to:

(1) *Re Hargreaves, Midgley* v. *Tatley* (1889), 43 Ch.D. 401; 59 L.J.Ch. 384; 62 L.T. 473; 38 W.R. 470, C.A.; 37 Digest 58, *27*.

(2) *Evans* v. *Walker* (1876), 3 Ch.D. 211; 25 W.R. 7; 37 Digest 97, *335*.

(3) *Gooch* v. *Gooch* (1853), 3 De G.M. & G. 366; 22 L.J.Ch. 1089; 21 L.T.O.S.
I 249; 1 W.R. 397; 43 E.R. 143, L.C.; 37 Digest 62, *60*.

(4) *London and South Western Rail. Co.* v. *Gomm* (1881), 20 Ch.D. 562; 51 L.J.Ch. 193; 45 L.T. 505; 30 W.R. 321; on appeal (1882), 20 Ch.D. 576; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620, C.A.; 37 Digest 89, *259*.

(5) *Garland* v. *Brown* (1864), 10 L.T. 292; 37 Digest 97, *328*.

(6) *Re Frost, Frost* v. *Frost* (1889), 43 Ch.D. 246; 59 L.J.Ch. 118; 62 L.T. 25; 38 W.R. 264; 37 Digest 72, *130*.

(7) *Whitby* v. *Mitchell* (1890), 44 Ch.D. 85; 59 L.J.Ch. 485; 62 L.T. 771; 38 W.R. 337, C.A.; 37 Digest 71, *125*.

(8) *Blanford* v. *Blanford* (1615), Moore, K.B. 846; Cro. Jac. 394; Godb. 266; 1 Roll. Rep. 318; 72 E.R. 945; sub nom. *Blamford* v. *Blamford*, 3 Bulst. 98; 37 Digest 189, *172*.

(9) *Lampet's Case* (1612), 10 Co. Rep. 46b; 77 E.R. 994; sub nom. *Lampit* v. *Starkey*, 2 Brownl. 172; 37 Digest 74, *150*.

(10) *Cadell* v. *Palmer* (1833), 1 Cl. and Fin. 372; 10 Bing. 140; 7 Bli.N.S. 202; 3 Moo. & S. 571; 6 E.R. 956, H.L.; 37 Digest 65, *74*.

(11) *Long* v. *Blackall* (1797), 7 Term Rep. 100; 101 E.R. 875; 37 Digest 65, *71*.

(12) *Duke of Norfolk* v. *Howard* (1683), 1 Vern. 163; 1 Eq. Cas. Abr. 192, pl. 7; 23 E.R. 388; sub nom. *Duke of Norfolk's Case*, *Howard* v. *Duke of Norfolk*, 3 Cas. in Ch. 1; Poll. 223; on appeal (1685), 1 Vern. 164, H.L.; 37 Digest 76, *175*.

(13) *Cole* v. *Sewell* (1842), 4 Dr. & War. 1; 5 I.L.R. 190; affirmed: (1848), 2 H.L.Cas. 186; 12 Jur. 927; 9 E.R. 1062, H.L.; 37 Digest 83, *225*.

(14) *Purefoy* v. *Rogers* (1671), 2 Wms. Saund. 380; 2 Lev. 39; 85 E.R. 1181; sub nom. *Purfry* v. *Rogers*, 3 Keb. 11; 44 Digest 1036, *8934*.

(15) *Re Finch*, *Abbiss* v. *Burney* (1881), 17 Ch.D. 211; 50 L.J.Ch. 348; 44 L.T. 267; 29 W.R. 449, C.A.; 37 Digest 77, *178*.

(16) *Re Hollis' Hospital Trustees and Hague's Contract*, [1899] 2 Ch. 540; 68 L.J.Ch. 673; 81 L.T. 90; 47 W.R. 691; 43 Sol. Jo. 644; 37 Digest 72, *133*.

(17) *Chudleigh's Case*, *Dillon* v. *Freine* (1594), 1 Co. Rep. 113b; Poph. 70; 1 And. 309; 76 E.R. 261, Ex. Ch.; 38 Digest (Repl.) 849, *643*.

Also referred to in argument:

Cooke v. *Blake* (1847), 1 Exch. 220; 17 L.J.Ex. 370; 9 L.T.O.S. 357; 154 E.R. 93; 43 Digest 727, *1646*.

Adams v. *Adams* (1845), 6 Q.B. 860; 14 L.J.Q.B. 171; 4 L.T.O.S. 395; 9 Jur. 300; 115 E.R. 324; 43 Digest 730, *1672*.

Avern v. *Lloyd* (1868), L.R. 5 Eq. 383; 37 L.J.Ch. 489; 18 L.T. 282; 16 W.R. 669; 37 Digest 88, *257*.

Adjourned Summons.

Martha Sarah Ashforth made her will on Feb. 21, 1863. By it she devised her farm and all other real estate to her trustees and their heirs upon trust to receive and take the rents and profits thereof, and after payment thereout of expenses and outgoings, to divide the net profits of the said farm as soon as they conveniently could after Lady Day and Michaelmas Day in each year into three equal parts. And the testatrix directed that out of the first of such third parts her trustees should pay the sum of £26 by equal half-yearly payments to Eliza Robinson for her life, and that, subject to such payment, they should pay the residue of the said third part to her son John Morris Ashforth for his life, and after his decease to her son George Morris Ashforth and her daughter Martha Morris Ashforth during their joint lives in equal shares, and after the death of either of them the whole of this third part to the survivor during his or her life. She then directed her trustees to pay the remaining two equal third parts of the net profits to her other two children respectively during their respective lives; and, subject to such life interests, she made provisions similar to those stated above for the payment of each such third part to her surviving children during their joint lives, and to her last surviving child during his or her life.

The testatrix then proceeded as follows:

"And from and immediately after the decease of the longest liver of my said three children, John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth, I direct my said trustees for the time being, subject nevertheless to the payment of the said annuity to Miss Eliza Robinson, if she should be then living, to pay and divide the said rents and profits of the said farm half-yearly, as soon as conveniently can be after the days hereinbefore appointed, unto and equally amongst all such of the children born in my

A lifetime, or within twenty-one years after my death, of the said John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth, who shall be living on the Lady Day or Michaelmas Day preceding such payment and division. And after the death of all such children of the said John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth except one, I devise my said farm and all my said real estate to such surviving child B and the heirs of his or her body in tail, with remainder to the right heir of John Morris, son of my grandfather, Thomas Morris."

The testatrix died on July 7, 1864. Her son George Morris Ashforth died on Aug. 10, 1870, and left three daughters surviving him. Martha Morris Ashforth died on Nov. 20, 1877, without ever having been married, and John Morris C Ashforth died in November, 1897, leaving no issue. The three daughters of George Morris Ashforth were therefore the only issue of the testatrix's three children, and being desirous of selling certain real estate of the testatrix, they had taken out this summons for the determination of the following questions:

"(i) Whether the trusts by the said will of the said testatrix declared concerning the farm . . . and all other her real estate and the rents and profits D thereof to take effect after the death of the longest liver of the testatrix's two sons . . . and the testatrix's daughter . . . are valid and effectual, or whether the same, or any and which of them, are void from remoteness or otherwise to any and what extent? (ii) Whether, upon the true construction of the testatrix's will, and having regard to the declaration to be made on the first question, the plaintiffs are entitled to call for conveyance of the fee simple of E the premises."

Carr for the trustees.
J. G. Wood (*Upjohn*, *K.C.*, with him) for the plaintiffs.
Jenkins, *K.C.*, and *G. Henderson* for the heirs-at-law.

Cur. adv. vult.

F

Mar. 10, 1905. **FARWELL, J.**, read a judgment in which, after stating the facts and reading the material portions of the will, he proceeded as follows: The question for decision is whether the limitation in tail is or is not too remote. Property may be given to an unborn person for life or to several unborn persons successively for life, with remainders over, provided that such remainders be G indefeasibly vested in persons ascertained or necessarily ascertainable within the limits prescribed by the rule against perpetuities: *Re Hargreaves*, *Midgley* v. *Tatley* (1); *Evans* v. *Walker* (2). Counsel for the plaintiffs did not dispute this, but argued that, inasmuch as one of the three plaintiffs must necessarily be the survivor, they could combine to release or destroy the right of survivorship and take the property at once. But this assumes the existence of a present estate after the life estates, which H will remain when the obnoxious contingency is destroyed and there is none such. The only estates of inheritance are contingent interests in remainder. The court has first to construe the will, and is driven to conclude that these interests are void for perpetuity. There is, therefore, no estate of inheritance in existence available for dealings by way of conveyance or otherwise, and nothing is left but the three life estates. The fallacy lies in the lack of appropriate definition. No release I or destruction of the contingent interests would be of any avail. What is required is a dealing by way of conveyance of all the three contingent interests, and this is impossible, because they have been declared void, and three void contingent remainders will not make one good vested remainder. Counsel for the plaintiffs relied on a passage in LEWIS ON PERPETUITY, p. 164:

"A perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed

by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property, subject to the future limitation, except with the concurrence of the individual interested under that limitation."

It is plain that the learned author in speaking of destructibility is referring to remainders after an estate tail; but in any case the passage does not help counsel for the plaintiffs because the validity of the estate which he wishes to create must depend on the conveyance of the ultimate remainders. The persons entitled subject to that limitation are entitled for life only. Counsel for the plaintiffs also pressed on me a dictum of LORD CRANWORTH'S in *Gooch* v. *Gooch* (3), (3 De G.M. & G. at p. 383). If the whole of that passage is read it is plain that the Lord Chancellor was really thinking of a joint tenancy, and not of a gift to three with a contingent limitation to the survivor of them. But, however that may be, it is only a dictum; and the reasons given are not easy to reconcile with the judgments of the Court of Appeal in *Re Hargreaves, Midgley* v. *Tatley* (1) and *London and South Western Rail. Co.* v. *Gomm* (4).

The case before me is really undistinguishable from *Garland* v. *Brown* (5), before WOOD, V.C., where there was a gift to the surviving children of the testator's surviving child for life in equal shares as tenants in common with remainder to the survivor of those children in fee, and the remainder in fee was held void for remoteness. Then it is said that this is a legal contingent remainder supported by a particular estate vested in trustees during the lives of the grandchildren and of the survivor of them, and this was not disputed. But the plaintiffs argue further that such a remainder is not affected by any doctrine of remoteness, except the rule that estates cannot be limited to unborn persons for life with remainders to the issue of such unborn persons. I might have contented myself with following KAY, J.'s decision in *Re Frost, Frost* v. *Frost* (6); but it is said that this was only the second or alternative reason for his judgment, and I have accordingly considered the point for myself.

It is very difficult to say when the conception of perpetuity in its modern meaning first appeared in our courts. There is no doubt that the common law regarded all attempts to restrict the free alienation of property with extreme disfavour, as is stated in MR. BUTLER'S note to COKE ON LITTLETON (342, b. i.). Although the suspense or abeyance of the inheritance (as distinguished from the freehold) was allowed by the common law, it was discountenanced and discouraged as much as possible, and modern law has added her discouragement of every contrivance which tends to render property inalienable beyond the limits settled for its suspense, because it is clear that no restraint on alienation would be more effectual than a suspense of the inhabitants. He adds:

"The same principles have, in some degree, given rise to the well-known rule of law that a preceding estate of freehold is indispensably necessary for the support of a contingent remainder; and they influence, in some degree, the doctrines respecting the destruction of contingent remainders."

There was also the rule that an estate by purchase cannot be limited to the unborn child of an unborn child: *Whitby* v. *Mitchell* (7). With all respect to KAY, J., I do not think that much reliance can be placed on the existence of an independent rule of law forbidding a possibility on a possibility: (see GRAY ON PERPETUITIES, p. 86, and WILLIAMS ON REAL PROPERTY (6th Edn.) p. 245). The phrase seems due to LORD COKE'S unfortunate predilection for scholastic logic, and may possibly be a pedantic and inaccurate reason for avoiding remoteness: (see *Blamford* v. *Blamford* (8) cited in GRAY at p. 86).

"Coke moves another matter in this case on Popham's opinion, Coke I., Rector de Chedington, that a possibility on a possibility is not good, for here in our case is a possibility on a possibility . . . yet it seems that it is good, for, if Popham's opinion should be law, it would shake the common assurances

of the land. . . . But I agree that in divers cases there shall not be a possibility upon a possibility, and he puts the diversities put in *Lampet's Case* (9)."

It seems probable that contingent remainders could not anciently have been created (see WILLIAMS ON SEISIN, p. 190), and that down to the time of the Commonwealth the usual mode of settlement on marriage was by giving vested estates tail to living persons, and not estates tail to unborn children (ibid., p. 189). Although, therefore, there was a general principle that alienation should not be restricted by the creation of estates beyond a particular estate for life with a remainder in fee, or in tail, I can find no trace of any statement of the present rule in terms in any of the old books. But the general principle was well established, and as the ingenuity of real property lawyers invented new devices for rendering land inalienable for as long a time as possible, it became necessary to mould the expression of the old law so as to meet new emergencies. Thus, in *Cadell* v. *Palmer* (10), the House of Lords settled the question of the extent to which executory limitations and shifting uses, which had become possible under the Statute of Uses, could be lawfully carried, and they did this, not by creating any new law, for that would have been legislation, not decision, but by applying the limits of the old law to the new circumstances. The judges who advised the House supported their opinion by numerous authorities, and I would refer in particular to the quotation from LORD KENYON's judgment in *Long* v. *Blackall* (11) (7 Term Rep. at p. 102):

> "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the courts have said that the estates shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance."

Here, then, is an authoritative statement, in terms of precision, of the rule of law which had existed for centuries, but had not been theretofore defined, and had been applied from time to time as occasion arose by judges, who, without formulating the precise limits of the rule, held (as LORD NOTTINGHAM said in the *Duke of Norfolk's Case* (12) (3 Cas. in Ch. at p. 31):

> "If it tends to a perpetuity, there needs no more to be said, for the law has so long laboured against perpetuities, that it is an undeniable reason against any settlement, if it can be found to tend to a perpetuity."

The rule, however, was only to be applied to cases where it was really necessary in order to defeat remoteness, and accordingly LORD ST. LEONARDS, in *Cole* v. *Sewell* (13) (4 Dr. & War. 1), points out that it has no application to remainders limited to arise after an estate tail, because they are destructible by barring such estate tail, and are no more open to objection than the estate tail itself; and this is the meaning of the reference to destructibility in the passage that I read above from LEWIS ON PERPETUITY, p. 164. But this reason has no application to contingent remainders not so limited and destructible, nor do I think that LORD ST. LEONARDS so intended: see his book SUGDEN'S LAW OF PROPERTY, pp. 116–121, and LORD BROUGHAM'S opinion in the same case in the House of Lords (2 H.L.Cas., at p. 234), where he puts this ground plainly as the reason for his observations.

It would be strange, indeed, that LORD ST. LEONARDS should have referred to the "sacred rule" enunciated in *Purefoy* v. *Rogers* (14) (2 Wms. Saund. p. 388, n. 9), that no limitation shall be construed as an executory or shifting use which can by possibility take effect by way of remainder—a rule which probably owes its origin to the chance of destruction by the failure of the particular estate incident to the one and not to the other—and should at the same time have affirmed that the rule against perpetuities had no application to such contingent remainders, although they might exceed the limits allowed for executory limitations, because they could not exceed the limits of perpetuity, for the proposition is self-contradictory. Assume that the doctrine of the destructibility of contingent remainders by failure of the particular estate is due to the desire of the courts to avoid

remoteness (as MR. BUTLER suggests), it does not follow that such remainders should be free from all other bonds. Liability to destruction for a particular cause at or before a given period is not incompatible with, or any ground for immunity from, destruction at the same period for a cause common to all other interests, executory, equitable, or otherwise, which may lead to remoteness. It is plain, moreover, that the courts have acted upon the principle that the rule against perpetuities is to be applied where no other sufficient protection against remoteness is attainable. Thus, inasmuch as equitable contingent remainders never failed for want of a particular estate, it was held that the rule must apply to them. In *Re Finch, Abiss* v. *Burney* (15) the gift was to trustees on trust for A. for life, and after his death on trust to convey to such son of his as should first attain twenty-five. SIR GEORGE JESSEL, M.R., said (17 Ch.D. at p. 230):

> "Where the legal fee is outstanding in the trustees, that doctrine of contingent remainders which, until the recent statute prevented contingent remainders from taking effect at all unless they vested at the moment of the termination of the prior estate in freehold, has no operation, and on that ground I think this appeal should be allowed."

In *Re Hollis' Hospital Trustees and Hague's Contract* (16) BYRNE, J., held that the rule against perpetuity applied to a common law condition. He says ([1899] 2 Ch. at pp. 552, 553):

> "The courts have first to find what is the common law—that is, the principle embodied in what is called the common law—and to apply it to new and ever-varying states of fact and circumstances. . . . New statutes and the course of social development give rise to new aspects and conditions which have to be regarded in applying the old principles. The policy of the law against the creation of perpetuities was certainly asserted at a very early date, as was also the policy of discountenancing unrestricted restraints upon alienation."

In *Chudleigh's Case* (17) (the case of perpetuities) the court defeated an attempt to make the Statute of Uses serve as the means of protecting contingent remainders from destruction, lest lands should remain too long in settlement. In *Re Finch, Abbiss* v. *Burney* (15) the Court of Appeal defeated an attempt by vesting all the property in trustees. The present attempt is made by vesting a legal estate pur autre vie in trustees and limiting the contingent remainders as a legal use. In my opinion, the court is equally bound to defeat this; nor can I find any rule of law, or decision, or principle to the contrary. The opinion of MR. CHALLIS (Real Property (2nd Edn.) pp. 174–177) is, I think, sufficiently displaced by BYRNE, J.'s judgment in the *Hollis' Hospital Case* (16), and that of JOSHUA WILLIAMS by GRAY ON PERPETUITIES, pp. 283–298; and the conclusion at which I have arrived is supported by (in addition to the text-writers cited in that case and *Re Frost, Frost* v. *Frost* (6), an argument in JARMAN ON WILLS (1st Edn.), vol. 2, p. 727, and repeated in some of the later editions, by MR. SERJEANT STEPHEN'S note in his COMMENTARIES (8th Edn.), vol. 1, p. 554, and by MR. GRAY'S excellent treatise on perpetuities. The rule against perpetuities applies to all contingent equitable limitations of real estate and all contingent limitations of personalty, including leaseholds. It would certainly be undesirable to add another to the anomalies that adorn our law, as I should succeed in doing if I held that the rule did not apply to legal contingent remainders. I therefore answer the first question by saying that the limitation in question is void for remoteness, and the second question in the negative.

Solicitors: *Bird & Eldridges*; *G. A. Buxton Carr.*

[*Reported by* H. C. GARSIA, ESQ., *Barrister-at-Law.*]

Re STUCLEY. STUCLEY *v.* KEKEWICH

[COURT OF APPEAL (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.), October 31, November 3, 6, 7, 1905]

[Reported [1906] 1 Ch. 67; 75 L.J.Ch. 58; 93 L.T. 718; 54 W.R. 256; 22 T.L.R. 33]

Lien—Vendor's lien—Sale of personal property—Reversionary interest—Purchase price not paid—Charge on fund representing legacy—Vendor's right to lien for purchase price and interest thereon.

A vendor's lien for unpaid purchase money extends to personal property which is the subject-matter of the sale. The lien covers not only the principal money, but also interest from the time when the lien came into existence. The right arising under an equitable lien, such as a vendor's lien, is the same right as that arising under an express charge, namely, to have the charge raised by sale or mortgage of the property charged.

Davies v. *Thomas* (1), [1900] 2 Ch. 462, *Rose* v. *Watson* (2) (1864), 10 H.L.Cas. 672, and *Munns* v. *Isle of Wight Rail. Co.* (3) (1870), 5 Ch. App. 414, applied.

In 1874 the plaintiff, who was entitled to a reversionary legacy of £5,000 on the death of his father, the sole trustee of the fund representing the legacy, assigned the legacy to the father absolutely in consideration of the sum of £1,500 which the deed of assignment expressed to have been paid by the father to the plaintiff, the receipt for that sum being endorsed on the deed. In fact the sum of £1,500 was never paid by the father to or for the benefit of the plaintiff, and on the father's death in 1900 the plaintiff brought an action against the executors and trustees of the father's will claiming a declaration that he was entitled to a lien on the fund representing the reversionary legacy for the unpaid purchase price of £1,500.

Held: the plaintiff as unpaid vendor was entitled to a lien on the fund representing the legacy for the unpaid purchase money of £1,500, and under the lien he was entitled to recover against the fund not only the principal sum, but as no statute of limitations applied to the enforcement of a charge on personal property so as to prevent the plaintiff recovering the whole of the interest due, also interest thereon at 4 per cent. from the date when the purchase money became due.

Mellersh v. *Brown* (4) (1890), 45 Ch.D. 225, and *Re Hancock*, *Hancock* v. *Berrey* (5) (1888), 57 L.J.Ch. 793, applied.

Notes. It seems that s. 18 (1) of the Limitation Act, 1939 (13 HALSBURY'S STATUTES (2nd Edn.) 1176), will apply to liens on personalty so that under s. 18 (1) no action may be brought to recover any principal sum of money secured on personal property by an equitable lien after the expiration of twelve years from the date when the right to receive the money accrued.

Referred to: *Re Beirnstein*, *Barnett* v. *Beirnstein*, [1925] Ch. 12; *Weld* v. *Petre*, [1929] 1 Ch. 33; *Stoker* v. *Elwell*, [1942] 1 All E.R. 261; *Mendl* v. *Smith* (1943), 112 L.J.Ch. 279.

As to a vendor's lien, see 24 HALSBURY'S LAWS (3rd Edn.) 156. As to limitation of actions to enforce an equitable lien, see ibid., p. 173. Generally, as to limitation of actions to recover money secured on personal property, see 24 HALSBURY'S LAWS (3rd Edn.) 264; and as to when the right accrues see ibid., p. 267. For cases on equitable liens, see 32 DIGEST 254 et seq. For cases on the effect of assignments of choses in action, see 8 DIGEST (Repl.) 609 et seq.

Cases referred to:

(1) *Davies* v. *Thomas*, [1900] 2 Ch. 462; 69 L.J.Ch. 643; 83 L.T. 11; 49 W.R. 68; 44 Sol. Jo. 608, C.A.; 32 Digest 284, *614*.

(2) *Rose* v. *Watson* (1864), 10 H.L.Cas. 672; 3 New Rep. 673; 33 L.J.Ch. 385; 10 L.T. 106; 10 Jur.N.S. 297; 12 W.R. 585; 11 E.R. 1187, H.L.; 32 Digest 268, *493*.

(3) *Munns* v. *Isle of Wight Rail. Co.* (1870), 5 Ch. App. 414; 39 L.J.Ch. 522; 23 L.T. 96; 18 W.R. 781, L.J.; 11 Digest (Repl.) 243, *1103*.

(4) *Mellersh* v. *Brown* (1890), 45 Ch.D. 225; 60 L.J.Ch. 43; 63 L.T. 189; 38 W.R. 732; 32 Digest 317, *31*.

(5) *Re Hancock*, *Hancock* v. *Berrey* (1888), 57 L.J.Ch. 793; 59 L.T. 197; 36 W.R. 710; 32 Digest 317, *30*.

(6) *Smith* v. *Hill* (1878), 9 Ch.D. 143; 47 L.J.Ch. 788; 38 L.T. 638; 26 W.R. 878; 32 Digest 421, *988*.

(7) *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321; 42 L.J.Ch. 49; 27 L.T. 281; 20 W.R. 907, H.L.; 35 Digest 256, *147*.

(8) *Mackreth* v. *Symmons* (1808), 15 Ves. 329; 33 E.R. 778, L.C.; 32 Digest 281, *587*.

Also referred to in argument:

Collins v. *Collins*, *Downes* v. *Downes* (1862), 31 Beav. 346; 54 E.R. 1172; 32 Digest 283, *608*.

Levy v. *Stogdon*, [1898] 1 Ch. 478; 67 L.J.Ch. 313; 78 L.T. 185; affirmed, [1899] 1 Ch. 5; 68 L.J.Ch. 19; 79 L.T. 364, C.A.; 32 Digest 316, *27*.

Hovenden v. *Lord Annesley* (1806), 2 Sch. & Lef. 607; 32 Digest 509, *1687*.

Re Lake's Trusts (1890), 63 L.T. 416; 32 Digest 473, *1366*.

London and Midland Bank v. *Mitchell*, [1899] 2 Ch. 161; 68 L.J.Ch. 568; 81 L.T. 263; 47 W.R. 602; 15 T.L.R. 420; 43 Sol. Jo. 586; 32 Digest 326, *128*.

Thomson v. *Eastwood* (1877), 2 App. Cas. 215, H.L.; 32 Digest 469, *1342*.

Action by the plaintiff, Edward Arthur George Stucley, for declarations.

In 1874, the plaintiff, being in financial difficulties, his father, Sir George Stucley, paid off all his liabilities secured and unsecured. Various documents were then executed, among which was a deed of assignment, dated Jan. 31, 1874, made between the plaintiff and his father. The deed, after reciting that under his mother's will the plaintiff was entitled in reversion immediately expectant on his father's death to a legacy of £5,000, being one moiety of a sum of £1,000 secured on a debenture of the Mersey and Irwell Navigation Co., and that the plaintiff had contracted with his father for the sale to him of the reversionary legacy for the sum of £1,500, witnessed that, in consideration of the sum of £1,500 which was expressed in the deed to have been paid to the plaintiff by his father, and the receipt for which was endorsed on the deed and signed and witnessed, that the reversionary legacy of £5,000 was thereby assigned to the plaintiff's father absolutely. At the date of the assignment the father was the sole trustee of the reversionary legacy, the fund representing it being in his legal control. No part of the sum of £1,500 expressed in the deed to have been paid as the consideration for the assignment was in fact ever paid by the plaintiff's father to or for the benefit of the plaintiff. Immediately after the foregoing transaction the plaintiff went to Australia where he remained until his father's death in March, 1900. Some time after his return to this country the plaintiff began this action against the executors and trustees of his father's will, and against his elder brother who took interests under that will, claiming declarations that the deed of assignment of Jan. 31, 1874, was not binding on and was void against the plaintiff; that notwithstanding the deed of assignment the moiety of the debenture of the Mersey and Irwell Navigation Co. for £1,000, to which the plaintiff had become entitled, was held by his father as security only for the sums paid by the father on behalf of the plaintiff and that the plaintiff, or the trustees of a voluntary settlement executed by him, were now entitled to have the moneys representing the moiety handed over to them. In the alternative the plaintiff claimed a declaration that he was entitled to a lien for the sum of £1,500 on the investments representing one moiety of the debenture of the Mersey and Irwell Navigation Co., as the purchase price stated in the deed of assignment to have

A been paid by the father to the plaintiff but which in fact was unpaid, and interest thereon from Jan. 31, 1874. The action came on for trial before FARWELL, J., who on Feb. 14, 1905, delivered a reserved judgment, in which he held that the deed of assignment of Jan. 31, 1874, was not intended to be, and was not a mortgage or charge on the property, viz., the reversionary legacy of £5,000, but was an assign-
B ment of the legacy by way of sale in consideration of the sum of £1,500, and that the £1,500 had never been paid as cash to the plaintiff. FARWELL, J., then dismissed the action without dealing with the plaintiff's alternative claim for an unpaid vendor's lien, for the purchase money of £1,500, on the fund representing the reversionary legacy. On appeal by the plaintiff from FARWELL, J.'s decision, the alternative claim was argued. For the defendants it was submitted that the doc-
C trine of the equitable lien of an unpaid vendor did not apply to a sale of personal property; that in the present case, the plaintiff as an unpaid vendor was not entitled to all the remedies which accrued to the owner of an express charge to enforce payment of the sum charged and interest on the reversionary legacy, and that in any event the plaintiff was not entitled to payment of interest for the whole period from the date when the purchase money became due.

D *Jenkins*, *K.C.*, and *George Lawrence* for the plaintiff.
Upjohn, *K.C.*, and *Vaughan Hawkins* for the defendants.

VAUGHAN WILLIAMS, L.J., stated the facts and continued: FARWELL, J., gave judgment dismissing the action, holding that the evidence on the trial of the action was not strong enough to override the plain words of the deed of Jan. 31, 1874. But, although dismissing the action, the learned judge does not expressly
E deal with the claim for a declaration of a lien in favour of the plaintiff, Edward Stucley, as an unpaid vendor. I agree with the findings of fact of the learned judge and with his conclusion in respect of other claims. It was really not contended that there ever was a payment in cash by Sir George Stucley to his son, the plaintiff, of £1,500, notwithstanding that such payment is acknowledged by the receipt en-
F dorsed on the deed. The executors cannot find any trace of this sum ever having been paid, either in cash or in account or by agreed appropriation. In fact, counsel for the defendants admitted that he could not argue that, as cash, that sum had, in accordance with the receipt endorsed, been paid, and FARWELL, J., in his judgment takes the same view.

The question therefore arises whether the plaintiff, Edward Stucley, is not, as
G unpaid vendor, entitled to the declaration of lien he claims on this reversionary legacy assigned by him to his father, and which continued reversionary down to the death of the father. Two points were made by counsel for the plaintiff as against this claim. One was that the doctrine of the lien of an unpaid vendor does not apply to a sale of personal property. The other was that although the expression is frequently used that equity gives the unpaid vendor "an interest" in
H the subject-matter of sale to the extent of the purchase money owing to him, yet that expression is merely figurative; and that the unpaid vendor here is not entitled to all the remedies which accrue to the owner of an express charge to enforce payment on the reversionary legacy of the sum charged and interest.

With regard to the first point, *Davies* v. *Thomas* (1) is a sufficient authority that the vendor's lien for unpaid purchase money extends to personal property. That
I was a case in which the principle of a vendor's lien for unpaid purchase money was held applicable to the sale of a share of the proceeds of a sale of leaseholds directed by the will of a testator under a trust for conversion. LORD ALVERSTONE, M.R., there said ([1900] 2 Ch. at p. 468):

> "But, even if the thing sold had been simply a claim to receive a share of the money arising from the realisation of the leaseholds, I think the unpaid vendor would have been entitled to a lien upon the share which he sold."

And although RIGBY, L.J., stated that there was another way in which the case might be disposed of without going carefully into the question of a vendor's lien, he

did not dissent from the view taken by LORD ALVERSTONE, M.R. The case is, in my opinion, an express authority that a vendor's lien for unpaid purchase money extends to personal property. And I wish to add having regard to the express decision in *Davies* v. *Thomas* (1) that I do not think it is at all necessary to do more than follow that decision of the Court of Appeal. But an examination of the authorities, to my mind, shows that the principle affirmed in that case—namely, that the lien of an unpaid vendor applies to personal property, is by no means a new principle there affirmed for the first time.

As to the second point, in the first place *Rose* v. *Watson* (2) shows that the lien extends not only to principal money, but also to interest from the time that the equitable lien comes into existence; and *Munns* v. *Isle of Wight Rail. Co.* (3) shows that the right which the owner of an express charge possesses to have the charge raised by a sale or mortgage of the property charged extends to a lien arising under general principles of equity, such as a vendor's lien. In the present case, an unpaid vendor is claiming a declaration of lien for the purpose of enforcing the undoubted interest he possesses to have his unpaid purchase money paid out of the subject-matter of the assignment in question. It was suggested that, although he might have had a lien which he could have enforced—and enforced by obtaining an order of the court for a sale or mortgage—yet this right did not extend to payment of interest for the whole period since the date on which the purchase money ought to have been paid. And an attempt was made to contend that the right to interest can only be enforced with regard to arrears of interest for which an action can be brought without being obnoxious to the Statute of Limitations. In my judgment the authorities clearly show that this is not so. Of course, in the case of a sale and purchase of land, the express provisions of s. 42 of the Real Property Limitation Act, 1833 [repealed], apply. That section, however, has no application to a case of personalty; and, in my opinion, the authorities show that, in the case of a lien on personal property which is the subject-matter of a sale, not only does that statute not apply, but there is no Statute of Limitations which has any application at all. The first case in which, in my judgment, that state of the law was recognised is *Smith* v. *Hill* (6), where it was held that a mortgage of a reversionary interest in a sum of money forming part of a testator's residuary personal estate was unaffected by s. 42 of the statute, notwithstanding that such sum was invested on mortgage of real estate. But the case which, to my mind, comes nearer to the present is *Mellersh* v. *Brown* (4), a decision of KAY, J., as he then was. The headnote to that case is this (45 Ch.D. at p. 225):

> "A mortgage of reversionary interests in personal estate contained a covenant by the mortgagor for payment of the mortgage money with interest at 5 per cent. on a specified day; but there was no provision for payment of any subsequent interest. No interest was ever paid. Fourteen years after the date of the mortgage an action was brought for foreclosure and the usual decree was made: Held, that redemption could only be allowed on payment of interest at 5 per cent. for the whole period of fourteen years."

Now, if it is true that the unpaid vendor has this equitable lien on the personal property, the subject-matter of the sale, for his unpaid purchase money, and if it is true—and I have already said that in my opinion it is true—that the remedy for enforcing that lien is the same as where there is an express charge, then it follows that in such a case there is no Statute of Limitations which will prevent the vendor from recovering that purchase money together with the whole of the interest from the time the purchase money ought to have been paid. In my judgment the result is that the plaintiff, Edward Stucley, is entitled to enforce his remedies against the fund representing the reversionary legacy for obtaining the £1,500 unpaid purchase money, together with interest from the date of the assignment, which interest, I suppose, should be at 4 per cent. It is not necessary that we should work out the figures now, but the result is that to a substantial extent the plaintiff has succeeded in this action, though the largest part of the plaintiff's claim is a claim in which he

A has failed. As to the costs, in the circumstances it seems to me that justice will best be done in this case by directing that there shall be no costs either below or on appeal.

STIRLING, L.J., [after stating that upon the evidence there was no real ground for the contention that the deed purporting to be an assignment by the son to the B father of the reversionary legacy of £5,000 ought to be treated as a security only, continued:] In the circumstances of this case I have come to the conclusion that the sum of £1,500 which was expressed to be the consideration money for the purchase of this reversionary interest was not paid by the father in any shape whatever, and therefore that the plaintiff is, as regards that sum of purchase money, in the position of an unpaid vendor of that reversionary legacy.

C The question, therefore, is whether the plaintiff is entitled as an unpaid vendor to a lien upon the legacy. In *Shaw* v. *Foster* (7), which, although a case relating to leaseholds, is equally applicable to real estate, the relation subsisting in the eye of a court of equity between a vendor and a purchaser is thus stated by LORD CAIRNS (L.R. 5 H.L. at p. 338):

> D "The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a court of equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and cestui que trust subsisted, but subsisted E subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."

So that the unpaid vendor is there treated as having an "interest"—"a personal and substantial interest"—in the property he has sold.

Again, in *Rose* v. *Watson* (2), which was the converse case—namely, a case in F which the purchaser had paid part of his purchase money under a contract for sale, and then declined to complete—LORD CRANWORTH says this (10 H.L.Cas. at pp. 683, 684):

> "There can be no doubt, I apprehend, that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as owner of G the estate. When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase money the vendor had executed a mortgage to him of the estate to that extent."

H Those last words seem to be very material to the argument which has been addressed to us.

Here a case has occurred, which has happened frequently before, that a vendor has executed a conveyance upon the face of which it is expressed that he has received the purchase money, and there is an endorsement on the conveyance I accordingly. It has long since been decided by *Mackreth* v. *Symmons* (8) that although the conveyance contains a statement upon the face of it that the purchase money has been paid, and a receipt for the money is endorsed on the deed, yet, if the money has not in fact been paid, the vendor's lien will prevail, not only against the purchaser but also against all persons claiming under him with notice that the purchase money has not been paid. Such, then, is the position defined by the authorities as regards a sale of real estate. In my opinion, *Davies* v. *Thomas* (1) is an authority that the doctrine is not limited to the case of a sale of real estate, but extends, at any rate in some cases, to a sale of personal estate, and to all cases

in which the property sold is of such a nature as that the court will decree specific performance of the contract for purchase of it.

In my opinion, therefore, the plaintiff here is to be treated as having an interest in him in the nature of property in the subject-matter of this sale—namely, in the £5,000 legacy purporting to be assigned by this deed of assignment. If, then, he has an interest in the nature of property he is entitled to enforce that interest. It makes, in my opinion, no difference whether the interest arises from a lien given him by a court of equity, or whether it arises from an express charge or from an express assignment by way of mortgage. As LORD CRANWORTH said in *Rose* v. *Watson* (2) the right of interest acquired under the lien is the same as if a mortgage had been executed for the amount unpaid. So it appears to me. The plaintiff, the unpaid vendor here, is in the same position as if, immediately after the transaction in which the purchase money was not paid, the father had executed to the plaintiff a charge upon this equitable reversion for the sum unpaid. That being so, there is no statute of limitations which applies to the case of a person coming to recover an interest in personal property such as the fund here, the reversion in which has now fallen in.

In my opinion, KAY, J.'s observations in *Re Hancock*, *Hancock* v. *Berrey* (5) apply to the present case. The learned judge there pointed out that in the case before him, which was an assignment of a reversionary interest by way of mortgage, the Statute of Limitations would not apply, and he proceeds as follows—and this meets a considerable part of the argument that has been addressed to us (57 L.J.Ch. at p. 795):

> "But then it is said—or at least this is the only way in which the argument could possibly be put, as it seems to me—the debt to secure which this assignment was made is barred, or, rather, the right to sue to recover the debt is barred; and that, therefore, the mortgagor has some right to recover back the share he has assigned. Is that so? For example, let us try it by the most concrete instance one can put. Suppose the assignee of this reversionary interest in personal property had commenced an action against the trustees, claiming to have the share handed over to him. Of course, he need not make the assignor a party. He has nothing to do but prove his assignment, and the trustees would have had no answer whatever; they must have handed it over. Then could the mortgagor have maintained successfully a suit to prevent their handing it over? On what ground? Suppose he had brought an action, saying 'True, I did assign this; true, the reversion fell in so lately as October, 1887; but I seek to restrain the trustees from handing over that reversion to my assignee, because I say that the debt to secure which I made the assignment is barred.' What Statute of Limitations, or any other statute, would enable him to maintain an action like that? There is no Statute of Limitations which destroys the debt. The Statute of Limitations only destroys the remedy of the creditor. The creditor could not sue the mortgagor upon the covenant, because then he would be met by the Statute of Limitations which bars the action. The mortgagee says: 'I do not want to sue anybody; all I want is to have this mortgaged property, which is mine, handed over to me.' How it can be kept from him I cannot conceive."

All that applies, with very slight variations, to the present case. Here the position of the plaintiff's father was this—that he became sole trustee and executor of the will under which the plaintiff claims, and in that capacity he had the fund under his control. He of course had notice of the assignment to him, and of the fact that he had failed to pay the purchase money.

That brings the case almost directly within *Davies* v. *Thomas* (1). In that case RIGBY, L.J., after pointing out that the trustees of the will at the time of the mortgage (which was of a reversionary share of the proceeds of leaseholds directed to be sold) held the property upon certain trusts, and that at the time of the sale of the mortgagor's interest the trustees held the property in the condition of lease-

A holds, and that subsequently to the assignment to the purchaser they sold the leaseholds and then held the proceeds in trust for the persons entitled, proceeded as follows ([1900] 2 Ch. at p. 471):

> "What was the position of the trustees? David Lewis, the purchaser, was throughout the solicitor who acted for the trustees as well as the solicitor for the plaintiff, who was the vendor. Observations have been made as to the propriety of his becoming the purchaser from his own client, but I think it is unnecessary to go into this matter. It would, in my opinion, be impossible for the trustees to say that they had not in equity constructive notice of the purchase by their solicitor of the mortgaged property, and of the fact that he had not paid the whole of the purchase money. It was their duty to administer the trust fund produced by the sale of the leasehold property—a fund which was in their hands subject to the trusts of the will. Could they in favour of their solicitor ignore the rights of the vendor and say that they were not concerned with him, but were concerned only with their own solicitor who had purchased the mortgaged share from him? If a court of equity had been administering the fund, it would have inquired into the facts, and, finding that the purchaser had not paid the purchase money, it would have held that it was its first duty to see that the mortgagee, and through him the mortgagor, had been satisfied before handing over the purchased share to the purchaser. The court would have had no difficulty in doing that. And, in my opinion, the trustees are bound to do that which the court would have done had it been administering the fund."

So here the fund was under the legal control of the father in his capacity of trustee and executor. If the court had been administering the fund and had found that the trustee of the fund had, on purchasing the reversionary interest in it, failed to pay his purchase money, the court would have had no difficulty in enforcing the right of the unpaid vendor.

I am therefore of opinion that the plaintiff has a lien for the unpaid sum of £1,500 entitling him to payment of that sum, together with interest at 4 per cent. from the date of the purchase. This is in accordance with *Smith* v. *Hill* (6) and *Mellersh* v. *Brown* (4). It appears that the legacy in question formed a moiety of a sum of £10,000 originally secured by a bond of the Mersey and Irwell Navigation Company. According to the evidence of the solicitor to the defendants, that bond has been sold and the money has been invested on other security. The fund having been under the control of Sir George Stucley, not only the bond itself but also the security substituted for it became liable to the plaintiff's lien. As to the defendant's contention that the plaintiff's claim is too late, in my opinion, having regard to the circumstances of the case, the plaintiff's demand is not a stale one, and that he is not on that ground deprived of the right he now seeks to enforce. It appears to me, therefore, that on this part of the case the plaintiff succeeds.

COZENS-HARDY, L.J.—I am of the same opinion, and have very little to add. I agree entirely with all that FARWELL, J., said upon that part of the case to which his decision was directed with regard to the point as to the right of the vendor to a lien for his unpaid purchase money. But for the elaborate argument we have heard upon that part of the case, I should have thought it was scarcely arguable. To my mind it is impossible to doubt that this assignment must be treated as it purports to be, that is, as an assignment by way of absolute sale. I cannot rely upon parol evidence of a transaction which happened thirty years ago. I think one is bound to take all the documents relating to that transaction as they stand, and one of those documents is an assignment upon the purchase by the father from the son of the latter's reversionary legacy of £5,000 in consideration of the sum of £1,500, and the part of that transaction which it is now important to consider is that the £1,500 purchase money was never paid by the father to the son. That being so, it is said that the vendor has, according to well-settled principles, a lien upon the property

which he sold for the purchase money which has never been paid. It is quite settled that a vendor's lien is not a mere personal equity, and that it really creates a charge upon and an interest in the property sold, in the same manner as if that charge had been created by writing. One cannot illustrate that better than by reference to the old law of mortmain. Under that law the purchase money for land contracted to be sold by a testator, but in respect of which he had the usual vendor's lien at his death, was not available for satisfying charitable legacies, and for this reason because that lien was an "interest in land"; for a vendor's lien on the sale of land is recoverable by statute as being an incumbrance on the land.

But it has been argued that a vendor's lien is limited to land and does not extend to personal estate. Now there is the distinct authority of the Court of Appeal in *Davies* v. *Thomas* (1) to the contrary; and, that being so, I do not think it necessary to go back to the earlier authorities, or to discuss the principles upon which these authorities were decided. I see no reason in principle why the doctrine should not apply to every case of personal property in which the Court of Equity assumes jurisdiction over the subject-matter of the sale. Then, if there is in the present case the right to a vendor's lien, as I am of opinion there is over this personal estate which was sold, there is no Statute of Limitations which applies; and there is no answer to the claim for interest from the date at which the right to interest arose, that is from the date of the deed. Again, the purchaser, Sir George Stucley, was in the position of sole trustee of the fund the reversionary interest in which was the subject-matter of the sale and purchase. He was also entitled to the income of the fund during his life, and by reason of his purchase he became entitled to the reversion in that fund, but subject to the vendor's lien. His representatives cannot, merely because the fund is now in possession and no longer reversionary, say that that lien is thereby destroyed. In my opinion that lien is imposed upon the fund which was in the father's hands, and is now in the hands of his representatives. Accordingly there must be an order for payment to the plaintiff of the £1,500 out of the fund, together with interest at 4 per cent. from the date of the purchase, with liberty to apply.

Order varied.

Solicitors: *Witham, Roskell, Munster & Weld*; *Moon, Gilks & Moon*, for *Battishill & Houlditch*, Exeter.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

SMITH *v.* GIDDY

[King's Bench Division (Wills and Kennedy, JJ.), June 21, 1904]

[Reported [1904] 2 K.B. 448; 73 L.J.K.B. 894; 91 L.T. 296; 53 W.R. 207; 20 T.L.R. 596; 48 Sol. Jo. 589]

Nuisance—Adjoining premises—Overhanging trees—Damage to neighbour's crops.

Where damage to crops is caused by the branches of trees belonging to and in the land of an adjoining owner overhanging the land on which the crops are growing, the owner of crops is not confined to his remedy by cutting off the branches which overhang his land, but he may maintain an action for the damage.

Rule in *Rylands* v. *Fletcher* (1) (1868), L.R. 3 H.L. 300, and principle in *Crowhurst* v. *Amersham Burial Board* (2) (1878), 4 Ex.D. 5, applied.

Notes. Considered: *Butler* v. *Standard Telephones and Cables, Ltd.*, *McCarthy* v. *Standard Telephones and Cables, Ltd.*, [1940] 1 All E.R. 121; *McCombe* v. *Read*, [1955] 2 All E.R. 458; *Davey* v. *Harrow Corpn.*, [1957] 2 All E.R. 305. Referred to: *Cheater* v. *Cater*, [1916–17] All E.R.Rep. 239; *Edwards* v. *Birmingham Navigations*, [1924] 1 K.B. 341.

As to liability for the dangerous user of property, see 28 Halsbury's Laws (3rd Edn.) 145–149; and for cases see 2 Digest (Repl.) 88–92 and 36 Digest (Repl.) 281 et seq.

Cases referred to:

(1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

(2) *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex.D. 5; 48 L.J.Q.B. 109; 39 L.T. 355; 27 W.R. 95; 2 Digest (Repl.) 90, *545*.

(3) *Lemmon* v. *Webb*, [1894] 3 Ch. 1; 63 L.J.Ch. 570; 70 L.T. 712; 58 J.P. 716; 10 T.L.R. 467, C.A.; on appeal, [1895] A.C. 1; 64 L.J.Ch. 205; 71 L.T. 647; 59 J.P. 564; 11 T.L.R. 81; 11 R. 116, H.L.; 2 Digest (Repl.) 88, *534*, *535*.

Also referred to in argument:

Earl of Lonsdale v. *Nelson* (1823); 2 B. & C. 302; 3 Dow. & Ry.K.B. 556; 2 L.J.O.S.K.B. 28; 107 E.R. 396; 2 Digest (Repl.) 88, *533*.

Pickering v. *Rudd* (1815), 1 Stark. 56; 4 Camp. 219; 2 Digest (Repl.) 89, *542*.

Ponting v. *Noakes*, [1894] 2 Q.B. 281; 63 L.J.Q.B. 549; 70 L.T. 842; 58 J.P. 559; 42 W.R. 506; 10 T.L.R. 444; 38 Sol. Jo. 438; 10 R. 265; 2 Digest (Repl.) 90, *548*.

Bryant v. *Lefever* (1879), 4 C.P.D. 172; 48 L.J.Q.B. 380; 40 L.T. 579; 43 J.P. 478; 27 W.R. 612, C.A.; 19 Digest (Repl.) 67, *368*.

Warren v. *Brown*, [1900] 2 Q.B. 722; 69 L.J.Q.B. 842; 83 L.T. 318; 16 T.L.R. 549; on appeal, [1902] 1 K.B. 15; 71 L.J.K.B. 12; 85 L.T. 444; 50 W.R. 97; 18 T.L.R. 55; 46 Sol. Jo. 50, C.A.; 19 Digest (Repl.) 150, *977*.

Appeal by the plaintiff from a decision of the learned county court judge at Chertsey County Court.

The plaintiff and the defendant were adjoining landowners at Feltham, Middlesex. The plaintiff was a market gardener, nurseryman, and fruit grower, and he occupied a nursery and fruit garden adjoining the land of the defendant. On the defendant's land there were a number of elm and ash trees which belonged to the defendant, the majority of which overhung the garden and fruit trees of the plaintiff. The plaintiff alleged that the branches of the defendant's trees which

overhung his (the plaintiff's) fruit trees did damage to the fruit trees, and he claimed (i) an injunction restraining the defendant from permitting the trees to continue to overhang the plaintiff's premises so as in any way to damage and interfere with the proper growth of the plaintiff's fruit trees; (ii) damages for the injury occasioned to the plaintiff's fruit trees and the cost of cutting and removing overhanging branches of the defendant's trees. The learned judge was of opinion that the only remedy which the plaintiff had was to abate the nuisance himself by cutting the overhanging branches of the defendant's trees, and he held that the action could not be maintained and directed a non-suit. The plaintiff appealed.

A. T. Lawrence, K.C. (*Owen Thompson* with him), for the plaintiff.
R. J. Drake for the defendant.

WILLS, J.—I am of opinion that the judgment of the learned county court judge was erroneous, and that there must be a new trial. There is the great authority of KELLY, C.B., in *Crowhurst* v. *Amersham Burial Board* (2) in support of my opinion that there is no precedent to be found for such an action as the present. The Chief Baron stated that, among other propositions, as a concise way of putting the argument for the defendant in that case in the strongest way in which it could be put, yet, notwithstanding that he said that that view might very reasonably be pressed, he and the other learned judges of that court decided that in that case the action lay. The action there was against the owners of a yew tree who planted and grew the tree on their own ground, but its branches overlapped the boundary and went over their neighbour's ground, the overhanging branches of the tree were eaten by the neighbour's horse, and the horse died. It was held on principle that the action was maintainable. Why? Because the tree did in fact overhang the plaintiff's ground, and because, so overhanging the plaintiff's ground, it had brought upon the plaintiff the loss by reason of his horse having eaten it.

Is there any difference in principle between damage occasioned by the fact that cattle will eat trees which are within reach and damage to crops occasioned, as in the present instance, by the overhanging branches of the trees and the other matters which naturally follow from the trees overhanging the plaintiff's land? For the purpose of the present case we are obliged to assume that as a fact they do damage the plaintiff's crops. I can see no difference in principle between the two cases. In *Crowhurst* v. *Amersham Burial Board* (2) the court, in the circumstances which arose in that case, treated the cause of action which was set up there as one of a very large class of actions of which *Rylands* v. *Fletcher* (1) is perhaps the generic type—namely, that where a man has the power of keeping within his own boundaries a thing which may do harm to his neighbour and he does not do so, and in consequence of his not doing so harm happens to his neighbour, there being no legal ground of justification for the thing which does the harm, there an action will lie.

I have come to the conclusion that this action will lie, but I have come to that conclusion somewhat reluctantly, because I have a very strong feeling against the desirability of establishing new causes of action. There are plenty of people in the world who are glad enough to torment their neighbours with all the forms of action which have been established for centuries, and I always approach with much caution the introduction of a new ground of action. I think, however, it is impossible to decide otherwise than as I do without giving the go-by to *Crowhurst* v. *Amersham Burial Board* (2), which rests upon the same principle as the present case. I also think that although certainly we are not bound by expressions in *Lemmon* v. *Webb* (3), in the Court of Appeal, which were not absolutely necessary to the decision of that case, still we have the opinion of two very distinguished lawyers, LINDLEY, L.J., and KAY, L.J., both of whom say in so many words that, in their opinion, an action such as that which is now being brought in the present

case may be maintained. It is difficult to see on what principle it can be held otherwise.

Of course it may be contended that the remedy which the plaintiff has of cutting the trees himself is all-sufficient, and so it is not necessary to invent a new cause of action. On the other hand, it is very difficult to say why, if the plaintiff has a right to resort to that remedy of cutting the overhanging branches himself under circumstances like the present, he should not have a right of action if those branches do him damage. The plaintiff's right to remove the branches clearly indicates that the defendant in such a case cannot set up any rival right which will establish by prescription, or in any other way, a justification for him allowing his trees to overhang the plaintiff's land. Therefore, although it is perfectly true that no precedent for this action can be found, *Crowhurst* v. *Amersham Burial Board* (2) comes so very near it, and the principles which are involved are so clear, that, in my opinion, it is not possible to hold with the learned county court judge that this is an action which cannot be maintained. The case must, therefore, go back to be tried.

KENNEDY, J.—I am of the same opinion. The learned county court judge has nonsuited the plaintiff, and we must assume, for the purpose of this rehearing to-day, that the plaintiff, being the owner of the adjoining land where he had a garden, found that he had material damage produced to his garden by reason of the extent to which the trees on the defendant's adjoining property overhung it. It is said, and I have no doubt quite truly, that such actions are rare. I have no doubt they are. The question, however, is, when we look at the matter on principle, why should an action not lie for this as a nuisance? A person has land on which he is entitled to grow trees, but by what right can he claim immunity if he allows that which is on his premises, and which may do damage of this kind, to inflict damage upon his neighbour, and to say, as the defendant does in this case: "There is no right of action at all even if you prove that you have sustained damage by the growth of the trees which I have allowed to overhang, which are on my land, and which you cannot take away, because you cannot come on my land to take them away, and no action will lie for the injury."

It seems to me that in principle an action ought to lie. I cannot myself differentiate this case in principle from the decision in *Crowhurst* v. *Amersham Burial Board* (2). In that case it was a perfectly justifiable act for the defendants to grow yew trees on their own ground. There is, I think, a decision, which has not been referred to, to the effect that as long as the yew tree is proved not to so overhang and its owner has not cut the branches so that they fall on his neighbour's land—which, of course, produces another element of damage—there is no right of action. I think there are certainly dicta that no action would lie against the owner, if, for instance, to take the simplest case, the owner had yew trees on his ground, and in a high gale the yew leaves were blown on to the adjoining land. No action, I take it, would lie for that. I think it has been distinctly said that, if there are thistles growing by force of nature on a person's land, the mere fact that the thistle-down blows on to his neighbour's land gives him no right of action. But in this case there is something which, in the condition in which it is maintained by the defendant, is visibly and actively doing damage to his neighbour and creating a pecuniary loss to him. Whether the principle be that of *Rylands* v. *Fletcher* (1), or not, it seems to me to be a sound principle in law that a person has no right to maintain on his own land and thrust from that land on to his neighbour's land something which it must be assumed is doing damage, only by reason of its maintainance, to his neighbour. I cannot see that there is any reason why an action should not lie in such circumstances. If there is no damage done, it may be that all that would be said would be that there was simply a right to cut down so much of the branches as overhung the land, but where a tree is overhanging and damage results from the overhanging branches to that person's neighbour, I do not see why the only right should be for that neighbour to go to

the expense and labour of lopping the branches himself. In my opinion, this action ought to lie, and, if the facts support it, damages will result.

Appeal allowed.

Solicitors: *Neave & Bretherton*, for *Cholmeley & Taylor*, Feltham; *Allen & Son.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

R. *v.* RUSSELL AND ANOTHER. Ex Parte MORRIS AND OTHERS

[King's Bench Division (Lord Alverstone, C.J., Lawrance and Ridley, JJ.), August 9, 1905]

[Reported 93 L.T. 407; 69 J.P. 450; 21 T.L.R. 749; 49 Sol. Jo. 735]

Criminal Law—Libel—Criminal information—Libel on persons discharging public statutory duties, but not acting judicially—Licensing—Compensation authority.

The remedy of criminal information for a libel is not confined to cases of libel upon persons acting in a judicial capacity while discharging judicial duties. The court can in its discretion grant a criminal information for the protection of persons who are discharging public duties imposed upon them by statute, in respect of a libel published of them in the performance of those duties, e.g., the assessment by members of a licensing committee of the compensation payable on a refusal to renew an old on-licence under s. 2 of the Licensing Act, 1904 [see now Licensing Act, 1953, s. 17: 33 Halsbury's Statutes (2nd Edn.) 164].

Notes. Informations are now rarely used for preferring a criminal charge, the modern practice being to proceed by indictment, but it is felt that the grounds on which the information in the present case was allowed might be relevant for consideration on a trial on indictment.

As to criminal libel, see 24 Halsbury's Laws (3rd Edn.) 4, 133–139; and for cases see 32 Digest 188 et seq.

Cases referred to:

(1) *Boulter* v. *Kent Justices*, [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288; 61 J.P. 532; 46 W.R. 114; 13 T.L.R. 538, H.L.; 30 Digest (Repl.) 75, *579.*

(2) *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q.B. 431; 61 L.J.Q.B. 409; 66 L.T. 513; 56 J.P. 404; 40 W.R. 450; 8 T.L.R. 352, C.A.; 32 Digest 128, *592.*

(3) *R.* v. *Howard, etc., Farnham Licensing Justices*, [1902] 2 K.B. 363; 71 L.J.K.B. 754; 51 W.R. 21; 18 T.L.R. 690; sub nom. *R.* v. *Farnham Licensing Justices, Ex parte Smith*, 86 L.T. 839; 66 J.P. 579, C.A.; 30 Digest (Repl.) 50, *377.*

Also referred to in argument:

R. v. *Labouchere* (1884), 12 Q.B.D. 320; 53 L.J.Q.B. 362; 50 L.T. 177; 48 J.P. 165; 32 W.R. 861; 15 Cox, C.C. 415; 32 Digest 192, *2366.*

R. v. *Masters* (1889), 6 T.L.R. 44, D.C.; 32 Digest 150, *1820.*

Ex parte the Earl of Radnor (1869), 33 J.P.Jo. 740; 15 Digest (Repl.) 847, *8132*.
Ex parte Hoskyns (1869), 33 J.P.Jo. 68; 32 Digest 150, *1818*.

Rule Nisi calling upon Sir Edward Russell and Mr. Alexander Jeans to show cause why an information or informations should not be exhibited against them or either of them for misdemeanours in printing and publishing in a newspaper called the "Liverpool Daily Post and Liverpool Mercury" of July 13, 1905, false and scandalous libels of and concerning the applicants for the rule, eight justices of the peace in and for the city of Liverpool, namely, Mr. Isaac Morris, deputy-chairman of the Liverpool Licensing Committee, and the following members of the committee—Sir Charles Petrie, Messrs. W. Oulton, F. W. Frodsham, Charles H. Giles, Thomas Menlove, Morris P. Jones, and Dr. Richard I. Richardson.

The libel complained of was published in the "Liverpool Daily Post and Liverpool Mercury" in the following leading article:

"In the course of the debate on the third reading of the Licensing Act [Licensing Act, 1904, repealed] the Prime Minister [Mr. A. J. Balfour] said: 'I am perfectly convinced that when the Bill is working, and when it is seen that by this Bill, and by this Bill alone, you can without gross injustice and discontent really diminish the number of licences in this country, all parties, forgetting the differences which have unhappily divided us for the last three months, will admit that this is the greatest contribution ever made to the cause of temperance reform.' Brave words these! Now, let us see how this greatest contribution ever made to the cause of temperance reform is operating in Liverpool to diminish the number of licences. Yesterday there was a meeting of the licensing committee to fix the rate of levy on licensed houses to form the compensation fund. Four members of the committee—Mr. Charles Jones, Mr. Henderson, Mr. T. D. Laurence, and Mr. Doughan—were in favour of fixing the rate at the maximum allowed by the Act. Sir Thomas Hughes, probably feeling that it would be impossible to persuade the committee to impose the maximum, suggested three-fifths. Even this modest compromise was rejected, and the committee decided, by the votes of Sir Charles Petrie, and Messrs. Isaac Morris, Oulton, Frodsham, Giles, Menlove, M. P. Jones, and Richardson, to fix the rate at half the maximum. These gentlemen will hardly pretend that they were influenced in the course they took by the desire to diminish the number of licences in the city. The sum which it will be possible to raise in the current year at the fixed rate will amount to about £17,500. Now, apart from the expenses of administration, which will be considerable, the very modest programme which the Bench have decided on for the present year must involve an expenditure considerably in excess of the total that can be raised by yesterday's decision. The Bench have not ventured to propose the extinction of a single full licence, but they have taken a few of the 1869 beerhouses in the A and B divisions for abolition under the Act. Compensation for a few of these, amounting in all to £8,000, has been fixed by mutual agreement, and the rest have been referred, as provided by the Act, to the arbitration of the Inland Revenue authority. The amount of these cases is not likely to be less than £13,000. The matter, therefore, stands thus: For the extinction of the selected licences—licences which the Bench have decided ought to be extinguished forthwith in the interests of the community—a sum of not less than £21,000 is required, and now the licensing committee decline to levy a larger sum than £17,500. There is only one explanation of this state of affairs. The dominant party on the Bench do not desire to facilitate the working of 'the greatest contribution ever made to the cause of temperance reform'; they do not desire to diminish the number of licences in the city, but rather to hamper and obstruct those who are striving to effect, without 'gross injustice and discontent,' a sorely needed reduction. The effect of the committee's decision will be to make the rate of reduction actually less than it was under the old order of things, a result which, no doubt,

was shrewdly foreseen. We congratulate 'the trade' upon the ability and courage of their friends—we had almost said their representatives—on the licensing committee."

Asquith, K.C., Horridge, K.C., and *Hemmerde* showed cause against the rule. *Sir Edward Clarke, K.C., W. F. Taylor, K.C., F. E. Smith* and *W. H. Oulton* supported the rule.

LORD ALVERSTONE, C.J.—When this rule was granted I departed from the course usually followed in granting rules nisi by pointing out that we considered there was a serious matter to be discussed in order that the court might come to a right decision whether it was a case for a criminal information or not, and that we were not in any way expressing any opinion in granting the rule nisi. That point has been discussed, and the effect of the very able and careful argument has been to force me to the conviction that this rule must be made absolute. I am quite aware, and have often recognised, that the practice with regard to a criminal information has of recent years been very properly narrowed. I have had occasion to point that out several times during the few years I have been on the Bench. I know it is confined to special cases, and it is said that it should only be applied to protect public persons in the discharge of their public duties. I do not want to draw any distinction between persons who are in a high position and persons who are in a low position. I do not think that would be a right distinction to draw, especially as in these days people of, comparatively speaking, humble position are sometimes called on to perform very responsible duties, and are entitled to as much protection as the highest in the land. If this had been a case of honest political criticism of the conduct of an individual, or of individuals, if this article could be regarded by the ordinary commonplace mind as being a mere discussion as to the way in which judicial or quasi-judicial functions had been exercised, I should be very slow indeed to allow the criminal law to be put in force.

I wish to repeat, that I recognise that in exceptional cases, and under exceptional circumstances, this protection ought to be given. I decline to recognise the theory that no protection should be offered by criminal information simply because people are not acting in a judicial capacity. There are authorities which show that in those cases it ought not to be given, but I prefer to say that, in my opinion, it would be highly detrimental to the public interest if public officials called on to perform public acts were not entitled to the protection simply because the particular act they were doing at the material time was not a judicial act. It is, in fact, inverting the proposition. It is attempted to be argued that, because it is understood there is protection for officials when they are acting judicially, they ought not to be protected when they are not so acting. It will be found that this protection has been accorded where persons are discharging public duties as well as where they are discharging judicial duties. But there are other considerations which induce me to come to the conclusion that this case is very near the border line. It must be remembered that we are dealing with a new Act of Parliament, and with new duties imposed on magistrates. It cannot be disputed that, if this had been simply a case of the renewal or the refusal to renew a licence at quarter sessions, and the magistrates had been acting and sitting as magistrates to decide whether a licence should be renewed or not, they would have been acting judicially. What is their position here? The quarter sessions has to decide finally whether or not licences are to be renewed or refused, subject to compensation. I do not wish to express any opinion as to what its effect would be, but I have no doubt, as at present advised, that, exercising that jurisdiction, the quarter sessions are acting quasi-judicially if not judicially. The statute contemplates the delegation of the duties of the quarter sessions to a committee, and one of the things that the committee has to decide is what rates shall be imposed in the locality under s. 3 (1) of the Licensing Act, 1904, in order to form a fund out of which compensation shall be paid. If they decide that no amount shall be imposed they have

to certify that. It is enough for these purposes to say that, in my opinion, it is not accurate to describe the functions of these magistrates as being purely administrative, but I wish it also to be understood that, it being a public duty to be performed by them impartially and as magistrates, I must not be thought to concur in the opinion that they are entitled to less protection because this particular act in which they were engaged might be said to be not strictly judicial in character.

With regard to the passages which were read from *Boulter* v. *Kent Justices* (1), *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (2), and *R.* v. *Howard* (3), they were passages which had no relation to the subject-matter we are now considering. They were only expressions of opinion as to what was the position of persons who were exercising the functions of licensing justices as a preliminary licensing authority, and they certainly had no relation, and were intended to have no relation, to such a matter as we are now considering.

I recognise that to justify the court in making the rule absolute for a criminal information the persons who are seeking the protection in question must in such a case as this satisfy the court that they were exercising a public duty as magistrates, and that in performing these duties they were discharging duties imposed on them by statute. Certainly, to anyone who has followed the agitation on the licensing question and the legislation which led up to the Licensing Act, 1904, there are few branches of public duty which require a greater demand upon impartiality and fair dealing. What is this case? All the seven gentlemen who voted in favour of the reduction of the amount to be levied are named, all of them, in the alleged libel. The gentlemen who opposed them are referred to as being in favour of fixing the maximum amount, and the chairman as supporting a compromise. The article proceeds:

> "These gentlemen will hardly pretend that they were influenced in the course they took by the desire to diminish the number of licences in the city."

I think that that paragraph was in the nature of comment upon what might have been done by one side or the other. If that had been the only criticism I should have agreed that it was not a case for a criminal information, but it must be taken in connection with the passage in which the names are mentioned and contrasted with other names. Because what follows? Statements were made in the article to which no exception could be taken as to the amount which would be required, whether it was £21,000 or only £17,500. I do not think that makes much difference. That would be fair comment; but there follows this:

> "The dominant party on the Bench do not desire to facilitate the working of the [Act]; they do not desire to diminish the number of licences in the city, but rather to hamper and obstruct those who are striving to effect, without 'gross injustice and discontent,' a sorely-needed reduction."

I can only read that, after the fullest consideration, as any fair-minded man would, as a suggestion that these gentlemen did not approach the question fairly or with the desire to discharge a public duty fairly, but were striving to prevent the Act from being carried into effect. The article proceeds:

> "The effect of the committee's decision will be to make the rate of reduction actually less than it was under the old order of things, a result which no doubt was shrewdly foreseen. We congratulate 'the trade' on the ability and courage of their friends—we had almost said their representatives—on the licensing committee."

I know the high position filled by Sir Edward Russell, and I note his counsel's statement that he was influenced by the most honest and straightforward motives, but he says that he did not wish to attack these gentlemen's motives and yet he has given no explanation of the words: "a result which no doubt was shrewdly foreseen." There can be but one thing aimed at when so alluding to the conduct

of these gentlemen. Then there are the words:

"We congratulate 'the trade' on the ability and courage of their friends—we had almost said their representatives—on the licensing committee."

I know it is very easy for us sitting here to criticise such language—we ought to be very careful in judicial criticism and one ought to make every allowance possible for a sudden thought which occurs to the mind of some brilliant writer under the pressure of publication and on the moment—but here is a public charge persisted in—that these seven gentlemen who voted had been actuated by these motives. In my opinion, this is one of the cases in which, for the protection of public men in the discharge of a public duty, the remedy by criminal information still remains. The doubt I had when I granted this rule—and I had grave doubts whether the article was one which came within the rules recently applied to criminal informations—has been removed, and the case is one in which there is no alternative but to make the rule absolute. I think it will be sufficient to make it absolute only against Sir Edward Russell, because Mr. Jeans was not a party to the publication of this article. So far as he is concerned, the rule will be discharged without costs, but the rule will be made absolute in the case of Sir Edward Russell.

LAWRANCE, J.—I agree.

RIDLEY, J.—I also agree.

Solicitors: *Field, Roscoe & Co.*, for *Oliver Jones, Billson & Co.*, Liverpool; *Sharpe, Parker, Pritchards, Barham & Lawford*, for *Payne, Frodsham & Bewley*, Liverpool.

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

LIVERPOOL CORPORATION. *v.* WEST DERBY UNION

[King's Bench Division (Kennedy and Ridley, JJ.), April 17, 1905]

[Reported 92 L.T. 467; 69 J.P. 277; 53 W.R. 633; 21 T.L.R. 469; 3 L.G.R. 647; 1 Konst. Rat. App. 219]

Rates—Public building—Library—Erection by local authority under statutory powers—No dedication of site to public—Exemption—Grant of statutory certificate—Power of court to refuse exemption—Scientific Societies Act, 1843 (6 & 7 *Vict.*, c. 36), *s.* 1.

Under statutory powers a corporation were authorised to establish and maintain a public library and to appoint a committee invested with the control and management of the library, which was to be held upon trust by the corporation for the benefit of the inhabitants of the city and neighbourhood, and others resorting thereto. Admission was to be free, and a rate was to be levied for the purpose of defraying the expenses. Premises consisting of reading-rooms, where books and newspapers could be read, and a library, were established by the corporation under these powers, and, in addition to the rate, grants were made and some money was derived from other sources for their maintenance. Should the land become unnecessary for the purpose of the library, the corporation had power to sell or let it.

Held: while the corporation were bound to use the premises for the benefit of the public, the site of the library had not been dedicated to the public by the statutes permitting the establishment of the library and the corporation could do away with it or remove it elsewhere if they thought fit; the land was, therefore, not held by the corporation under an irrevocable obligation to keep it for the use of the public, and they were liable to be rated in respect of it.

Lambeth Overseers v. *London County Council* (1), [1897] A.C. 625, and *Hare* v. *Putney Overseers* (2) (1881), 7 Q.B.D. 223, distinguished.

London County Council v. *Erith &c. Assessment Committee* (3), [1893] A.C. 562, applied.

Held, further: although a certificate under s. 1 of the Scientific Societies Act, 1843, and s. 2 (1) (c) of the Friendly Societies Act, 1896 (see HALSBURY'S STATUTES (2nd Edn.), vol. 14, p. 7, and vol. 10, p. 531, respectively), had been obtained, on the facts the library was not supported wholly or in part by annual voluntary subscriptions within the meaning of s. 1 of the Act of 1843 and so was not entitled to exemption under that section.

Notes. Approved: *Battersea Metropolitan Borough* v. *British Iron and Steel Research Association*, [1949] 1 K.B. 434; *British Launderers' Research Association* v. *Hendon Borough Rating Authority*, [1949] 1 All E.R. 21. Referred to: *Hornsey School of Art* v. *Edmonton Union* (1905), 94 L.T. 203; *Westminster City Council* v. *Royal United Service Institution*, [1938] 2 All E.R. 545.

As to rateable occupation, see 32 HALSBURY'S LAWS (3rd Edn.) 16 et seq.; and for cases see 38 DIGEST (Repl.) 476 et seq.

Cases referred to:

(1) *Lambeth Overseers* v. *London County Council*, [1897] A.C. 625; 66 L.J.Q.B. 806; 76 L.T. 795; 46 W.R. 79; 13 T.L.R. 527; sub nom. *St. Mary, Lambeth (Churchwardens and Overseers)* v. *London County Council*, 61 J.P. 580, H.L., 36 Digest (Repl.) 351, *13*.

(2) *Hare* v. *Putney Overseers* (1881), 7 Q.B.D. 223; 50 L.J.M.C. 81; 45 L.T. 339; 46 J.P. 100; 29 W.R. 721, C.A.; 38 Digest (Repl.) 480, *38*.

(3) *London County Council* v. *Erith Parish (Churchwardens, etc.) and Dartford Union Assessment Committee, West Ham Parish (Churchwardens, etc.)* v. *London County Council, St. George's Union Assessment Committee* v. *London County Council*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 42 W.R. 330; 10 T.L.R. 1; 6 R. 22; sub nom. *London County Council* v. *Erith Overseers, London County Council* v. *West Ham Union, London County Council* v. *Woolwich Union, London County Council* v. *St. George's Union*, Ryde, Rat. App. (1891–93) 382, H.L.; 38 Digest (Repl.) 481, *47*.

(4) *Mersey Docks* v. *Cameron, Jones* v. *Mersey Docks* (1865), 11 H.L.Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur.N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 38 Digest (Repl.) 545, *395*.

(5) *West Bromwich School Board* v. *West Bromwich Overseers* (1884), 13 Q.B.D. 929; sub nom. *R.* v. *West Bromwich School Board*, 53 L.J.M.C. 153; 52 L.T. 164; 48 J.P. 808; 32 W.R. 866, C.A.; 38 Digest (Repl.) 551, *428*.

Also referred to in argument:

R. v. *St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581; 46 L.J.M.C. 243; 25 W.R. 827; sub nom. *Willing* v. *St. Pancras Assessment Committee*, 37 L.T. 126; 41 J.P. 662; Ryde, Rat. App. (1871–85) 188; 38 Digest (Repl.) 469, *5*.

Smith v. *New Forest Union Assessment Committee* (1889), 61 L.T. 870; 54 J.P. 324; 6 T.L.R. 31; sub nom. *Crowther-Smith* v. *New Forest Union*, Ryde, Rat. App. (1886–90) 311, C.A.; 38 Digest (Repl.) 480, *39*.

Manchester Corpn. v. *McAdam*, [1896] A.C. 500; 65 L.J.Q.B. 672; 75 L.T. 229; 61 J.P. 100; 12 T.L.R. 606; 3 Tax Cas. 491, H.L.; 28 Digest (Repl.) 17, *64*.

R. v. *Russell Institution* (*Governors*) (1854), 2 C.L.R. 755; 22 L.T.O.S. 237; 18 J.P. 149; 2 W.R. 169; sub nom. *Russell Institution* v. *St. Giles Vestry*, 3 E. & B. 416; 23 L.J.M.C. 65; 18 Jur. 597; 118 E.R. 1198; 38 Digest (Repl.) 579, *608*.

Special Case stated by the Recorder of Liverpool.

The appellants, Liverpool Corporation, were rated as the occupiers of premises consisting of a free library. The premises were opened as a free library on May 12, 1903, and were placed by the corporation under the control of their library and museums committee under the provisions of the Liverpool Library and Museums Act, 1852, the Liverpool Improvement Act, 1867, the Liverpool Corporation Act, 1889, s. 7, the Local Government Board Provisional Order Confirmation (No. 10) Act, 1895, s. 2, and the Liverpool Corporation Act, 1900, s. 30. By the Liverpool Library and Museums Act, 1852, the corporation was to establish and maintain a public library and museum with a gallery of arts, and power was given to sell or let land not wanted for the purposes of the Act. They might appoint a committee to be called the library and museums committee, and delegate to them such powers as they thought proper. The corporation was to provide all necessaries proper for the convenient use and enjoyment of the premises, and the premises and contents were to be held upon trust for the benefit of the inhabitants of the borough of Liverpool and the neighbourhood thereof and others resorting thereto. Admission was to be free of charge, and power was given to the corporation to levy a library and museum rate for the purpose of defraying the expenses. By subsequent statutes the corporation was empowered to make byelaws for the management and regulation of the premises and for the regulation of persons resorting thereto, and penalties were provided for their infringement. By the Liverpool Corporation Act, 1889, the corporation were empowered to establish and maintain lending libraries and reading-rooms, and such establishment and maintenance were to be deemed to be within the powers conferred by the Liverpool Library and Museums Act, and all the provisions of that Act were, so far as the same were applicable, to apply accordingly. The byelaws referred to were to apply to the premises from time to time erected under the Act of 1852.

The premises were established by the corporation as a public library under the above powers, and used by the public under regulations made by the corporation. They were open to the public during the appointed hours without charge or hindrance except as shown in the regulations. The corporation from time to time appointed a committee under the Liverpool Libraries and Museums Act, 1852, and delegated to that committee the powers hereinafter mentioned. The committee were appointed annually, and the exercise of the powers delegated to them was subject to confirmation or rejection by the corporation. The committee consisted in part of members of the corporation and in part of persons not members of the corporation. The committee were invested with the control and management of all the public libraries in Liverpool, including the premises in question. The fund available for the maintenance of the libraries was at the time in question derived from the following sources: (i) A library and museum rate of 1½d. in the pound collected with the poor rate. The money raised by this rate could only be used for the purposes or some of them which the committee was appointed to manage and control. (ii) A contribution of £250 per annum from the Liverpool Education Committee, being part of the annual grant made by the Imperial Exchequer out of the proceeds of national taxes to that committee, and allocated by them to the libraries and museums committee for the purchase of technical books. This contribution might, if the technical instruction committee so decided, have been allocated and used for other technical instruction purposes. (iii) Moneys derived from fees paid by the public for admission to lectures given on premises other than those in question arranged and controlled by the libraries and museums committee.

(iv) Moneys derived from fines imposed under the rules and regulations in respect of books kept beyond the allowed period.

In addition to the books, newspapers, and other publications purchased out of this fund the corporation received gifts of books and reports of societies from various sources. The committee appointed two librarians and certain attendants to clean and keep order on the premises. The books bought for the library were purchased by the committee, who also had the custody and management of its affairs and of the premises. No person resided on the premises. Books, furniture, and effects belonging to the corporation and held for the purposes of the library were always upon the premises. The premises were in the care of the librarians and servants, and open to the public from 9 a.m. to 9.30 p.m. Nothing was received by the corporation or by anyone in respect of the use of the premises or the contents except certain fines for detaining books contrary to the regulations. The premises consisted of a general reading-room for men, a reading-room for boys, and a reading-room for women, and contained some 8,000 volumes of books and also current magazines, newspapers, and directories. Books and papers could be read on the premises, or, subject to the regulations, books could be taken to be read outside by members of the public whose respectability was certified by two Liverpool ratepayers. In the reading-rooms books, newspapers, magazines, and directories might be read and consulted. The reading-rooms were largely used by the public for reading newspapers and periodicals of the lighter kind as well as for reading books. They were also used by ladies for reading ladies' periodicals and by children for looking at children's picture-books. A minority only of those using the reading-rooms did so for the purpose of reading books or periodicals devoted to more serious literature or science or fine arts.

The questions for the court were: (i) Were the corporation in occupation of the premises? (ii) Were the libraries and museums committee in occupation of the premises? (iii) Were the premises in the rateable occupation of the corporation or the libraries and museums committee? (iv) If the corporation were in rateable occupation of the premises, were they exempt from rating by reason of the Scientific and Literary Societies Act, 1843? (v) If the libraries and museums committee were in the rateable occupation, had they become exempt from rating by reason of the last-mentioned Act and certificate?

Carver, K.C., and *F. E. Smith* for the corporation.
F. Marshall, K.C., and *Greer* for the West Derby Union.

KENNEDY, J.—I have come to the conclusion that there is no exemption from the rating of this public library. The position as it seems to me is this. Here is a building with its furniture and its fittings, with its rules and regulations, and the land on which it stands that is unquestionably controlled by the corporation of Liverpool acting through the committee which partly consists of members of the corporation and partly of persons appointed by the corporation from outside the corporate body. The committee merely act, as it seems to me, taking the true interpretation of these various statutory provisions and reading them together, as persons who control and manage, like any other committee appointed by the corporation, as a sort of department for the purpose of administration in the matter of libraries. That being so, the corporation do a number of acts which would naturally be the acts of those who are for the time being occupiers. Counsel for the corporation says quite truly that there are two arguments in *Lambeth Overseers* v. *London County Council* (1), which are treated by the Lord Chancellor and LORD HERSCHELL, both of them great authorities, as distinct. They decided there against the rateability. The one argument was that there was really no occupation at all, and the other was that under the circumstances there was no beneficial occupation. In a sense it is clear that those are distinct views, but I do not think that, in considering either of them, one can leave out of sight the subject-matter of the rate—namely, the use of the buildings, and the relation of the public authority to those

buildings. In *Lambeth Overseers* v. *London County Council* (1), as in *Hare* v. *Putney Overseers* (2), there was under Parliamentary authority a property which was for all purposes the property of the public, and though, of course, an Act of Parliament may undo what a previous Act of Parliament has done, yet until there are statutory alterations Brockwell Park, on the one hand, and Putney Bridge, on the other, belong to the public in the fullest sense. In regard to Brockwell Park, there being both duties and rights on the part of the London County Council to manage it, and see that it is properly looked after, and no doubt to provide for the maintenance of a staff there, it is, by the terms of the Act which enabled the county council to purchase it, for ever and for all time the property of the public. It seems to me, therefore, that, dealing with the question of occupation apart from the question of beneficial occupation, the character of the property cannot be left out of sight, so that acts which, when you have property clearly not the property of the controlling body, might be treated as acts merely of custodians may none the less, when you have property which is really the property of the administering body, be treated as acts both in the nature and as evidence of an actual occupation. In the present case these buildings are bought under statutory authority. They happen to be buildings bought by the corporation, but they might be buildings leased by the corporation, The corporation have retained the power whenever this building is not required to sell it, or to lease it, or to deal with it as they please, and they retain a control over it which, seeing that the property is not public property, but their property, seems to me is fairly and properly under the circumstances referable to acts of occupation, and to the character of an occupier. It is true they are bound to use their building for the benefit of the public. The council first of all are to establish and maintain a public library which, of course, means a library to which the public will have access. Then the statute enacts that, subject to the provisions thereinafter contained, the public library, museum, and gallery of arts and premises used for the purposes thereof, and all articles and specimens therein shall be vested in and held upon trust by the mayor, aldermen, and burgesses, and shall be managed by the council, and shall at all times be kept in fit and proper order for the benefit of the inhabitants of the borough of Liverpool and the neighbourhood thereof and others resorting thereto. That seems to be a provision which, as applied to property acquired, whether by purchase or lease, under the powers of the statute, is justly referable to the corporation as occupiers in the legal sense of the word, and not merely as "custodians," to borrow the words of the House of Lords in *Lambeth Overseers* v. *London County Council* (1). It is only, in those two cases which I have mentioned, where the property was the property of the public, though administered under statutory authority by some public body for some purpose, that any exemption has been made to the liability to be rated. For there to be exemption, it seems to me, there must be the central fact referred to so often by Lord Halsbury and Lord Herschell of the particular character of the property with which they were dealing. It requires something of that kind to take the present case out of a class of cases which has long been well recognised, those cases where public bodies are administering for the benefit of the public an area more or less limited, be it schools or other institutions, or pumping stations under public authority for public purposes, using a piece of land and buildings thereon and machinery placed in those buildings. In all those cases, although the purpose is public and although the public can require the use of those things which are held by the public body for those purposes, and can require them to be dealt with in accordance with statutory rules, they are none the less subject to rates. In the present case the property unquestionably may at any time, when it is no longer required for the purposes of the Act, be sold or leased, and the fact that it is not for the time being anything except a place used subject to certain regulations for the public does not appear to me in itself sufficient to take this building out of the list of rateable buildings in respect of the occupancy of the corporation.

Then it is suggested, but not pressed so much, that this place may be exempt under the provisions of the Literary and Scientific Societies Act, 1843, which was

an Act to exempt from local rates land and buildings occupied by scientific or literary societies. I think there are more difficulties than one in the way of any such contention. In the first place (and that is sufficient for me) I do not see that this particular society—if you can treat either the corporation or the committee in respect of this library, museum, and rooms a society, is supporting these premises either wholly or in part by annual voluntary contributions. All that is suggested here in the way of voluntary contributions are possible gifts of books from persons choosing to give books, and the £250 a year which is received from the educational authority. It seems to me to call the latter a voluntary contribution is to do violence to the ordinary meaning of language which has an ordinary accepted meaning, and to treat a gift of books to an institution as a voluntary contribution would hardly seem to me to come within the fair meaning of the Act. Therefore, assuming you can call either the corporation or the committee a society instituted for the purpose of science, literature, or the fine arts exclusively, the premises would not become an institution which even in part, are occupied for any one of those three purposes. They are occupied for the general acquisition of that knowledge which it is so pleasant to acquire through the medium of a newspaper as to what is going on from time to time, and which is not either for literary, scientific, or artistic purposes. But, be that as it may, it is sufficient for my view to say that this clearly does not fall as an institution within the meaning of this section. I am of opinion, therefore, that the case ought to be decided in favour of the respondents.

RIDLEY, J.—I have come to the same conclusion, namely, that this rate ought to be maintained. I think that the hereditaments in question are not within the meaning of the decisions in *Lambeth Overseers* v. *London County Council* (1) or *Hare* v. *Putney Overseers* (2). I think that, speaking generally, we may regard those two cases as standing by themselves, though there is another class of property which has been put along with them—namely, sewers—which in one of the cases which came before the court were held not to be rateable. Upon the other side there are a long string of decisions since *Jones* v. *Mersey Docks* (4), which was decided in the House of Lords, under which it has been decided from time to time that, although lands are held for public purposes, they are not on that account not rateable. It was held otherwise formerly, but since the decision in *Jones* v. *Mersey Docks* (4) that is the law that has been consistently followed.

I think that *Lambeth Overseers* v. *London County Council* (1) is the first and main decision to which we must turn and see how it was that in that case Brockwell Park was held to be incapable of being rated. It was so held for two reasons—first of all, that there was no occupation of it in anybody, and, secondly, that, if there were any occupation, it was not a beneficial occupation. Brockwell Park was by statute placed under the London County Council, who were under a perpetual obligation to maintain and preserve it, when they had purchased it, as a park for the perpetual use of the public for exercise and recreation. The park itself and the land was held by them under that perpetual obligation. It was decided upon those facts, both by LORD HALSBURY and LORD HERSCHELL, that there was not a rateable occupation by anybody, because the public was the occupier and no one else. As LORD HALSBURY said ([1897] A.C. at pp. 629, 630):

> "I do not think there is here a rateable occupation by anybody. The 'public' is not a rateable occupier; and I think that that one sentence disposes of the case."

LORD HERSCHELL, when he dealt with that point, said also (ibid. at p. 632):

> "Moreover, I am not satisfied that the county council are occupiers of this park for rating purposes, though the legal possession is, no doubt, vested in them. They seem to me to be merely custodians or trustees to hold it and manage it for the use of the public."

That is, in other words, the same reason as was given by the Lord Chancellor. The second reason that was given was that, if there was an occupation at all, it

was not an occupation which as a matter of law could be a beneficial one. That is to say, as I understand the reasoning, it was an occupation affecting the site, affecting the premises, affecting the hereditaments in question, and it must be held for the benefit of the public. Therefore, if it was held in that way as a matter of law and as a matter of compulsion, it was not a thing out of which the occupant, if there was an occupant, could get without some statute which is beyond the ken of the judgment releasing him from the obligation. For that reason there ceased to be a beneficial occupation. Those are the two reasons, and they are given at some length by both the noble Lords who gave the judgment; but LORD HERSCHELL, in giving his judgment, distinguished and pointed out the difference between the case with which he was dealing and *London County Council* v. *Erith etc. Assessment Committee* (3). Perhaps *Hare* v. *Putney Overseers* (2) ought to be mentioned at this point. That was a case which, as it seems to me on the facts, which I consider material, cannot be distinguished from *Lambeth Overseers* v. *London County Council* (1). It is hardly worth while saying that, perhaps, for it is a decision of the House of Lords; but what I wish to point out is that the reason why they are exactly alike is that in *Hare* v. *Putney Overseers* (2) as in *Lambeth Overseers* v. *London County Council* (1) there was an obligation upon the Metropolitan Board of Works to hold the bridge for ever for the benefit of the public; and it was upon that ground that, in *Hare* v. *Putney Overseers* (2) the bridge was held not to be subject to occupation, and, therefore, not to be rateable. Those are the two cases which I mentioned before as constituting the authorities on the side upon which counsel for the corporation claims that his clients are exempt. Upon the other side there are the school board cases and there is the pumping station case, which, perhaps, it is most convenient to discuss, although there are many others besides. *London County Council* v. *Erith &c. Assessment Committee* (3), the pumping station case, was distinguished in *Lambeth Overseers* v. *London County Council* (1), and LORD HERSCHELL said that it had no application, because there the land on which the pumping station was constructed, the rateability of which was in question, was not by statute dedicated to that use, but there was a duty on the London County Council to make outfall works which would get rid of the sewage, and for that purpose the pumping station was necessary. So far the duty was one to the public. It was on behalf of the public that the work had to be done, but there was no statute that dedicated the pumping station to that use, and there was a statute dedicating Brockwell Park to the public use. The London County Council could place their pumping stations where they pleased. They could not take away Brockwell Park and place it where they pleased. They could remove the pumping station elsewhere at any time they thought fit, or dispose of it altogether. If they adopted some other method of dealing with the sewage they could sell the land or let it to a tenant, because they had unrestricted use of it. There is the distinction which existed between the two cases. I do not say that the case of the pumping station is precisely similar to that with which we have now to deal, but my point is that there was no statute dedicating the site of the pumping stations to the public any more than there is here a statute dedicating the site of these buildings to the public. If it is true to say that the London County Council could do away with the pumping station when they pleased, it is also true to say that the corporation of Liverpool could do the same here. It is a part of the obligation upon them that they should continue this work; that there should be a library for the benefit of the public so long as it is required. It is not a case in which they can by adopting another method of benefiting the public or carrying out the duty which is intrusted to them get rid of that which they are now doing. But that does not seem to me to be material. I think the distinction between this case and the two cases relied on by the corporation is that here there is no statute dedicating this site to the use of the public just as in the pumping station case. I must refer further to *London County Council* v. *Erith &c. Assessment Committee* (3) in order to point to some observations which occur to me to emphasise the point which I have been endeavouring to make. It is a case in which in the opinions of the House of Lords

a great many authorities are cited, and one of them is *West Bromwich School Board* v. *West Bromwich Overseers* (5). That case was quoted by LORD HERSCHELL, who said that the rateability of the school depended upon very much the same considerations as those in the *Erith Case* (3), namely, that the premises were liable to be rated although the premises in question were used for public purposes, and he quoted BOWEN, L.J.'s judgment, in the Court of Appeal. He says ([1893] A.C. at p. 590):

> "BOWEN, L.J., said (13 Q.B.D. at pp. 942, 943):
> 'I will assume that in the hands of the school board it is not capable of being beneficially occupied; but we must consider whether it is capable of being beneficially occupied in the hands of any other person. If land is by law struck with sterility when in any and in everybody's hands, so that no profit can be derived from the occupation of it, it cannot be rated for the relief of the poor. But if the schoolhouse is not used by this school board for any profitable purpose, it by no means follows that the site of it must be sterile in every other person's hands.' "

According to the best consideration I can give to this matter, that reasoning applies exactly in the present case. It is adopted by LORD HERSCHELL in the opinion which he was then giving, and it seems to me that it does supply a good distinction which we ought to follow as between the two cases which are on one side of this question and the long string of authorities which is upon the other. I certainly think it would be an extension of the principle upon which *Lambeth Overseers* v. *London County Council* (1) and *Hare* v. *Putney Overseers* (2) were decided if we were to hold that it extended to the present case. This case does not fall within the language which was used by the House of Lords in deciding the Brockwell Park case, and I should hesitate long before extending it, because I can conceive that the tendency of the decisions on the other side was to include within the liability to be rated almost every property unless one can establish an exemption for it. Here it lies upon those who say that the public library is not rateable to show that it is exempt, and I think, for the reasons I have given, that that contention is not well founded, and that, as those two authorities are not on all fours with the present case, we ought not to extend that principle. On the rest of the case and on the other points taken under the statute of 1843, I do not propose to add anything to what my brother KENNEDY has said.

Judgment accordingly.

Solicitors: *F. Venn & Co.*, for *E. R. Pickmere, Liverpool*; *Sharpe, Parker & Co.*, for *Cleaver, Holden & Co.*, Liverpool.

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*]

A

MALONE *v.* LASKEY AND ANOTHER

[COURT OF APPEAL (Sir Gorell Barnes, P., Fletcher Moulton and Kennedy, L.JJ.), March 19, 20, 1907]

[Reported [1907] 2 K.B. 141; 76 L.J.K.B. 1134; 97 L.T. 324; 23 T.L.R. 399; 51 Sol. Jo. 356] B

Nuisance—Private nuisance—Injury to licensee on premises—Claim for damages—Need to prove right of property.

In 1899 the defendants demised a house to a tenant without undertaking any obligation to repair. In 1901 the tenant sublet part of the house to a sub-tenant, who permitted his manager to reside in the house with his wife, the C plaintiff. A tank fixed to the wall of the lavatory in the house became insecure owing to the vibration caused by an engine for generating electricity worked by the defendants on adjoining premises belonging to them. The plaintiff and her husband complained to the tenant about the insecure condition of the tank, and the defendants, when the complaint was communicated to them by the tenant, sent their servants to do the necessary repairs. These men fixed D a heavy iron bracket to support the tank, and in May, 1905, that bracket fell on and injured the plaintiff when she was using the lavatory. On a claim by her to recover damages on the ground that her injuries had been caused by a nuisance committed by the defendants, viz., the vibration of the engine, and, further, by the negligence of the defendants' servants in not doing the repairs properly, E

Held: the nuisance caused by the vibration was a private nuisance; the plaintiff had no right of property in the premises, but was a mere licensee; and, therefore, she was not entitled to recover.

Held, further: on the evidence the plaintiff could not maintain her claim in respect of negligence.

Notes. The decision in this case relating to the claim for negligence was over- F ruled by *A. C. Billings & Son, Ltd.* v. *Riden*, [1957] 3 All E.R. 1.

Considered: *Cunard and Another* v. *Antifyre, Ltd.*, [1932] All E.R.Rep. 558; *Otto* v. *Bolton and Norris*, [1936] 1 All E.R. 960; *Metropolitan Properties, Ltd.* v. *Jones*, [1939] 2 All E.R. 202. Applied: *Ball* v. *L.C.C.*, [1949] 2 K.B. 159. Reversed in part: *A. C. Billings & Sons* v. *Riden*, [1957] 3 All E.R. 1. Referred to: *Blacker* v. *Lake and Elliott* (1912), 106 L.T. 533; *White* v. *Steadman* (1913), G 109 L.T. 249.

As to actions for private nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 153–158; and for cases see 36 DIGEST (Repl.) 306–310.

Cases referred to in argument:

Jones v. *Chapell* (1875), L.R. 20 Eq. 539; 44 L.J.Ch. 658; 36 Digest (Repl.) 307, H *534*.

Benjamin v. *Storr* (1874), L.R. 9 C.P. 400; 43 L.J.C.P. 162; 30 L.T. 362; 22 W.R. 631; 36 Digest (Repl.) 312, *598*.

Midwood & Co. v. *Manchester Corpn.*, [1905] 2 K.B. 597; 74 L.J.K.B. 884; 93 L.T. 525; 69 J.P. 348; 54 W.R. 37; 21 T.L.R. 667; 3 L.G.R. 1136, C.A.; 38 Digest (Repl.) 43, *219*.

I

Appeal by the defendants from the verdict and judgment at the trial before DARLING, J., and a jury, of an action by the plaintiff to recover damages for personal injuries caused by a nuisance for which the defendants were responsible, and by the negligence of the defendants' servants.

SIR GORELL BARNES, P.—The plaintiff brought this action for damages for personal injuries sustained by her, and I will shortly state the circumstances giving rise to the claim.

The accident to the plaintiff occurred on premises belonging to the defendants as trustees of the Birkbeck Permanent Benefit Building Society. In 1899 the defendants let to Witherby & Co. a house belonging to the society under an oral agreement by which the defendants did not contract to do any repairs to the premises, and in 1901 Witherby & Co. sublet a part of that house to the Script Shorthand Co. The plaintiff's husband was in the employment of the Script Shorthand Co., as manager and secretary of the company, and with his wife and family occupied as servant of the company a part of the house in which there was a lavatory which was used by him and his family. In that lavatory there was a flushing cistern fixed against the wall. In 1904 that cistern was said to be unsafe, and a communication was made by the plaintiff's husband to Witherby & Co. on the subject. Witherby & Co. then wrote to the representative of the society saying that the cistern was in a dangerous condition and required to be replaced. On Jan. 5, 1905, the plaintiff wrote to Witherby & Co. complaining of the cistern, and suggesting that its dangerous condition was due to the vibration which arose from the working of an engine for generating electricity in the adjoining premises of the society. Shortly afterwards the society sent their servants to rectify what was complained of. Those workmen placed an iron bracket under the cistern, and, I suppose, thought that they had left it in a secure condition, but, in May, 1905, the plaintiff, when using the lavatory, was injured by the iron bracket falling upon her. A claim for damages was made, and the plaintiff then brought this action. The action was tried before DARLING, J., with a jury, and the following questions were left to, and answered by, the jury: "Q. Did the bracket fall by reason of the working of the boilers and engines of the defendants?—Answer: Yes. Q. Did such workings cause a vibration amounting to a nuisance?—Answer: Yes. Q. If so, was the injury to the plaintiff the consequence of that?—Answer: Yes. Q. Did the defendants, when they put up the bracket and placed the tank upon it, do this work in an improper and negligent manner, and leave the apparatus in a condition dangerous to anyone properly using the lavatory?—Answer: Yes. Q. If so, was the plaintiff injured in consequence of such action on the part of the defendants?—Answer: Yes." The damages were assessed at £400.

The facts which I have stated and those findings of the jury have given rise to this appeal by the defendants, who ask for judgment or for a new trial. Substantially the argument before us has been upon the question whether the defendants ought to have judgment entered for them. There is one other fact which I wish to mention. The plaintiff said, in cross-examination, that when the new bracket was fixed she did not think it was safe, and that she wrote about it; and her husband said in his evidence that the cistern shook after the bracket had been put up. No question, however, was left to the jury as to the knowledge of the plaintiff that the cistern was still unsafe, possibly for the reason that the plaintiff had been seriously hurt and her evidence, therefore, was not strictly accurate. Accordingly, the case has to be considered before us upon that question independently of any finding of the jury thereon.

The two main points which we have to consider are, first, the question arising with regard to the nuisance alleged by the plaintiff, which involves the consideration of the first three answers given by the jury; and, secondly, the case based on the negligence of the defendants, who undertook to do this work, but did it so negligently that the plaintiff was injured by the bracket giving way and falling on her. Upon the first point I feel some doubt whether there was any substantial evidence that the fall of the bracket was due to the vibration; but that only affects the question whether there should be a new trial, and not the question whether judgment should be entered for the defendants. The main point to consider is the legal position of the parties, assuming that it was proved that the injury was due to the alleged vibration. The question is whether the plaintiff can maintain the action upon the ground that there was such vibration as alleged, and that it caused the bracket to fall upon her. In my opinion, the plaintiff has no cause of action upon that ground. Many cases have been cited with reference to persons having

proprietary rights in property which has been injured by a nuisance, but no authority has been cited, and no principle formulated, which would enable a person in the position of the plaintiff, having no right of property, to sue for damages for personal injury caused by the nuisance. On that ground, therefore, I think that the plaintiff has no cause of action in respect of the nuisance.

[His Lordship dealt with the claim for negligence and said, in view of the evidence:] This case is not within any class of cases in which the courts have held that there was such negligence on the part of the defendant as to give a cause of action to the plaintiff. It does not come within that class of cases where the owner of property invites persons to come upon premises of which he has the control. In the absence of any authority or principle which can bring this case within any of those classes of cases, I think that the plaintiff fails to establish any cause of action, and that this appeal must be allowed, and judgment entered for the defendants.

FLETCHER MOULTON, L.J.—I am of the same opinion. As to the question of nuisance, I think that the contention on behalf of the plaintiff is wholly without support from principle or authority. Witherby & Co. were the tenants and occupiers of the house, and, if they had been injured by the vibration or noise of the engines, they could have taken any one of three courses. They might have come to the courts for redress; they might have tolerated the nuisance; or they might have authorised its continuance. A mere licensee upon the premises, such as the plaintiff was, could not dictate to them what course they should take. In this case they seem to have permitted the vibration to go on without interfering. That was a matter entirely for them, and a mere licensee in the house could not complain of this nuisance which was not a public nuisance. Upon the question of negligence I think that the case is equally clear against the plaintiff.

KENNEDY, L.J.—I am of the same opinion. As to the question of vibration there is no more to be said. No question has been raised as to whether the alleged nuisance amounted to a public nuisance. I agree that the mere existence of vibration which would be a private nuisance to the owners or occupiers of premises affected by it would give no cause of action to the plaintiff.

Appeal allowed.

Solicitors: *Rubinstein, Myers & Co.*; *Wrentmore & Son.*

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

YOUNG v. HOFFMAN MANUFACTURING CO., LTD.

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Sir Gorell Barnes, P., and Kennedy, L.J.,) June 25, 26, July 4, 1907]

[Reported [1907] 2 K.B. 646; 76 L.J.K.B. 99; 97 L.T. 230; 23 T.L.R. 671]

Master and Servant—Duty of master—Provision of safe working conditions—Employment of competent persons to superintend work—Instruction of infant or adult under disability—Increased standard of care.

The duty of an employer to see that his servants do not suffer injury through his negligence is the same in the case of adult servants and infant servants or adult servants with a disability. In all these cases he is bound to select proper and competent persons to superintend and direct the work and to instruct the servants. He does not warrant that proper instruction shall be given to an infant workman whereas he only contracts with an adult workman that he will employ competent persons to give proper instruction. But the sufficiency of the means adopted by the employer in order to fulfil his duty varies. For instance, instruction which satisfies the standard of reasonable care in the case of an adult may be insufficient in the case of a young person, and the degree of mental or physical capacity in an adult servant may be as important an element in the consideration of this matter as juvenility. A clearly printed notice of warning and instruction may fairly be deemed to discharge the employer's obligation in the case of an educated, intelligent workman, but it would be no use to one who could not read, and oral instructions to a deaf man would be equally insufficient. But the presence of any of these circumstances cannot be treated as effecting an alteration in the nature of the employers' obligation which is in all cases to use reasonable care to prevent injury.

The plaintiff, a boy of fifteen years of age, brought an action at common law, by his father as next friend, against the defendants by whom he was employed at their engineering works, to recover damages for injury alleged to have been sustained by him in consequence of the negligence of the defendants while he was at work at a machine. The work in which the plaintiff was engaged was dangerous unless the machine was properly used, and it was contended on his behalf that he had not been instructed sufficiently in the working of the machine. The jury found for the plaintiff "on the matter of negligence in not instructing him sufficiently in the working of the machine," and awarded him damages. On an application by the defendants for judgment or a new trial on appeal from the verdict and judgment.

Held: the case must go back for a new trial, and if it was established that a competent foreman was employed by the defendants whose duty it was, either by reason of express directions or by reason of directions implied from the nature of his employment, to give proper instructions, regard being had to the plaintiff's age and other circumstances, the defendants would not be liable for the omission of the foreman to give proper instructions, but if this were not established the defendants would be liable.

Cribb v. *Kynoch, Ltd.* (1), [1907] 2 K.B. 548, approved.

Notes. So far as this decision rests on the doctrine of common employment it is no longer effective for the defence was abolished by the Law Reform (Personal Injuries) Act, 1948. By the Law Reform (Contributory Negligence) Act, 1945, the defence of contributory negligence was abolished, it being enacted that where the plaintiff's negligence had contributed to the damage he had suffered the damages were to be reduced to such extent as the court thought just and equitable having regard to the plaintiff's share in the responsibility for the damage.

Considered: *Fanton* v. *Denville*, [1932] All E.R.Rep. 360. Referred to: *Greenwood* v. *Greenwood* (1907), 97 L.T. 771; *Toronto Power Co.* v. *Paskwan*, [1915] A.C. 734; *Cole* v. *De Trafford*, [1918–19] All E.R.Rep. 290; *Heasmer* v. *Pickfords* (1920), 36 T.L.R. 818; *Wilsons and Clyde Coal Co.* v. *English*, [1937] 3 All E.R. 628; *Holdman* v. *Hamblyn*, [1943] 2 All E.R. 137.

As to an employer's duty to young servants, see 28 HALSBURY'S LAWS (3rd Edn.) 19; and for cases see cases there cited and 34 DIGEST 194 et seq.

Cases referred to:

(1) *Cribb* v. *Kynoch, Ltd.*, [1907] 2 K.B. 548; 76 L.J.K.B. 948; 97 L.T. 181; 23 T.L.R. 550, D.C.; 34 Digest 211, *1742*.

(2) *Wilson* v. *Merry* (1868), L.R. 1 Sc. & Div. 326; 19 L.T. 30; 32 J.P. 675, H.L.; 34 Digest 211, *1747*.

(3) *Leslie* v. *Fitzpatrick* (1877), 3 Q.B.D. 229; 47 L.J.M.C. 22; 37 L.T. 461; 41 J.P. 822; 34 Digest 42, *184*.

(4) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 36 Digest (Repl.) 168, *908*.

(5) *Priestley* v. *Fowler* (1837), 3 M. & W. 1; Murp. & H. 305; 7 L.J.Ex. 42; 1 Jur. 987; 150 E.R. 1030; 34 Digest 71, *479*.

(6) *Farwell* v. *Boston and Worcester Railroad Corpn.* (1842), 45 Mass. 49; reprinted 3 Macq. 316.

(7) *The Petrel*, [1893] P. 320; 62 L.J.P. 92; 70 L.T. 417; 9 T.L.R. 566; 7 Asp.M.L.C. 434; I.R. 651; 34 Digest 213, *1757*.

(8) *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. 266; 31 L.T.O.S. 255; 22 J.P. 560; 4 Jur.N.S. 767; sub nom. *Bartonshill Coal Co.* v. *Clark*, 6 W.R. 664, H.L.; 34 Digest 126, *971*.

(9) *Murphy* v. *Smith* (1865), 19 C.B.N.S. 361; 12 L.T. 605; 144 E.R. 827, 34 Digest 219, *1821*.

(10) *Grizzle* v. *Frost* (1863), 3 F. & F. 622, N.P.; 34 Digest 219, *1820*.

(11) *O'Byrne* v. *Burn* (1854), 16 Dunl. (Ct. of Sess.) 1025; 34 Digest 195, *1594i*.

(12) *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685; 56 L.J.Q.B. 340; 57 L.T. 537; 51 J.P. 516; 35 W.R. 555; 3 T.L.R. 495, C.A.; 34 Digest 232, *1976*.

Also referred to in argument:

Hutchinson v. *York, Newcastle and Berwick Rail. Co.* (1850), 5 Exch. 343; 6 Ry. & Can. Cas. 580; 19 L.J.Ex. 296; 15 L.T.O.S. 230; 14 Jur. 837; 155 E.R. 150; 34 Digest 207, *1697*.

Charles v. *Taylor, Walker & Co.* (1878), 3 C.P.D. 492; 38 L.T. 773; 42 J.P. 724; 27 W.R. 32, C.A.; 34 Digest 212, *1749*.

Crocker v. *Banks* (1888), 4 T.L.R. 324, C.A.; 34 Digest 195, *1595*.

Smith v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 34 Digest 202, *1657*.

Johnson v. *Lindsay & Co.*, [1891] A.C. 371; 61 L.J.Q.B. 90; 65 L.T. 97; 55 J.P. 644; 40 W.R. 405; 7 T.L.R. 715, H.L.; 34 Digest 22, *24*.

Robinson v. *W. H. Smith & Son* (1901), 17 T.L.R. 423, C.A.; 34 Digest 195, *1596*.

Sharp v. *Pathead Spinning Co., Ltd.* (1885), 12 R. (Ct. of Sess.) 574; 22 Sc.L.R. 368; 24 Digest (Repl.) 1046, **54*.

Application by the defendants for judgment or a new trial on appeal from a verdict and judgment at the trial of the action heard before RIDLEY, J., and a common jury at Chelmsford Assizes.

C. A. Russell, K.C., and *Harold Morris* for the defendants.

Low, K.C. (with him *C. E. Jones*), for the plaintiff.

Cur. adv. vult.

July 4, 1907. The following judgments were read.

SIR HERBERT COZENS-HARDY, M.R.—The plaintiff, a boy of fifteen, met with a serious accident while working in the defendants' engineering works.

His arm was caught by a circular saw. The plaintiff alleges that it occurred through the negligence of the defendants. The jury negatived negligence, except on one point. The operation on which the plaintiff was engaged was dangerous, and the jury found for the plaintiff

> "on the matter of negligence in not instructing him sufficiently in the working of the machine; but not in fencing."

The defendants' foreman, in the opinion of the jury, had not fully instructed or cautioned the plaintiff. The defendants desired to raise the point that they were not liable to the plaintiff for the consequences arising from the negligence of their foreman, which was not their negligence. RIDLEY, J., declined to allow this, on the ground that the defence was not pleaded. It was scarcely contended that the learned judge's decision could be supported on that ground; but it was strenuously urged before us that as against an infant workman no such defence can, in law, be good, and that, therefore, a new trial ought not to be ordered.

In my opinion there is no justification for the distinction sought to be drawn between an adult workman and an infant workman. The principle applicable cannot be more clearly stated than it was by LORD CAIRNS in *Wilson* v. *Merry* (2); L.R. 1 Sc. & Div. at p. 332):

> "The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. . . . But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master."

That the nature of the contract varies according to the age of the workman is an impossible suggestion. It cannot be that the master warrants that proper instruction shall in fact be given to an infant workman by competent persons, whereas he only contracts with an adult workman that he will employ competent persons whose duty it shall be to give proper instruction. But although the nature of the contract cannot vary, I do not doubt that the method and extent of instruction required may vary according to the age and known disabilities of a workman. A written notice or warning might be "proper" and sufficient instruction in the case of a fairly educated man, but would not be "proper" and sufficient instruction in the case of a man who cannot read. In like manner, a boy may require more full and more careful instruction than an adult. It was argued that the whole doctrine rests upon the theory or assumption that the workman contemplates risk from the negligence of his fellow-workmen and agrees that his master shall not be liable for such negligence; and that an infant cannot thus agree. I cannot assent to this view. A contract of service is regarded as beneficial to an infant; and it is no objection that the contract contains stipulations and provisions usual in the particular trade, and such as a master may reasonably impose as a protection to himself: see *Leslie* v. *Fitzpatrick* (3). There can be no legal difficulty in implying as one of the terms of the contract a stipulation which, if the contract were expressed in writing, would be free from objection. In other words, an infant can enter into a contract of service upon the usual reasonable terms upon which alone the master will employ him. I do not think it necessary to refer to the authorities which are most elaborately discussed in the judgment of the Divisional Court in *Cribb* v. *Kynoch, Ltd.* (1).

In my opinion, the case must go down for a new trial. If it is established that a competent foreman was employed by the defendants, whose duty it was, either

by reason of express directions or by reason of directions implied from the nature of his employment, to give proper instructions, regard being had to the plaintiff's age and other circumstances, the defendants will not be liable for the omission of the foreman to give proper instructions. Unless this is established, the defendants will be liable, assuming that, as in the first trial, contributory negligence on the part of the plaintiff is negatived.

SIR GORELL BARNES, P.—This is a case of some importance, for one of the principal questions raised is whether *Cribb* v. *Kynoch, Ltd.* (1) was rightly decided.

The plaintiff, a boy of fifteen years of age, by his father as next friend, sued the defendants in a common law action for damages for injury alleged to have been sustained by him owing to the negligence of the defendants. He was, at the time of the accident to him on Feb. 19, 1906, in the employ of the defendants at their works at Chelmsford, and, while at work at a small circular saw, his sleeve was caught by the saw, and he was injured. The two points made for the plaintiff were that the machine was not properly fenced, and that the plaintiff was not instructed sufficiently in the working of the machine. The jury found

> "for the plaintiff on the matter of negligence in not instructing him sufficiently in the working of the machine; but not in fencing".

They awarded him £105 5s. 6d. damages. The defendants' counsel contended at the trial that if the negligence was in not giving sufficient instructions, it was the negligence of the defendants' foreman, and that, therefore, the plaintiff could not recover. RIDLEY, J., before whom the case was tried, declined to direct the jury on this question, on the ground that the point was not taken in the pleadings. In my opinion, the point was open to the defendants on the pleadings when they are fully considered, and should have been disposed of at the trial. But the question mainly argued on this appeal was that, even assuming the point was open, the defendants could not avail themselves of it because the plaintiff was an infant, and the defendants had a duty towards him to instruct him properly and were liable for the negligence of the plaintiff's fellow-servant whose duty it was to instruct the plaintiff if that fellow-servant failed to perform that duty properly. The plaintiff's counsel endeavoured to distinguish the position of the plaintiff as an infant from what it would have been had he been an adult, on the ground that he could not agree to take the risk of negligence on the part of a fellow-servant. It seems clear from the evidence and finding of the jury that the machine was not a dangerous machine if properly used, and did not require fencing, and in the following observations I do not propose to consider what are the duties or undertakings of an employer with regard to a machine which can be termed a dangerous machine.

If the plaintiff had been an adult, it would hardly have been contended that, according to the now well-established rule of the common law, he could have recovered unless there had been some negligence on the part of the master in selecting incompetent servants, or in omitting to take such precautions as the master ought to take having regard to the nature of the employment. If a servant enters the employment of a master, his rights must depend upon the terms of the contract between them, and, as in most cases nothing is said but to fix the wages and work to be done, the rest of the terms must be implied terms. The principle upon which implied terms in a contract are to be gathered is very clearly stated by BOWEN, L.J., in *The Moorcock* (4) as follows (14 P.D. at p. 68):

> "I believe if one were to take all the cases—and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that, at all events, it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business

efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

By a similar method the present rule in contracts of service has, in my opinion, really been arrived at.

The first reported case in England in which the matter was dealt with was *Priestley* v. *Fowler* (5), in 1837, the reasoning, however, in which does not, perhaps, appear to be so clear as that of Shaw, C.J., of Massachusetts, in *Farwell* v. *Boston and Worcester Railroad Corpn.* (6), whose judgment in that case was described by SIR FRANCIS JEUNE in *The Petrel* (7) ([1893] P. at p. 323) as "the most complete exposition of what constitutes common employment," and seems to be the source of the later decisions. It is unnecessary to refer at length to that excellent judgment, but one or two passages may be quoted:

"The claim, therefore, is placed and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties applicable to this point, it is placed on the footing of an implied contract of indemnity arising out of the relation of master and servant. . . ."

"The master, in the case supposed, is not exempt from liability, because the servant has better means for providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the implied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied."

The reasoning of this judgment has been approved in England and applied to Scotland (see *Bartonshill Coal Co.* v. *Reid* (8); also *Wilson* v. *Merry* (2) and especially the judgment of LORD CAIRNS (L.R. 1 Sc. & Div. at p. 332) in the passage referred to by the Master of the Rolls, whose judgment in the present case I have had an opportunity of reading. The matter has not been regarded in the same way in some other countries. In France some writers have considered that it is an implied term of the contract that the master should insure the servant against all accidents in the course of the service and not due to the servant's own fault or vis major: see SIR FREDERICK POLLOCK'S work on TORTS (7th Edn.) p. 99, notes.

Then, does it make any difference that the servant is an infant? I think not; except, of course, that the duty which the master himself would have had to perform towards an adult may be greater in degree towards an infant, as it might also be in other cases where it may vary according to the want of experience, age, and capacity of the servant. In general a contract of service is for the benefit of an infant, and he can bind himself as an apprentice or enter into a contract of service, though there are cases where the contract is so manifestly to the disadvantage of the infant that he could not be bound by it. If, however, the terms of the contract are of the common kind, and such as the master might reasonably impose for his own protection, and the wages are fair, there seems no reason for implying terms different in kind in the case of the infant from those implied in the contract of the adult: see the cases collected in SIMPSON ON INFANTS (2nd Edn.), p. 94. In *Murphy* v. *Smith* (9) the court, consisting of ERLE, C.J., WILLES, BYLES and KEATING, JJ., made absolute a rule to enter a nonsuit in a case where the plaintiff, a boy of sixteen years of age, in the defendant's employ, was injured through the negligence of a foreman. I suppose there are many thousands of persons who have not attained their majority employed in most of the trades carried on in this country, and their relations

to their employers are for all practical purposes similar to those of adult servants, and no adequate reason was suggested by counsel for implying different terms according to whether the servant was under or over twenty-one. A

It was suggested that there was a difference because an infant could not consent to take the risks of his employment, but this suggestion appears to me to be disposed of on the grounds I have above indicated—that it must be ascertained what the employer has undertaken to be responsible for, and that an infant may enter into a contract of service. It was further urged for the plaintiff that the rule did not apply where the negligence complained of was in not giving the plaintiff sufficient instructions in the working of the machine, and *Grizzle* v. *Frost* (10) and the Scottish case of *O'Byrne* v. *Burn* (11) were relied on; but the latter case was decided in 1854, and at that time the different positions of the plaintiff and the negligent fellow-servant, who seems to have been considered as a deputy of the master, may have affected the decision. The former was a nisi prius case in which the contest seems to have been confined to the question of what instructions the plaintiff in fact had; no evidence appears to have been offered to show that the defendants had exercised due care with regard to providing for the instruction of the plaintiff, and, in the summing-up, the foreman in that case was treated as a deputy of the master instead of a fellow-workman, which is not in accordance with the decision in *Wilson* v. *Merry* (2). It is practically impossible for the employers themselves in most works to give the necessary instructions to inexperienced workmen as to the work they have to do, and the mode in which they should do it. It seems unreasonable to imply that the master has undertaken to do so. The result of an obligation on the part of the master personally to instruct might, as Lord Cairns said (in the passage of his judgment above referred to) of the execution of the work, be disastrous to the servant, for he might be incompetent personally to instruct. The master is bound to take reasonable care to select proper and competent persons to give the necessary instructions, but he does not, in my opinion, undertake to be responsible for their negligence any more than he does for the negligence of a superior fellow-servant whose negligence in the actual work causes injury to another servant. In my opinion, *Cribb* v. *Kynoch, Ltd.* (1) was rightly decided, and in the present case a new trial must be ordered. I do not think judgment can now be entered for the defendants, as the plaintiff is entitled to try the question whether there has been default on the defendants' part causing injury to him. B C D E F

KENNEDY, L.J.—I have had the opportunity of reading the judgment which has just been pronounced by the Master of the Rolls, and it is needless to re-state the summary of the material facts and of the legal points discussed in the arguments before us which is given in the opening sentences of that judgment. G

It appears to me that, in accordance with the judgment of Lord Cairns, L.C., in the leading case of *Wilson* v. *Merry* (2), the most important passage in which has been quoted by the Master of the Rolls, we may, in regard to the argument put forward by the learned counsel for the plaintiff in the present case, treat as correct the following propositions: (i) In the absence of a special contract between employer and employed, it is an implied term of the relation that the master undertakes, in the view of the common law, to use reasonable care (a) in the selection of competent fellow-servants; (b) in having and keeping his machinery, the use of which might otherwise be dangerous to the servant in his employment, in proper condition and free from defect; (c) where the employment involves the handling by the servant of machinery which, though not defective or less fenced or otherwise protected than is required by statute, or apart from statute, is reasonably necessary for the safety of the employed, may prove dangerous to the servant unless he is instructed to take reasonable care to avert that danger by such instruction and warning as will be sufficient to enable the servant to avoid the danger. For a breach of any part of this implied contract causing the injury the master may be held liable to the servant, unless he can shelter himself under H I

the defence of contributory negligence on the part of the servant or a possible application of the maxim volenti non fit injuria as expounded by BOWEN, L.J., in *Thomas* v. *Quartermaine* (12). (ii) But the master does not undertake to indemnify the servant against the consequences of the negligence of any person except the master himself.

In the present case the jury have not found, for no such issue was presented to them, that there was any negligence on the part of the defendants themselves and apart from their servants. They have found that the plaintiff was not instructed as he should have been, and the fault of Pannell, a foreman in the defendants' employ, in failing (according to the verdict) to give him this instruction has, through the ruling of the learned judge at the trial, been treated as if by itself such failure constituted an actionable breach of contract on the part of the defendants whose servant Pannell as well as the plaintiff was at the time. It has been sought by the plaintiff's counsel to justify this ruling upon the ground that the implied contract between an employer and a workman who is an infant differs in nature from the contract between the employer and an adult workman; and that the infant workman cannot be held to undertake the risks which the judgment in *Wilson* v. *Merry* (2) declares to be involved as part of the servant's undertaking in the contract of service. I share the inability of the Master of the Rolls to find any justification for such a distinction between the rights of an infant and the rights of an adult workman under the implied contract with the employer. I agree with him that the stipulations of this contract cannot be held, as the counsel for the plaintiff invited us to hold, to vary with the age of the workman so that the duty of the employer in the case of the adult workman to use reasonable care to avert danger in the use of machinery by adequate instruction or other means is transmuted, in the case of an infant workman, to a warranty of the employer that he shall be so instructed. The contractual duty of the employer in the two cases appears to me to be identical and invariable. What does, I think, vary according to the circumstances of each particular case is the sufficiency of the means adopted by the employer in order to fulfil his invariable duty. Instruction which makes the standard of reasonable care in the case of an adult might not improbably be held by a jury to be insufficient in the case of a young lad or girl of fourteen. But youth in the servant is not the only circumstance which has to be considered in regard to the proper discharge of the employer's duty. The degree of mental or physical capacity in the servant may be as important an element in the consideration as juvenility. A clearly printed notice of warning and instruction might fairly be deemed to discharge the employer's obligation in the case of an educated and reasonably intelligent workman, but it would be of no use to one who could not read. On the other hand, merely oral instructions to one who was deaf would be equally insufficient. In some cases, indeed, the inexperience of an adult might require much better and more explicit instruction than the mere youthfulness of an infant who had received some previous training in the factory or workshop.

To sum up, in judging the truth of the master's assertion of the adequacy of the means by which he claims to have fulfilled his contractual obligation to use reasonable care in averting by proper instruction the injury which might otherwise arise to the servant in operations connected with machinery which may be dangerous, the immaturity of the servant and the mental or physical incapacity of the servant are points to be considered, much as such immaturity or incapacity has to be considered in the issue of contributory negligence in actions where the party injured is a stranger which are discussed by the light of both English and American judgments in MR. BOWEN'S work on NEGLIGENCE IN LAW, vol. 1, pp. 183–192. But the presence of any of these circumstances cannot be treated as effecting an alteration in the nature of the obligation itself, which is in all cases to use reasonable care to prevent injury.

There is, I think only one other question in the case as it was argued before us, and that is this. If it be the duty of the employer, in order that he might discharge

his obligation to use reasonable care to prevent injury to his servant in handling the machinery upon which the servant is employed, to instruct him as to the safe and proper method of working, may that duty be discharged by delegating the business of instruction to a competent person—call him foreman or overlooker or what you will—so that, if an injury happens to the servant from the failure of the delegate to give any instruction, or adequate and proper instruction, the negligence causing the injury is, in point of law, the negligence, not of the master, but of the foreman or overlooker, who is a fellow-servant with the injured person? I agree with the Master of the Rolls that the contractual duty of the master to instruct may be discharged in this manner, and, further, that such delegation may be either an express delegation or implied as a part of the known and recognised duties of the delegate—whether styled foreman or overlooker or anything else—in the course of his service. Whether in the particular case such delegation either express or implied, has existed; whether the directions of the employers, if expressly given to the delegate, are sufficiently precise and explicit; whether the delegate was or was not competent to understand and to fulfil the delegated duty; all these—just as, in a case where the employer gives instructions personally or by written or printed notice, what has to be considered is the adequacy of such personal direction or notice—are matters proper for the consideration of the tribunal which, whether judge or jury, has to decide the issues of fact upon which the question of the fulfilment or non-fulfilment of the employer's duty to use reasonable care to avert danger to his servant employed about the machinery, and consequently the question of his liability or non-liability for the injury to the servant, depends. RIDLEY, J., by his ruling in the present case shut out the consideration of all such questions, and as, in my opinion, it was the defendants' right to have the issues of law and fact involved in their defence of "common employment," or, perhaps more correctly, in their defence that there had been no negligence on the part of the defendants, as distinguished from negligence on the part of their servants, adjudicated upon, the case must, in my opinion, go down for a new trial. In regard to the authorities which were cited to us very fully and carefully by the learned counsel for the plaintiff, I deem it unnecessary to refer to them, because I am prepared to adopt as my own the analysis and review of those authorities which are contained in the considered judgment of the Divisional Court in *Cribb* v. *Kynoch, Ltd.* (1).

Appeal allowed.

Solicitors: *Treadwell & Aylwin*; *Walter Hilliard.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

THE BEARN

[Court of Appeal (Sir Richard Henn Collins, M.R., Sir Gorell Barnes, P., and Romer, L.J.), December 14, 15, 16, 1905]

[Reported [1906] P. 48; 75 L.J.P. 9; 94 L.T. 265; 22 T.L.R. 165; 10 Asp.M.L.C. 208]

Harbour—Obstruction—Duty of authority to remove—Obstruction at berth owned by wharfinger—Implied obligation by wharfinger to keep berth safe—Damage to vessel—Liability of authority and wharfinger.

By their private Act a harbour authority were under a duty to "preserve the navigation of the harbour and the use thereof by the persons trading thereto, and for that purpose to . . . remove . . . any obstructions or impediments whatsoever which may in any way hinder . . . the navigation of the said harbour." Damage was caused to a vessel when she grounded on an obstruction while lying at a berth within the harbour at a wharf which was owned by a railway company.

Held: the harbour authority were under a statutory duty to take reasonable care to see that the berth was in a safe condition; they could not absolve themselves from the consequences of a breach of that duty by relying on the acts of either the railway company, as owners of the wharf, or the pilots who had to take certain soundings in the harbour from time to time, but were the servants of Trinity House and not those of the harbour authority; and therefore the authority was liable for the damage to the vessel.

Held, further: the railway company were also liable, there being an implication on their part as wharfingers that they had taken reasonable care to ascertain that the condition of the berth was safe.

Notes. Applied: *Bede Steamship Co.* v. *River Wear Comrs.*, [1907] 1 K.B. 310. Considered: *Liebig's Extract of Meat Co.* v. *Mersey Docks and Harbour Board and Nelson*, [1918] 2 K.B. 381. Distinguished: *The Empress*, [1923] P. 36. Considered: *Great Lakes Steamship Co.* v. *Maple Leaf Milling Co.* (1924), 41 T.L.R. 21; *The Grit*, [1924] P. 246; *Dorey (Onesimus) & Sons, Ltd.* v. *Headley's Wharf, Ltd., and William Ashby, Ltd.*, [1939] 3 All E.R. 23. Referred to: *Cawood Wharton & Co.* v. *Samuel Williams & Sons, Ltd.*, *The Cawood III*, [1951] P. 270.

As to the liabilities of harbour authorities and wharfingers, see 35 Halsbury's Laws (3rd Edn.) 829–834; and for cases see 41 Digest 975 et seq.

Case referred to:

(1) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 36 Digest (Repl.) 168, *908*.

Action in which the plaintiffs, owners of the steamship *Bearn*, claimed from the defendants, the Shoreham Harbour Trustees and the London, Brighton, and South Coast Rail. Co., Ltd., the owners of a wharf known as Kingston Wharf, damages for damage to the vessel when she took the ground while lying at a defective berth at Kingston Wharf to discharge her cargo.

By the New Shoreham Act, 1816 (56 Geo. 3, c. lxxxi), as amended and varied by the New Shoreham Harbour Act, 1873 (36 & 87 Vict., c. ccxi), the New Shoreham Harbour Act, 1876 (39 & 40 Vict., c. ccxi), and the New Shoreham Harbour Act, 1887 (50 & 51 Vict., c. xcv), the first defendants were constituted the harbour authority for the harbour of New Shoreham, and as such authority had the control and management of the harbour and the berths therein, including a berth alongside a wharf called the Kingston Wharf, and full power and authority to direct the mooring of all vessels coming into the said harbour. These defendants had power to levy tolls in respect of all vessels entering and using the harbour, and tolls on a higher scale in respect of all vessels loading or unloading within the limits of the said harbour. The plaintiffs alleged that the harbour trustees, in

breach of their duty as harbour authority, failed to make or maintain or to take reasonable care to make or maintain the berth in a safe and proper condition, but allowed a heap of rubble and refuse to lie on the ground. The trustees delivered a defence by which they admitted that they were the port and harbour authority for the harbour of New Shoreham, but denied that they had the control and management of the berth, and did not admit that the berth was in an uneven and defective condition, or that the *Bearn* was in consequence strained or damaged. The defence then proceeded:

"There was and is no duty on the defendants to make and maintain the said berth in a safe and proper condition, nor are they or their servants required to ascertain if the said berth was in a proper condition, and if unsafe or dangerous to warn the plaintiffs of the fact. The said berth and adjoining wharf are the property of and maintained by the London, Brighton, and South Coast Railway for their own use and profit, and for the purposes of loading and discharging vessels, and the plaintiffs' steamship *Bearn* came to the said berth at the invitation and request of the said company for the purpose of discharging her cargo at their wharf. If the bottom of the said berth was not in a fit and safe condition (which is not admitted) the same was due to the negligence of the said company or their servants, for whose acts or negligence the defendants are not responsible."

In answer to an interrogatory these defendants said that they had relied, as they reasonably might, on the proper discharge by the railway company of their duty to vessels using the wharf, by the pilots of their duty to vessels employing them to keep themselves thoroughly acquainted, by soundings and otherwise, with the depth of water at and the condition of the berth to which vessels were piloted and moored, and by those on board vessels using the wharf and berth, not to throw or let fall overboard anything likely to make the berth unsafe. No report, they said, was made or notice given by the railway company, pilots, or any other person that the unevenness of the ground at the berth existed before or whilst the *Bearn* was at the berth, or that the berth was in other than good condition and safe. As against the railway company the plaintiffs alleged that those defendants had failed to make or maintain, or to take reasonable care to make or maintain, the berth in a safe and proper condition. The company denied liability, and pleaded that they believed that the berth had been from time to time sounded and examined by others on behalf of the Shoreham Harbour authority, who from time to time repaired the berth, as and when required, and maintained the same in good order and condition, but they were unable to say when the berth was last examined.

The regulations made by the Trinity House for the pilots licensed for the Shoreham district contained the following clause:

"6. The pilots are to take soundings once a week, or oftener if necessary, at the undermentioned places at the following states of the tide, and the senior pilot is to record the result, with the further particulars required, in the book provided for that purpose, which is to be kept at the watch house, and is to be accessible to the pilots at all times: (a) date; (b) state of tide—low water, neap tides, low water, spring tides; (c) places—on the bar between the piers, East Arm, between the Dolphins, in the channel at various places, and also at the wharves, West Arm, Soldier's Point, in the channel at various places, and also at the wharves; (d) result—depth of water to be ascertained by means of a graduated rod."

The harbour trustees had made the following byelaw:

"Every pilot acting as such to any vessel entering or leaving or within the harbour or dock shall from time to time acquaint himself and keep himself thoroughly acquainted by soundings and otherwise with the depth of water in the harbour and dock and the entrance thereof respectively, the shape and

slope of the bed of the channels, and all other matters necessary to qualify himself sufficiently to navigate such vessel in and out of the harbour or dock."

Bargrave Deane, J., gave judgment for the plaintiffs and the defendants appealed.

Carver, *K.C.*, and *D. C. Leck* for the Shoreham Harbour Trustees.

Pickford, *K.C.*, and *D. Stephens* for the London, Brighton, and South Coast Rail. Co. Ltd.

Laing, *K.C.*, and *Stubbs* for the owners of the *Bearn*.

Dec. 16, 1906. **SIR RICHARD HENN COLLINS, M.R.**—These are appeals from a decision of Bargrave Deane, J., who has held that the two defendants, the Shoreham Harbour Trustees and the London, Brighton, and South Coast Rail. Co., are respectively liable to the owners of the *Bearn* for the damage sustained by that vessel, owing to the defective condition of a berth in Shoreham Harbour, where she took the ground. The vessel is French, and was carrying grain, and was brought by a pilot under the direction of the brokers to Kingston Wharf, which is in Shoreham Harbour, and belongs to the defendant railway company. The harbour is under the control of the first defendants, the Shoreham Harbour Trustees, and they are under obligations as to the maintenance of that harbour and as to sounding and the removal of obstructions, and have a number of other duties imposed upon them, in the broadest possible terms by their Acts of Parliament. I will refer to the terms of those duties presently. The vessel sustained serious damage owing, as is now admitted, to the defective condition of the berth where she lay, and the action was brought charging each of these defendants with responsibility for that damage by reason of negligence on their part.

Of course, the plaintiffs in this case, as in every other, have to make out their case, and counsel for the harbour trustees contends that the plaintiffs have not discharged the burden which is on them. That is rather a difficult point, in the particular circumstances of this case, for the trustees to make good. When one comes to look at what their own case is with respect to their duties in this matter they in terms deny, by their statement of defence, that there is any duty on them at all. They plead as follows:

> "There was and is no duty on the defendants to make and maintain the said berth in a safe and proper condition, nor are they or their servants required to ascertain if the said berth was in a proper condition, and, if unsafe or dangerous, to warn the plaintiffs of the fact. The said berth and adjoining wharf are the property of and maintained by the London, Brighton, and South Coast Railway for their own use and profit and for the purposes of loading and discharging vessels, and the plaintiff's steamship *Bearn* came to the said berth at the invitation and request of the said company for the purpose of discharging her cargo at their wharf. If the bottom of the said berth was not in a fit and safe condition (which is not admitted), the same was due to the negligence of the said company or their servants, for whose acts or negligence the defendants are not responsible."

In their answer to interrogatories, they take up the same position in a still more emphatic manner. They say, after asserting that the duty is on the defendant railway company:

> "There is no duty on the part of the defendant to vessels coming to or lying at the said wharf to provide a safe berth or ascertain its condition, or give warning if the berth is unsafe. The defendants relied, as they reasonably might, on the proper discharge by the said railway company of their duty to vessels using the said wharf."

That is the attitude of these defendants who are now asserting that there is no primâ facie evidence of negligence against them. They begin with an absolute disclaimer of all duty, and they do that in the face of the admitted fact that

this berth was in a defective condition. It seems to me that the plaintiffs have gone a long way, under those circumstances, to throw the onus upon the defendants, who certainly have a primary duty, to put it at the lowest, to take reasonable and ordinary care that this berth, among other places in the harbour, shall be safe. It seems to me that the plaintiffs have discharged the onus upon them, and thrown back upon the defendants, who dispute any obligation, the burden of showing they were not negligent, which is a somewhat difficult position for them to extricate themselves from.

I said I would refer to the terms of the duty imposed upon these defendants. They are to be found in s. 27 of the New Shoreham Act, 1816, and that Act has been supplemented by later Acts. That section begins by defining the limits of the harbour, which clearly embrace the locus in quo in this case, and proceeds:

> "Shall and are hereby empowered, authorised, and required to deepen, cleanse, scour, and enlarge the channel of the said harbour within the limits aforesaid, and to make a new pier or piers, with the necessary wharfing, to confine the channel opposite to and near the intended entrance to the said harbour, which they are hereby required to open, and from time to time to amend or improve as they may deem expedient. [Then follow words empowering them to provide dredgers and hoppers for removing the shoals within the limits aforesaid, and to construct lighthouses, etc., and to make and effect such other works within the aforesaid limits] as shall be necessary for improving and preserving the navigation of the said harbour, and the use thereof by the persons trading thereto, and for that purpose to dig, take up, remove, and carry away any rocks, stones, soil, sand, gravel, rubbish, or other gross matter which shall obstruct, prejudice, or hinder the navigation of the said harbour and the improvement thereof [and also to remove any] obstructions or impediments whatsoever which may in any way hinder or prevent the navigation of the said harbour [for the purpose of] preserving the navigation and use of the said harbour within the limits aforesaid and rendering the said harbour safe and commodious."

Therefore, there can be no doubt whatever that the first defence set up by the defendants, the Shoreham Harbour Trustees, that they were under no duty hopelessly breaks down. So, in my opinion, does the second position taken up by them, which is a corollary of the first, that the obligation was not on them because it was on the railway company. It was not on the railway company. There was nothing to derogate from the absolute duty primarily imposed upon the harbour trustees, and if they rely on someone else performing their duty they take the risk, whether those others perform the duty or not. There is a primâ facie case, not merely of negligence, but of an absolute declining by them to accept the obligation placed on them.

The question then arises: Is the mischief that happened traceable to the negligence of the defendants? As far as the trustees are concerned we start with a complete declining of any duty at all, followed by a corresponding conduct—namely, a total abstention on their part from taking any steps whatever to assure themselves that the berth in question was in a safe condition. They took no steps whatever to remove any obstructions by dredging or to see whether obstruction were there or not. They do not pretend they did either. They simply hoped and expected that other people not in their service—namely, the pilots—might do their duty so efficiently as to make it of no consequence whether the harbour authority did their duty or not. The question being whether the harbour authority took reasonable care, and the fact being they took no care themselves, and did not examine to see whether other people had done the harbour authorities work, they cannot say they have taken reasonable care. If the trustees are going to rely upon the acts of other persons as being an exercise of reasonable care on their own part they are certainly under an obligation to show by the clearest possible evidence that those persons have so acted as to make it unnecessary for the

trustees to do anything more to keep the berth safe. When we come to examine the evidence, however, we find that they have done practically nothing. If their harbour master, who in respect of this part of the harbour does not seem to take a very high view of his duties, assumed that the pilots were doing something in the way of dredging, he did not know what it was and he did not inquire what it was, and the records in the pilots' book which he could have seen did not show him that this position had been dredged at such short intervals as to show with reasonable certainty that the place had been dredged at all, for the pilots' book shows no operation at this place between February, 1903, and Oct. 3, three weeks before this accident happened. That is the position of the defendants the harbour trustees, those facts show what they have done in this matter.

What is really the main defence of the trustees? It is in fact the only shadow of defence which, it seems to me, they have raised in their argument. They say, agreed that there was an obstruction which did damage to the *Bearn* on Oct. 22, the particular mischief which caused the injury may have arisen on Oct. 21, and if it arose on that date they had no reasonable opportunity of examining the berth and removing the obstruction before the *Bearn* arrived. Though, judging from their previous conduct, the chance of their availing themselves of that opportunity was remote. They say, we assume, that the accident that led to the formation of this hump in the berth and rendered it unsafe happened immediately before the *Bearn* arrived at the berth on Oct. 22, and there was in the circumstances under which she took the berth no interval between the departure of the *Worthing Belle*, the vessel which occupied the berth before the *Bearn*, and which is supposed to have created this hump, and the arrival of the *Bearn* in which we could reasonably have examined the berth, and, consequently, there is no case of negligence causing this damage made out against us. [His Lordship examined the evidence and continued:] For the reasons I have given I think the evidence does not point to this hump being made on the night or day before this accident. I should draw the inference that there was a gradual accumulation, which may have been going on for days. Putting it as high as possible in favour of the trustees, in my opinion there were ample grounds for the learned judge to come to the conclusion that by ordinary care on the part of the trustees, whose absolute duty it was to use reasonable care in respect of this berth, the state of the berth could have been discovered before the *Bearn* came into it. Therefore I am clearly of opinion that there is no answer on the part of the Shoreham Harbour Trustees to the liability imposed upon them by the judgment of the learned judge in the court below.

Now comes the case of the railway company, as to whom no doubt something more may be said, but I have come to the conclusion that they also are liable. There is no doubt an obligation on the harbour authorities, but without a doubt there is also an obligation upon the railway company. They are not the persons responsible for the condition of the berths in the harbour, but they are the owners of a wharf with a berth for steamers in front of it, and it is absolutely essential to have a berth, although they are not charged with the duty of keeping it in order, and are aware that other people are responsible. What is their duty? It seems to me that it cannot be put better than it was put by Bowen, L.J., in *The Moorcock* (1). In his judgment he says this (14 P.D. at p. 70):

> "No one can tell whether reasonable safety has been secured except themselves, and I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so."

These defendants, the railway company, are inviting persons to come to their wharf for the purpose of gain to themselves, and the persons who come are not

mere licensees, but by coming give the owners of the wharf an opportunity of taking a sum of money from the consignees, for the use of their wharf. They cannot earn that sum of money without the assistance of the vessel being given by coming to the wharf. Therefore, it is not the case of a licensee coming, but it is the case of a person coming at the invitation of the wharfinger, and the duty of the wharfinger is, therefore, higher than that of a mere licensor. Taking the measure of duty as laid down in the passage of the judgment of BOWEN, L.J., there is an implication on the part of the wharfinger that he has taken reasonable care to ascertain that the condition of the berth is safe, and if it turns out to be unsafe he cannot shelter himself by saying he did not know it. He could defend himself by showing that he did take reasonable care to find out, but, knowing how much care he has taken, if that care is not reasonable and he has no reasonable ground for thinking the berth safe, he is fixed with the obligation of telling the person coming to the berth that he does not know what the condition of it is. You cannot put his liability lower than that.

Taking that standard, have the railway company taken reasonable care to satisfy themselves as to the condition of the berth? It is clear that they did not warn the ship that they did not know what the condition of the berth was, and, therefore, they are liable unless they can show that they have taken reasonable care to satisfy themselves that it was in a safe condition. Again we find that position of detachment. They simply rely upon the chance of other people who owe a special duty doing all that is necessary with regard to the safe condition of this berth. They do not really know what those other people have done, because they do not take any steps to inform themselves what those other people have done, except that they have seen those other people moving about in a way to suggest sounding. Whether they found anything there the railway company did not take any steps to inquire. That, I think, is not an unfair interpretation of the evidence. This one passage in the evidence of the company's wharfinger sums up a series of questions:

> "Q. You leave it to chance whether the pilots tell you whether there is anything the matter with the berth or not?—A. Certainly. Q. And for yourself and your company you take no steps at all?—A. Not unless I know there is something there."

In further cross-examination he admits that he has taken no steps to find out whether there is anything the matter. As to the sounding by the pilots on Oct. 3, which the trustees relied on, the wharfinger was in a state of ignorance. He had seen the pilots there some time or other, but whether it was on Oct. 3 or not he did not know. It seems to me that he is not in a position to show that he took reasonable care to ascertain the condition of the berth as to which he has a duty to perform.

We fall back to the pilots, who have to bear the whole weight of the obligation to keep the berth in a proper condition. To begin with, it does not appear to me that there is any duty imposed upon the pilots in this particular matter. They are under an obligation to the Trinity House, which lays down the standard of duty for them, and they are required to take soundings once a week; but, as has been pointed out, the pilots are not sounding for the special purpose of seeing whether the berths are in a safe condition for vessels to lie in, but they are sounding, primarily, for the purposes of their own concerns—namely, the safety of the means of access or egress in and out of the harbour and about it. That might embrace the examination of the particular locus in quo, but the object would be not to take the contour of the berth, but simply to see whether the navigable passage was obstructed. Therefore, the main basis on which these defendants erect their structure of reasonable care seems to me to break down. The obligation of the pilots did not embrace an examination of the particular contour of the bed of the berth. If they have examined it it is an accident. In this particular case the harbour trustees and the railway company have never

taken any steps to ascertain what the pilots did know about the berth and have done, and the pilots themselves, instead of examining, even for their own purposes, once a week, as the Trinity Masters have appointed, do not pretend to have examined it more than once a fortnight or once in three weeks. I very much doubt, on the evidence, whether they have examined it as often as that.

The result is that these two defendants are both resting their defence upon speculation of what they chose to assume those other people had probably done. They seem to shelter themselves, for their own failure to do what they were bound to do themselves, behind the hope that other people have done something, which even if done would not relieve the defendants from the responsibility for not doing what they ought to have done. I think on both points of the case the learned judge was right. I do not stop to criticise in detail one or two sentences which the ingenuity of counsel singled out for comment. There may be some ground for saying that one passage, taken by itself put the wharfinger's obligation higher than what I have called the low-water mark laid down in *The Moorcock* (1), but when it is examined with the context I do not think the learned judge departed from the authority most relied on in this case—namely, *The Moorcock* (1). Even if he did, there was, in my opinion, on the principles laid down in that case, abundant ground for establishing this liability. Therefore, the appeals must be dismissed.

ROMER, L.J.—I have come to the same conclusion. It is clear the damage to the *Bearn* was caused by the existence of the hump, referred to in the evidence, in the berth where the ship lay, and that that hump ought not to have been where it was. I will first take the case of the harbour authorities. They had a general duty imposed upon them by statute to keep clear the channel of the harbour, including, of course, that part of it where this berth was, and they are liable for damage caused by their negligence in the performance of their duty.

The first question one has to consider is: Did they neglect their duty with reference to this berth? I think, undoubtedly they did. [His Lordship referred to the evidence.] We come to another suggestion of theirs which has been urged before us on their behalf. It is said that the harbour trustees were free from any obligation to take active steps by their own servants in reference to this matter, because of the directions that had been given to the pilots. It is clear that the pilots were not the servants of the harbour trustees, and owed no duty to them, nor did the harbour trustees supervise or see that they sounded sufficiently often or properly, not with regard to navigation, but with reference to ascertaining the condition of the bottom of the berth with reference to the question of vessels coming to the berth and having to lie in at low water. If the rule is turned to with regard to these pilots, you will find that such obligations as were cast upon the pilots with regard to soundings were with reference to pilots acting as such to any vessel entering or leaving or within the harbour or dock, and for the purpose of enabling the pilot "to qualify himself efficiently to navigate such vessel in and out of the harbour or dock." It is to be remembered that pilots bring in and take out their vessels at high tide, and such steps as they have to take or would take as to soundings are for the purpose of their own information, and are with reference to the question of navigation and not directly with reference to the question of the safety of a berth on which a vessel is to lie. It further appears on the evidence that the harbour trustees contented themselves with waiting until some one reported that the berth required attention or dredging, and then they dredged. That was the beginning and end of the way they performed their duty with regard to their obligations. [His Lordship referred to the evidence.] On the evidence, I come to the conclusion that this injury to the *Bearn* would not have been caused had the defendants, the harbour trustees, not been negligent in the performance of their duties. Therefore I think the appeal fails.

Next as to the railway company. Their duty apart from any special circumstances may be gathered from what BOWEN, L.J., said in *The Moorcock* (1), where he said in a similar case (14 P.D. at p. 70):

> "They at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so."

In fact, the railway company did no acts and took no active steps whatever to discharge that duty. Their case is that they were entitled to be passive by reason of two matters. The first of those matters is that the harbour trustees had the duty cast upon them to which I have previously referred, and the next is what the pilots did or have to do. With regard to the first point—namely, the duty of the harbour trustees, in my opinion, the fact that the harbour trustees had also a duty cast upon them did not free the railway as the owners of the wharf, from their duty, or justify a perfectly passive attitude on their part. I think any vessel entering this harbour and berth was entitled to rely upon both the duty cast upon the harbour trustees and the duty cast upon the railway company as owners of the wharfs, inviting ships to come there for remuneration. It is not suggested that the railway company had observed, in fact, or had taken steps to observe, that the harbour trustees were, in truth, properly attending to their duty in regard to this berth, and we know, in fact, that the harbour trustees had not done their duty. It is a curious commentary on this contention on the part of the railway company to see the two contentions of the defendants together. The harbour trustees say: We did not do our duty, because we relied upon the owners of the wharf, the railway company, doing theirs. The railway company, the owners of the wharf, say: We are excused from doing our duty because we rely upon the harbour trustees doing theirs. In my opinion, the vessel was entitled to require both defendants to do their respective duties, and, therefore, the railway company cannot escape from their duty by seeking to shift the sole responsibility on to the shoulders of the harbour trustees.

Next, with regard to the matter of the pilots. I have already dealt with what their position is, what they were instructed to do, and for what purpose; and it appears to me that the railway company were not entitled to regard the duties and acts of the pilots as justifying the railway company in simply standing by and doing nothing. Moreover, the railway company, in fact, took no steps to see whether the pilots sounded sufficiently often, or whether they did their work in a way which would be satisfactory and sufficient, not for the purpose of navigation by the pilots, but for the purpose of seeing whether the berth was a safe one for vessels coming into it to lie on it. The true position taken up by the railway company is that which is shown by the evidence of the wharfinger read by the MASTER OF THE ROLLS. On these facts I hold that the railway company did not discharge their duty, and that but for their neglect this accident would not have happened. Consequently, their appeal also fails.

SIR GORELL BARNES, P., said that on the evidence it was clear that both defendants were in breach of the duty which was on them, and he continued: The substantial defence in each case is this: We, ourselves, did nothing, but we sufficiently performed our duties by leaving this matter connected with this berth to the pilots of the port. Upon that there is one point upon which I think it is desirable I should refer. It is to be found in the judgment of BARGRAVE DEANE, J., where he says ([1906] P. at p. 55):

> "I do not think that the harbour authority can put on the servants of the Trinity House a duty which is put on themselves by Act of Parliament, unless they can show that the Trinity House pilots are their servants and that they were authorised by them as their servants to take these duties on them. There the Elder Brethren agree with me. They say: 'These pilots are our servants,

and not the servants of the harbour master or harbour board, and we protest against their being made the servants of the harbour authorities. They have got their own duties to perform, in which they look to us as their masters, and we object to any one else having any authority over them.' "

I do not desire that anything I say should in any way minimise the duties cast upon pilots by instructions from the Trinity House, or which may possibly be put upon them by the byelaws of the defendants, but it is perfectly clear, when their position is considered, that their duty is a duty to themselves and the ship which employs them, and is put upon them with the object of enabling them efficiently to navigate a vessel or vessels in and out of the harbour or dock. They are not duties placed upon them to enable them to discharge the duties of the harbour trustees or railway company; and the mere fact that the pilots do from time to time make an examination to qualify themselves to perform their own special duties appears to me not in any way to relieve the two defendants in this case of the duties placed upon them by law.

Having established both the duty and the breach of it, the only remaining question is whether the damage followed from the breaches of duty on the part of the defendants. Here we have a dangerous berth and damage which undoubtedly followed from the vessel being placed in it, and the only question seems to be whether the evidence was sufficient to show that, had the defendants discharged their duties, the state of the berth might have been discovered and the damage prevented. I do not desire to add anything to what has already been said by the learned judges, because they have analysed the evidence upon that point, but it seems to me, stated broadly, there was ample evidence upon which the learned judge was entitled to act in finding that the damage was a consequence of the breach of duty on the part of each of the defendants in this case. Therefore, I agree that both appeals fail.

Solicitors: *W. A. Crump & Son*; *Rose & Co.*; *Stokes & Stokes.*

[*Reported by* L. F. C. Darby, Esq., *Barrister-at-Law.*]

A

FLETCHER *v.* BIRKENHEAD CORPORATION.

[Court of Appeal (Sir Richard Henn Collins, M.R., Cozens-Hardy and Farwell, L.JJ.), December 17, 18, 1906]

[Reported [1907] 1 K.B. 205; 76 L.J.K.B. 218; 96 L.T. 287; 71 J.P. 111; 23 T.L.R. 195; 51 Sol. Jo. 171; 5 L.G.R. 293] B

Water Supply—Duties and liabilities of undertakers—Liability to pay compensation for damage—Damage to adjacent property caused by pumping water for waterworks—Waterworks Clauses Act, 1847 (10 & 11 *Vict.*, *c.* 17), *ss.* 6, 12.

The defendants, under powers conferred by a special Act incorporating the Waterworks Clauses Act, 1847, constructed waterworks which included a reservoir, well, and pumping station. After the completion of the works the defendants, in pumping water for the purposes of their waterworks from under the lands taken by them for the construction of the works, abstracted a bed of wet running silt from under the adjoining land of the plaintiff, and thereby caused damage to his property. C D

Held: sections 6 and 12 of the Waterworks Clauses Act, 1847, provided for the payment of compensation in the event of damage caused by the use or maintenance of waterworks as well as by their construction, and, therefore, the plaintiff was entitled to compensation.

Notes. Referred to: *Salt Union* v. *Brunner, Mond & Co.*, [1906] 2 K.B. 822; *Price's Patent Candle Co.* v. *London County Council*, [1908] 2 Ch. 526; *Martins* v. *Fowler*, [1926] A.C. 746; *Graigola Merthyr Co.* v. *Swansea Corpn.*, [1928] Ch. 31; *Re Simeon*, [1937] 3 All E.R. 149. E

As to the payment of compensation for damage by waterworks undertakers, see 33 Halsbury's Laws (2nd Edn.) 424–426; and for cases see 43 Digest 1069–1071, 1072–1077. For Waterworks Clauses Act, 1847, see 26 Halsbury's Statutes (2nd Edn.) 729. F

Cases referred to:

(1) *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; 68 L.J.Ch. 457; 80 L.T. 815; 63 J.P. 692; 15 T.L.R. 374, C.A.; 19 Digest (Repl.) 182, *1221*.

(2) *Hammersmith and City Rail. Co.* v. *Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 38 Digest (Repl.) 15, *59*. G

Also referred to in argument:

Fenwick v. *East London Rail. Co.* (1875), L.R. 20 Eq. 544; 44 L.J.Ch. 602; 23 W.R. 901; 38 Digest (Repl.) 303, *85*.

R. v. *Wycombe Rail. Co.* (1867), L.R. 2 Q.B. 310; 8 B. & S. 259; 36 L.J.Q.B. 121; 15 L.T. 610; 31 J.P. 197; 15 W.R. 489; 38 Digest (Repl.) 306, *108*. H

Emsley v. *North Eastern Rail. Co.*, [1896] 1 Ch. 418; 65 L.J.Ch. 385; 74 L.T. 113; 60 J.P. 182; 12 T.L.R. 219, C.A.; 38 Digest (Repl.) 304, *95*.

Holliday v. *Wakefield Corpn.*, [1891] A.C. 81; 60 L.J.Q.B. 361; 64 L.T. 1; 40 W.R. 129; 7 T.L.R. 153, H.L.; 11 Digest (Repl.) 170, *407*.

I

Appeal by the defendants from a decision of Bray, J., at the trial without a jury of an action by the plaintiff to recover the sum of £1,200 and costs under an award made in an arbitration under the Waterworks Clauses Act, 1847, and interest.

By virtue of the powers conferred on them by the Birkenhead Gas and Water Act, 1881, with which was incorporated the Waterworks Clauses Act, 1847, the defendants acquired a piece of land and sank a well or borehole on it at a distance of about 150 yards from the dwelling-house of the plaintiff, and pumped large quantities of water from the well or borehole for the purposes of their water supply.

The plaintiff alleged that by means of this pumping a large quantity of silt had been abstracted from under his house, and that a settlement had been thereby caused owing to the support being withdrawn and great damage had been done to his house. He claimed that his property had been injuriously affected, desired that the amount of compensation payable should be decided by arbitration, and appointed an arbitrator. The defendants denied that the plaintiff was entitled to any compensation, and appointed an arbitrator under protest. The matter went to arbitration, and the umpire made his award as follows:

"I award, settle, and determine: (1) The [defendant] corporation have by the authorised working, after the completion of the authorised works, occasioned damage to the property of the claimant—that is to say, by from time to time taking such water as was found in and under the lands taken by the corporation for constructing their works and authorised under the powers to be taken for the purposes of their undertaking. (2) (a) Such damage was not occasioned by the abstraction of water only; (b) such damage was occasioned by the abstraction of water which carried with it silt from under the premises of the claimant. (3) The weight of the buildings upon the land has not caused the damage. (4) The amount of damage done to the said hereditaments of the claimant is £1,200, which sum is to be paid by the said corporation to the claimant."

The umpire also awarded that the corporation should pay the costs of and incident to the arbitration and the award. During the trial, by agreement between the parties, Bray, J., asked the following question of the umpire:

"Was the substance or object which lay directly under and formed the support of the plaintiff's land, and the abstraction of which caused subsidence and damage, (a) a bed of wet or running silt, as contended by the plaintiff, or (b) a stratum of water in which some silt was held in suspense, as contended by the defendants?"

The umpire answered the above question as follows:

"The subsoil which lay directly under and formed the support of the plaintiff's land was a bed of wet running silt, which was drawn away by the pumping operations of the corporation."

The defendants by their defence alleged that the award was ultra vires and in excess of jurisdiction, and that the defendants were not under any legal liability to the plaintiff.

By the Waterworks Clauses Act, 1847:

"And with respect to the construction of the waterworks, be it enacted as follows:—

"Section 6. Where by the special Act the undertakers shall be empowered, for the purpose of constructing or supplying waterworks, to take or use any lands or streams otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in this Act, and if the waterworks be situated in England or Ireland, to the provisions and restrictions contained in the Lands Clauses Consolidation Act, 1845, and if the waterworks be situated in Scotland, the provisions and restrictions contained in the Lands Clauses Consolidation (Scotland) Act, 1845; and shall make to the owners and occupiers of and all other parties interested in any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorised, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons, by reason of the exercise, as to such lands and streams, of the powers vested in the undertakers by this or the special Act,

or any Act incorporated therewith. . . . Section 12. Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, the undertakers may execute any of the following works for constructing the waterworks (that is to say): They may enter upon any lands and other places described on the said plans and in the said books of reference, and take levels of the same, and set out such parts thereof as they shall think necessary, and dig and break up the soil of such lands, and trench and sough the same, and remove or use all earth, stone, mines, minerals, trees, or other things dug or gotten out of the same. They may from time to time sink such wells or shafts, and make, maintain, alter, or discontinue such reservoirs, waterworks, cisterns, tanks, aqueducts, drains, cuts, sluices, pipes, culverts, engines, and other works, and erect such buildings upon the lands and streams authorised to be taken by them, as they shall think proper, for supplying the inhabitants of the town or district within the prescribed limits with water. They may from time to time divert and impound the water from the streams mentioned for that purpose in the special Act, or the said plans or books of reference, and alter the course of any such streams, not being navigable, and also take such waters as may be found in and under or on the lands to be taken for constructing the works. Provided always, that in the exercise of the said powers the undertakers shall do as little damage as can be, and in all cases where it can be done shall provide other watering places, drains, and channels for the use of adjoining lands, in place of any such as shall be taken away or interrupted by them, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers."

BRAY, J., held that the plaintiff was entitled to compensation under either s. 6 or s. 12 of the Waterworks Clauses Act, 1847, and he gave judgment in favour of the plaintiff. The defendants appealed.

Horridge, K.C., and F. E. Smith for the defendants.
Pickford, K.C., and *Leslie Scott*, for the plaintiff, were not called upon to argue.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal from the decision of BRAY, J., in an action brought to enforce an award giving compensation for certain damage caused to the plaintiff by the execution of works under the Waterworks Clauses Act, 1847. The plaintiff's house had been injured by the subtraction of the subadjacent soil, the subadjacent soil being a running silt. By the operations of the defendants as the water authority this silt was withdrawn by pumping water from under the plaintiff's house, with the result that his house was damaged. That was the subject-matter of the arbitration, and the umpire found this:

"Such damage was not occasioned by the abstraction of water only. Such damage was occasioned by the abstraction of water which carried with it silt from under the premises of the claimant. The weight of the buildings upon the land has not caused the damage. The amount of the damage done to the said hereditaments of the claimant is £1,200, which sum is to be paid by the said corporation to the said Isaac Fletcher."

The second finding there was thought to be somewhat ambiguous, and the learned judge, with the consent of counsel, asked the umpire to clear that up by answering a question which the learned judge put to him, and I will read the question and the answer:

"Was the substance or object which lay directly under and formed the support of plaintiff's land, and the abstraction of which caused subsidence and damage, (a) a bed of wet or running silt, as contended by the plaintiff, or (b) a stratum of water in which some silt was held in suspense, as contended by the defendants?"

The umpire answered in these words:

> "The subsoil which lay directly under and formed the support of the plaintiff's land was a bed of wet running silt, which was drawn away by the pumping operations of the corporation."

That question was put in order to see whether the case came within the authority of *Jordeson* v. *Sutton, Southcoates and Drypool Gas. Co.* (1); and the answer of the umpire brought it within that authority. The learned judge, after an argument as to the effect of the Act with which we are about to deal, gave judgment for the plaintiff, and against that judgment this appeal is now brought.

The question, shortly stated, is this. It is contended by the defendants that the work which brought about the mischief of which the plaintiff complains was incident to the working of the waterworks and not to their construction; and they contend that it was analogous to the effect caused to neighbouring property by the vibration caused by the working of a railway after the railway has been constructed. They say that what was done by the defendants was analogous to the working of the locomotives, and that the working of the locomotives and the vibration caused thereby was the subject-matter of the decision in *Hammersmith and City Rail. Co.* v. *Brand* (2); and they contend that, though the works here were done, not under the Railways Clauses Consolidation Acts, but under the Waterworks Clauses Act, the two enactments are so similar that an authority on the construction of one is an authority upon the construction of the other, and that they come within the principle which was applied in *Hammersmith and City Rail. Co.* v. *Brand* (2), where damage incident to the working of a railway was excluded as the subject-matter of compensation. They say here that the damage arising from the pumping of water ought to be treated on the same footing as damage caused by the vibration of trains running upon a fully constructed line; and the question before us is whether they are right or not in that contention, which the learned judge decided against them.

It seems to me that they are met in limine by the difficulty that there is not in point of fact that analogy which they seek to establish between the working of locomotives on an already constructed railway and the pumping of water for the purpose of filling a reservoir in the case of waterworks. It seems to me that this is a case of construction, and that the former case stands upon a different footing, being merely the case of user of a railway for the purposes of the scheme by running trains upon an already completed construction. But, apart from that, I will call attention to the difference between the sections in the Railways Clauses Consolidation Act, 1845, and those in the Waterworks Clauses Act, 1847. The work which had to be done by this corporation, who are the water authority, is described in their private Act of 1881, s. 20, as follows:

> "Subject to the provisions of this Act the corporation may make and maintain in the line and according to the levels shown on the deposited plans and sections, the waterworks hereinafter described, with all proper wells, tunnels, drifts, adits, pipes, embankments, approaches, tanks, basins, engines, pumps, and other works and conveniences connected therewith respectively, and may deviate laterally from the lines shown on the said plans to any extent. . . . The waterworks hereinbefore referred to and authorised by this Act are: (1) A shaft or well (to be sunk to an uncertain depth) and pumping station in the township of Upton, in the parish of Overchurch, or in the township of Bidston-cum-Ford, in the parish of Bidston, near the bridge carrying the road leading from Birkenhead to Upton over the stream known as the Fender; (2) An aqueduct or line of pipes from the said intended pumping station to the reservoir of the corporation at Flaybrick Hill; (3) a reservoir in the township of Bidston upon Bidston Hill near to the south of the windmill on the said hill; (4) an aqueduct or line of pipes commencing near the Bidston toll bar by a junction with the intended line of pipes hereinbefore described and terminating at the intended reservoir on Bidston Hill."

Therefore, it seems quite clear that the Act of Parliament did not contemplate merely that structures capable of holding water and conducting water should be made. It was contemplated, it seems to me, that the operations should embrace the filling of the reservoir with water, otherwise the works never would become waterworks at all. In fact, the foundation of the whole scheme was to get the water to a level in a reservoir from which, by the operation of gravity, it could be distributed all over the required area. That that was clearly the intention of the statute, I think, is emphasised by s. 23 of the same Act, which says this:

> "The following provisions shall have effect: The corporation shall, when the pumping station is completed, deliver daily when required into a proper pipe or cistern to be provided by William Vaudrey, on land belonging to him in the township of Upton adjoining the pumping station, a supply of water which shall be sufficient to supply any and every house or tenement that may now or hereafter be erected on the said land, not exceeding twenty gallons per head per day on the number of inhabitants of each house, at a price of not exceeding fourpence for every 1,000 gallons supplied."

That contemplates as an incident of the completion of the works that the corporation shall be in a position to distribute water, and, therefore, not merely that the material appliances for pumping water shall be in existence, but that the water shall be in a condition to be delivered according to the exigencies of the neighbourhood.

Therefore, it seems to me that, if the right to compensation in this case be limited to damage caused by the construction as distinguished from the use of the works after construction, what was done here and what caused the mischief was properly speaking due to construction. But, apart from that, I think that, when one comes to look at the terms of the Waterworks Clauses Act, 1847, which apply to this case, and contrast them with the provisions of the Railways Clauses Act which were the subject of the decision in *Hammersmith and City Rail. Co.* v. *Brand* (2), the two cases are quite distinguishable, and that it does not at all follow, because on the construction put upon the provisions regulating the rights of the parties in *Hammersmith and City Rail. Co.* v. *Brand* (2), it was held that the vibration caused by engines was incident, not to the construction, but to the working of the railway, that, therefore, under the sections of the Waterworks Clauses Act, 1847, this operation of pumping for the purpose of supplying the reservoir is on the same footing as being merely the working of the enterprise and not the construction. It seems to me that the sections of the Waterworks Clauses Act, 1847, do comprise, not only the construction, but the maintenance and user of the whole thing to be brought into existence—that is, not only the place where the water was to be, but the waterworks themselves. I will take s. 6 as the corresponding section in the two Acts. It was on s. 6 of the Railways Clauses Consolidation Act, 1845, and another section which also has its analogy in the case of waterworks, that the decision in *Hammersmith and City Rail. Co.* v. *Brand* (2) turned.

Dealing first of all with s. 6, which I regard as the most important, I will point out what is the difference in the words used in the two Acts. First of all, taking the Railways Clauses Consolidation Act, s. 6 is prefaced by the words:

> "And with respect to the construction of the railway and the works connected therewith, be it enacted as follows."

That is what has been called a heading or preamble to a fasciculus of sections dealing with this matter. Section 6 then proceeds:

> "In exercising the power given to the company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the said Lands Clauses Consolidation Act; and the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full

A compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company."

That clause, of which I have read the material parts, was construed to be limited exclusively to matters of construction, and the heading was referred to as throwing B a strong light upon the purport and intention of the section; and it was pointed out that "injuriously affected" there meant injuriously affected "by the construction thereof," and that, that being its governing enactment, its effect was not altered or extended by the subsequent words,

"by reason of the exercise, as regards such lands, of the powers by this or the C special Act, or any Act incorporated therewith, vested in the company."

Taking the corresponding words in s. 6 of the Waterworks Clauses Act, 1847, we find that its terms are not limited to the construction of the works, but that it refers also to "maintenance," the words being,

"are injuriously affected by the construction or maintenance of the works thereby authorised or otherwise by the execution of the powers thereby D conferred."

I will read the section down to those words. The preliminary statement at the beginning is: "And with respect to the construction of the waterworks, be it enacted as follows." Then the section proceeds:

"Where by the special Act the undertakers shall be empowered, for the E purpose of constructing or supplying waterworks."

So there is a difference in the wording there, because it is not limited to construction, but embraces the supplying of waterworks, whatever that means. The section goes on:

"To take or use any lands or streams otherwise than with the consent of the F owners and occupiers thereof, they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in this Act, and, if the waterworks be situated in England or Ireland, to the provisions and restrictions contained in the Lands Clauses Consolidation Act, 1845, and, if the waterworks be situated in Scotland, the provisions and restrictions contained in the Lands Clauses Consolidation (Scotland) Act, 1845; and shall make to the G owners and occupiers of and all other parties interested in any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorised or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons, by reason of the exercise, as to such lands H and streams, of the powers vested in the undertakers by this or the special Act, or any Act incorporated therewith."

Dealing with those two sections, it seems to me that there is a radical difference between the wording of them. It may well be said, as it was said in *Hammersmith and City Rail. Co.* v. *Brand* (2), that s. 6 of the Railways Clauses Consolidation Act, 1845, is primâ facie limited to construction, and that the heading throws a light on I what comes afterwards, and shows that it is limited to construction. That was the construction put upon that section in that case; but when I come to read s. 6 of the Waterworks Clauses Act, the wording seems to me quite different, and I think that, construing the words in their natural sense, they bear the interpretation which the learned judge has put upon them as embracing not merely construction, but also the maintenance of the works. The two matters there referred to being "construction or maintenance," they enlarge naturally the meaning of the more general words. The introduction of "maintenance" as well as "construction" seems to me to show that the provisions for compensation are intended to embrace

injury caused by the execution of powers beyond those of construction. Therefore, it seems to me that the provisions of these two sections are different, and that we cannot apply the construction of one in terms to the construction of the other. In the report of *Hammersmith and City Rail. Co.* v. *Brand* (2) I think that the headnote fairly sets out the result of the decision; and it says, with regard to the effect of that statement or preamble at the beginning of a fasciculus of clauses, this (L.R. 4 H.L. at p. 171):

> "The headings of different portions of a statute are to be referred to, to determine the sense of any doubtful expression in a section ranged under any particular heading."

Certainly that was the view of LORD CHELMSFORD, and assuming it was also the view of LORD COLONSAY, who with LORD CAIRNS formed the tribunal in the House of Lords, the result seems to be as stated in the headnote. There must, however, be a doubtful expression in the section before one can invoke the aid of the preamble to determine its meaning. As pointed out by BRAY, J., if the expressions in the section itself are clear, they cannot be controlled by the words of the preamble. It seems to me clear that, in the Waterworks Clauses Act, the words of the preamble are abundantly satisfied by saying that in the main the provisions of the section relate to construction, but it seems to me that the mere fact that this enactment is mainly with respect to construction does not exclude necessarily from the provisions of the section matters which are more than construction or occur after construction; and that, if we find words in the section which, without any ambiguity, point to more than construction, then it is quite clear that the *Hammersmith Railway Case* (2) is no authority as to its effect. It seems to me to be quite natural to introduce into a section, which deals mainly with construction, provisions with regard to matters which follow upon construction, and this section in terms does so by the words

> "injuriously affected by the construction or maintenance of the works thereby authorised or otherwise by the execution of the powers thereby conferred."

If there are no controlling words in the preamble, I do not think anyone can doubt that the words "or otherwise by the execution of the powers thereby conferred" embrace the pumping, which would be a necessary operation in order to give effect to the object in view—that is, waterworks. Without the pumping they never could come into existence as waterworks, and whether that is called "maintenance" or "construction" does not appear to me to be very material. Certainly, if this case does not come under "construction," it clearly comes under "maintenance," and is equally covered by the words "in the execution of the powers thereby conferred."

I think, therefore, that we are not bound by the decision in *Hammersmith and City Rail. Co.* v. *Brand* (2) to do more than control, by the operation of the preliminary heading, words that are ambiguous. If the words are not ambiguous, if they are clear upon their face, it seems to me that the principle of that decision is not applicable. I agree with the learned judge that the words here are so clearly not limited to construction that they cannot be treated as so limited by the heading to the group of sections.

I come to the other corresponding sections, which are s. 16 of the Railways Clauses Consolidation Act, 1845, and s. 12 of the Waterworks Clauses Act, 1847. I do not desire to repeat again all that I have said with regard to s. 6, but it seems to me that the same observations apply with equal force to s. 12 of the Waterworks Clauses Act as compared with s. 16 of the Railways Clauses Act, and it is on this section that the learned judge has chiefly based his judgment. I will not go in detail through the two sections; but corresponding differences will be found in them. The words used in s. 12, upon which the learned judge relied, are:

> "They may from time to time sink such wells or shafts, and make, maintain, alter, or discontinue such reservoirs, waterworks, cisterns, tanks, aqueducts, drains, cuts, sluices, pipes, culverts, engines, and other works, and erect such

A buildings, upon the lands and streams authorised to be taken by them, as they shall think proper, for supplying the inhabitants of the town or district within the prescribed limits with water."

That clearly points to a supply of water by pumping; that is the very operation now in question; and it is the very operation in respect of which, by the terms of B the section, compensation has to be paid to all parties interested for all damage sustained by them through the exercise of such powers. It seems to me, therefore, for the reasons given by the learned judge, which are no other than what I have been trying to emphasise myself, that he was perfectly right in distinguishing this case from *Hammersmith and City Rail. Co.* v. *Brand* (2), and that it does not apply to this case. For these reasons, I am of opinion that the judgment of the C learned judge was right, and that this appeal must be dismissed.

COZENS-HARDY, L.J.—I so entirely agree, not only with the judgment of BRAY, J., but also with what has fallen from the Master of the Rolls, that I have very few words to add.

It seems to me that the construction of s. 6 and s. 12 of the Waterworks Clauses D Act, 1847, is reasonably plain, unless we are hampered and bound by the view taken by the House of Lords in *Hammersmith and City Rail. Co.* v. *Brand* (2) upon somewhat similar, but differing, sections in the Railways Clauses Acts, 1845. The House of Lords in that case seem to have regarded the "railway," the construction of which was referred to in the Railways Clauses Consolidation Act, as a causeway or embankment with rails laid upon it and nothing more—as a thing which primâ E facie was made once for all, although there was power given by s. 86 of the Act to run locomotives and carriages on the causeway or embankment when so made and laid with rails. I fail to see that there is any close analogy between a waterworks undertaking and a railway undertaking in this matter, and I think a fair comparison of the sections which have been gone through by the Master of the Rolls bears out that view. It is reasonably plain, I think, that in the Waterworks Clauses Act, F 1847, and in the special Act in this case, when "waterworks" are spoken of, that means something much more than the structure—that it is something which requires to be supplied with water from time to time, and, if necessary, by from time to time abstracting water from appropriate sources. When I come to compare the two sections which happen to bear the same number in the two Acts, there is in s. 6 of the Waterworks Clauses Act one word which, to my mind, is very G emphatic in regard to this question. In the Railways Clauses Consolidation Act, 1845, the words used are "for the purpose of constructing a railway"; in the Waterworks Clauses Act, 1847, they are "for the purpose of constructing or supplying waterworks." I think that there is a contrast between those two words "constructing" and "supplying," and that they do not mean the same thing; and, when the legislature talks of "supplying," I do not think that they mean the H purchase of an existing waterworks undertaking by the undertakers, for in that case it is difficult to see where the question of compensation would arise. I read those words rather as meaning both the constructing of waterworks and also the supplying of them with the water which is necessary to render them really waterworks in the true sense of the term. That reading seems to me to be confirmed by the words, to which the Master of the Rolls has alluded, lower down in the section, where it I speaks of lands or streams injuriously affected not merely by the construction, but also by the maintenance of the works. "Maintenance" again, in my view, is contrasted with and is something different from the mere construction of the works. I cannot myself give any other meaning to the words "supplying" and "maintenance" in s. 6 than that they apply to the operations which the undertakers are authorised to execute, either by the special Act or by the general Act, in providing water from, in this case, the well and pumping station through the pipes, which they are bound to lay down by s. 20 (2) of the special Act, into the reservoir which is also mentioned in s. 20—all three things being necessary in order that there may

be waterworks in the full sense of the term. I do not think I should be justified in going through ss. 16 and 12, the corresponding sections of the two Acts; but the language of s. 12 seems to me strongly to confirm that view. It contemplates on the face of it that the undertakers may from time to time sink wells, shafts, and so on, and from time to time divert and impound water. For all these reasons, I agree with the Master of the Rolls that the decision of the learned judge below was perfectly right; and that this appeal must be dismissed.

FARWELL, L.J.—I quite agree. It must be remembered that *Hammersmith and City Rail. Co.* v. *Brand* (2) determined no question of principle. In that case it was merely a question of construction of an Act of Parliament other than the one which we have to construe. Moreover, that Act dealt with a subject-matter so diverse from the subject-matter of the Act before us that the smallest consideration shows that the construction of the two Acts will not necessarily be the same. The *Hammersmith Railway Case* (2) obviously turned on the distinction, present to the majority of the Lords who decided it, between the construction of the railroad and the user of it after it had been made by running trains over it. There is no analogy between a railway and waterworks, such as we have in the present case, consisting, as the Master of the Rolls has pointed out, of a well from which water is pumped, and a reservoir to which it is carried and in which it is stored, and two aqueducts with lines of pipes for the purpose of conveying it. Those are the waterworks with which we have here to deal. We have to deal with a section of the general Act, which speaks of "constructing and supplying" the waterworks and of "injuriously affecting" lands

> "by the construction or maintenance of the works thereby authorised or otherwise by the execution of the powers thereby conferred."

How would one construct such waterworks? I should say that one would construct them not merely by making the well, pumping station, and reservoir, but by also filling them with water. How would one maintain them? In the same way, using the words of the Act, by supplying them with water. The use of them is to supply the public with water. The construction and maintenance of waterworks such as these consists in constructing and maintaining the reservoir and other works, and keeping the reservoir full of water supplied from time to time by means of the pumping station, wells, and aqueducts referred to in the Act. Why this court should in any way be bound by the decision of the House of Lords on sections relating to so different a subject-matter as a railway containing words so different from those in the present case, I fail to understand, and certainly all the more so as there was such a very wide divergence of judicial opinion in that case. It is difficult to see, when no principle is involved, how one can apply a decision upon the construction of words differing so much from those in the section now under consideration to the present case. The words in the present case are, to my mind, so clear that we cannot call in aid, as the majority of the House of Lords did in that case, the prefatory words with respect to the construction of waterworks, without striking out of s. 6 words which immediately follow—that is, the word "supplying," which is contrasted with "constructing" and therefore is something other than construction, and the word "maintenance," which is also contrasted with "construction" and therefore also is something other than construction. The true view of prefatory words of this sort is, I think, expressed in MAXWELL ON THE INTERPRETATION OF STATUTES (4th Edn.), p. 75:

> "The function of the preamble is to explain what is ambiguous in the enactment, and it may either restrain it or extend it as best suits the intention. The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections."

Taking that as a guide, it is plain that we cannot read the words of the heading as construing the section; we can only use them to explain any ambiguity. I see no

A ambiguity in the provisions of s. 6 in the present case. I am content myself to rest my decision on s. 6, and I will not add anything to what has been said by my brothers with regard to the other section, s. 12.

Appeal dismissed.

Solicitors: *F. Venn & Co.*, for *A. Gill*, Birkenhead; *Maude & Tunnicliffe*, for
B *J. F. Harrison & Burton*, Liverpool.

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

C

LODGE *v.* NATIONAL UNION INVESTMENT CO., LTD.

D [CHANCERY DIVISION (Parker, J.), December 4, 13, 14, 1906]

[Reported [1907] 1 Ch. 300; 76 L.J.Ch. 187; 96 L.T. 301; 23 T.L.R. 187]

Moneylender—Illegal transaction—Claim for return of securities—Order for return on repayment of loan.

E The plaintiff borrowed money from the defendants, who were moneylenders within the Moneylenders Act, 1900, but had not registered under that Act, giving as security for the loan a mortgage of a reversionary interest and a policy of life assurance. In an action by him to recover these securities on the ground that, as the defendants, by reason of their failure to register, were in breach of s. 2 (1) of the Moneylenders Act, 1900 [now s. 1 (3) of the
F Moneylenders Act, 1927; 16 HALSBURY'S STATUTES (2nd Edn.) 377], the transaction was illegal,

Held: the plaintiff's claim was an appeal to equitable jurisdiction and as he sought equity he must do equity, and, therefore, he could obtain an order for the return of the securities only if he repaid to the defendants the money which they had advanced him.

G **Notes.** This case must be read in the light of the decision in *Kasumu* v. *Baba-Egbe*, [1956] 3 All E.R. 266, where the present case was not followed.

Distinguished: *Chapman* v. *Michaelson*, [1909] 1 Ch. 238. Considered: *Victor Battery Co.* v. *Curry's, Ltd.*, [1946] Ch. 242. Not Followed: *Kasumu* v. *Baba-Egbe*, [1956] 3 All E.R. 266.

As to the restrictions on carrying on a moneylending business, see 27 HALSBURY'S
H LAWS (3rd Edn.) 29 et seq.; and for cases see 35 DIGEST 203 et seq.

Cases referred to:

(1) *Victorian Daylesford Syndicate, Ltd.* v. *Dott*, [1905] 2 Ch. 624; 74 L.J.Ch. 673; 93 L.T. 627; 54 W.R. 231; 21 T.L.R. 742; 49 Sol. Jo. 725; on appeal, [1906] 1 Ch. 747, C.A.; 35 Digest 204, *301*.

I (2) *Bonnard* v. *Dott*, [1906] 1 Ch. 740; 75 L.J.Ch. 446; 94 L.T. 656; 22 T.L.R. 399, C.A.; 35 Digest 204, *302*.

(3) *Mason* v. *Gardiner* (1793), 4 Bro.C.C. 436.

(4) *Scott* v. *Nesbit* (1789), 2 Bro.C.C. 640.

(5) *Fitzroy* v. *Gwillim* (1786), 1 Term Rep. 153; 99 E.R. 1025; 20 Digest (Repl.) 265, *119*.

(6) *Bosanquet* v. *Dashwood* (1734), Cas. temp. Talb. 38.

(7) *Hargreaves* v. *Hutchinson* (1834), 2 Ad. & El. 12; 4 Nev. & M.K.B. 11; 4 L.J.K.B. 17; 111 E.R. 5; 43 Digest 519, *577*.

(8) *Tregoning* v. *Attenborough* (1831), 7 Bing. 733; 1 Dowl. 225; 5 Moo. & P. 453; 131 E.R. 283; 2 Digest (Repl.) 732, *2435*.
(9) *Hindle* v. *O'Brien* (1809), 1 Taunt. 413.
(10) *Roberts* v. *Goff* (1820), 4 B. & Ald. 92.
(11) *Moses* v. *Macferlan* (1760), 2 Burr. 1005; 1 Wm. Bl. 219; 97 E.R. 676; 35 Digest 154, *511*.
(12) *Bradford Corpn.* v. *Ferrand*, [1902] 2 Ch. 655; 71 L.J.Ch. 859; 87 L.T. 388; 67 J.P. 21; 51 W.R. 122; 18 T.L.R. 830, D.C.; 44 Digest 35, *262*.

Also referred to in argument:
Kearley v. *Thomson* (1890), 24 Q.B.D. 742; 59 L.J.Q.B. 288; 63 L.T. 150; 54 J.P. 804; 38 W.R. 614; 6 T.L.R. 267, C.A.; 12 Digest (Repl.) 318, *2453*.
Hermann v. *Charlesworth*, [1905] 2 K.B. 123; 74 L.J.K.B. 620; 93 L.T. 284; 54 W.R. 22; 21 T.L.R. 368, C.A.; 12 Digest (Repl.) 317, *2444*.

Action for a declaration that certain moneylending contracts and transactions were illegal and void and for the delivery up to the plaintiff (the borrower) of certain securities.

Kemp, K.C., and *Edgar Foà* for the plaintiff.
Romer, K.C. and *George Henderson* for the defendants.

PARKER, J.—The plaintiff was at the time of the transactions, to be presently mentioned, contingently entitled in reversion expectant on the death of his mother to certain stocks and securities. On Mar. 2, 1905, he mortgaged this reversion to T. A. Greene to secure £750 and interest at 10 per cent. In November, 1905, the plaintiff arranged with one Ernst, in whose employment he was, to raise as much money as he could on the security of his reversion with the object of taking shares in a company of which Ernst was manager, in return for which Ernst promised to make him the secretary of the company. With a view to raising this money the plaintiff was introduced by his employer to a gentleman, who, on the plaintiff's behalf, approached the defendant company, the National Union Investment Co., Ltd., who were moneylenders within the Moneylenders Act, 1900, but had not registered their name under that Act, or obtained an exemption from the Board of Trade. The defendants consented to make advances up to £2,000. A proportion of this sum was to be expended in paying off the mortgage to Greene, and the mortgage was to be transferred to the defendants.

This proposed transaction was ultimately carried through in the following manner. By an indenture of Nov. 22, 1905, the plaintiff, in consideration of £1,250 expressed to be paid to him by the defendants assigned his reversion to them. This deed was in form an absolute assignment as on a sale, but subject to the mortgage to Greene. By another indenture of even date the plaintiff, in consideration of £50 said to be paid to him by them, assigned to the defendants a policy of insurance on his own life for £3,000, and he covenanted to pay the premiums. This was also in form an absolute assignment. On Nov. 22 the plaintiff accepted two bills of exchange payable three months after date drawn upon him by the defendants for £1,000 and £250 respectively. On the same Nov. 22 the defendants by their chairman signed a letter making it clear that the transaction was a mortgage, and the defendants do not contend that it is anything else. The plaintiff has no recollection of receiving any such letter. On the same Nov. 22 the plaintiff signed a letter authorising the defendants to pay the money to his solicitors, and the defendants by agreement with his solicitors retained certain sums for interest and commission, and paid over the remainder—viz., £1,075 only. On Nov. 25, 1905, the solicitors accounted for this £1,075 to the plaintiff, and he signed their account. This account contained various items, including £50 their own commission and costs and £799 19s. 11d. cash paid to Ernst at the plaintiff's request. I go into details because the plaintiff sets up that his solicitors were not his agents to receive, and that they were not authorised to make these payments, and in particular the sum of £799 19s. 11d. I find as a fact that

A the solicitors were authorised and that they paid the various sums in his presence or at his request, and with his knowledge and approval. The two bills of exchange fell due in February, 1906. They were then cancelled, and on payment of £150 by the plaintiff to the defendants two new bills were given in exchange payable in three months. On Mar. 30, 1906, the defendants paid off the money due on Greene's mortgage, and the mortgage and a policy of assurance on the B plaintiff's life for £800 held by Greene as further security were transferred to them.

The defendants are now admitted to have been moneylenders within the meaning of the Moneylenders Act, 1900. At the date of the transactions I have referred to they had not registered themselves under that Act, nor had they obtained any order from the Board of Trade exempting them from such registration. C It follows that on the authority of *Victorian Daylesford Syndicate Ltd.* v. *Dott* (1) and *Bonnard* v. *Dott* (2) the loan transactions referred to are void for illegality. The usual rule is that in the case of a transaction void for illegality neither party can take any proceedings against the other party for the restoration of any property or for the repayment of any money which has been transferred or paid in the course of the illegal transaction. To this rule, however, there are exceptions, one of them being in favour of the persons for whose protection the D illegality of the contract has been created, and in the authorities I have mentioned it has been held that in the case of loan transactions void under the Act of 1900 the borrower is within that exception. The illegality of the transaction, therefore, does not preclude the plaintiff from maintaining this action.

The defendants, however, maintain that, this being an appeal to the equitable E jurisdiction of the court, the plaintiff can be put upon terms and not allowed to assert any equity unless he himself is prepared to do equity by repaying the £1,075 less the £150 paid for the privilege of renewing the bills, and certain sums which they are willing to allow him to deduct which I need not refer to in detail. In support of this contention the defendants referred to the decisions of the court relating to transactions void under the old usury laws. On reference F to the statutes dealing with usury it will be found that usurious contracts were made illegal and a penalty imposed in much the same way as is done with regard to loan transactions prohibited by the Moneylenders Act, 1900. I refer in particular to the statutes 12 Car. 2, c. 13, and 13 Anne, c. 15 [both repealed by Usury Laws Repeal Act, 1854]. I think, therefore, I shall be justified in treating the decisions under those statutes against usury as authorities for what I ought G to do in the analogous cases which arise under the Act of 1900. It seems reasonably clear that, at any rate, in equity, if not also at law, a person taking advantage of the exception arising from the fact that he belongs to the class for whose protection the statutes were passed could not assert any right unless he was himself prepared to do what the court considered fair to the defendant. On this ground the LORD CHANCELLOR in *Mason* v. *Gardiner* (3) allowed a demurrer to a H bill asking for delivery up of an usurious security, when the bill contained no offer to repay what had been advanced on the legal interest. There is another case of *Scott* v. *Nesbit* (4), which is to the like effect.

It is by no means so clear what the courts of common law ought to do in such a case, but even at law the plaintiff has sometimes been put upon terms. In *Fitzroy* v. *Gwillim* (5) a pawner brought an action in trover against a pawnbroker I with whom she had pledged goods to secure an advance with illegal interest. She was nonsuited by LORD MANSFIELD, C.J., on the ground that the parties were in pari delicto, and that the rule potior est conditio possidentis ought to prevail. In other words, LORD MANSFIELD did not allow her to rely on the exception arising from the fact that she was one of the class of persons protected by the statutes. There was a motion to set aside the nonsuit. Counsel argued (1 Term Rep. at p. 154) that the plaintiff

"in order to recover, had only to show a title in herself, a possession in the

defendant, and a tender for the warehouse room. The defence set up to this was an usurious contract, which, if it were allowed, would entirely defeat all the statutes against usury."

The argument, therefore, was that there was no need for the plaintiff to rely on any exception, but that she could recover in trover without setting up any contract open to illegality. Upon this motion LORD MANSFIELD said (ibid.):

"This is an equitable action brought by the plaintiff in order to be released from an usurious contract. She must come therefore with clean hands according to the principle laid down in the case of *Bosanquet* v. *Dashwood* (6) that those who seek equity must do equity. It was there determined that a court of equity would afford relief in such cases upon payment of principal and interest. A lender upon an usurious contract is precluded from recovering anything upon such contract; but if the borrower seeks relief, he must first do what is right as between the parties. Here the plaintiff did not tender what had been actually advanced, and cannot therefore have the benefit of this equitable action."

BULLER, J., said (ibid.):

"It is the plaintiff who discloses and relies on the usurious contract in this case, in order to take advantage of it. The borrower brings the action. It is enough for the defendants to say that the goods were pawned by the plaintiff. Then the plaintiff in answer is obliged to show an agreement, by which she is entitled to have these goods returned to her on payment of certain interest, which is usurious on the face of it, and which she is desirous of setting aside; but she has done nothing to entitle herself to the relief she claims."

In other words, the argument put forward by counsel is negatived by the learned judges who heard the motion. They say that it is necessary in an action of trover for the plaintiff to put forward the contract and rely on the illegality; and, further, to rely on the exception enabling him to bring the action notwithstanding the illegality. As I understand it, this decision amounts to this, that anyone who seeks relief either at law or in equity, and for the purpose of that relief is obliged to set up an illegal contract, and rely on the exception arising by reason of his being within the protection of the statute imposing the illegality, is, in fact, bringing an equitable action, and will, therefore, be put on terms with regard to the relief granted.

This case of *Fitzroy* v. *Gwillim* (5) has been doubted on many occasions, if not actually overruled. In *Hargreaves* v. *Hutchinson* (7), which also was an action in trover by a pawner against a pawnbroker, the court refused to impose any terms, and treated *Fitzroy* v. *Gwillim* (5) as a very questionable authority; and, again, in *Tregoning* v. *Attenborough* (8), which was also an action in trover by a pawner against a pawnbroker, *Fitzroy* v. *Gwillim* (5) was dissented from on the ground that trover was a question of strict legal right. TINDAL, C.J., in an interlocutory observation, distinguishes it from an action for money had and received, which, he says, was undoubtedly an equitable action. I think it is possible, although it is not very clear on the reports, that the real reason for differing from *Fitzroy* v. *Gwillim* (5) was that the plaintiff in an action of trover really relies upon his property in, or a superior right to possession of, the goods he seeks to recover, and, in order to show that right, it is not necessary for him in any way to mention the illegal contract. When a pawnbroker defends such an action, he can only do so by showing in himself some special right of property negativing the right of the plaintiff. It is not apparent how the defendant in this case, or in any action in trover founded on facts analogous to those in *Fitzroy* v. *Gwillim* (5) could prove a property in the goods without reliance on the contract of pledge under which he had obtained the goods, and if, on proof of that contract, it appeared to be an illegal contract under which he could acquire no such right of property, he would have no defence to an action of trover. Even though

Fitzroy v. *Gwillim* (5) be treated as overruled, it is nevertheless possible that the principle applied in that case may be properly applied in cases where the plaintiff at law cannot succeed in an action such as trover or detinue without himself setting up a contract which is open to objection on the ground of illegality, and the moment he sets up that contract, in order to sue at all, he must rely on the exception to the general rule, and it may be right to put him on equitable terms. There is a case of *Hindle* v. *O'Brien* (9), where there was a motion in the Court of Common Pleas to set aside a judgment which had been given upon an usurious contract on the ground that the contract was illegal; this was stated by the court to be an application to the equitable jurisdiction of the court, and on that ground the applicant was put on terms which were terms such as a court of equity would impose. There is another case of *Roberts* v. *Goff* (10), the facts of which were, I think, on all fours with those of *Hindle* v. *O'Brien* (9). There the Court of King's Bench refused to put the applicant on any terms at all. *Hindle* v. *O'Brien* (9) was cited, and the court said that the construction and practice of that court had always been different from that of the Common Pleas; and added (4 B. & Ald. at p. 93) that they had

> "reason to know that some of the learned persons who argued that case in the Common Pleas, were not, at the time, at all satisfied with the decision."

Of course I am not considering an analogous case, and I have not to make up my mind whether I shall follow the principle laid down in the Common Pleas or that of the King's Bench. I may observe, however, that the decision of the Common Pleas is nearer to the principle applied in the courts of equity than that of the King's Bench. In this state of the authorities it is difficult to say what would be the result if the plaintiff were suing in detinue or trover. I have considerable doubt whether an action of detinue or trover would lie at all with respect to the bills of exchange or the two conveyances of Nov. 22, 1905. I do not see how there was ever in the plaintiff any property or right to possession with respect to these documents. I think, however, with regard to the policy of insurance which was delivered over under the conveyance of Nov. 22 it belonged to the plaintiff, and with respect to that policy he might have maintained an action of detinue. Supposing, however, that he could have maintained an action of detinue for that, and also for the other documents he seeks to recover, I am of opinion that he could not succeed without setting up the illegal contract, and for this reason. Supposing he had brought his action in trover or detinue founded on property or possession, the defendant would immediately set up the conveyances, which are in form absolute conveyances, and it would be only in the reply that the fact of the illegality of the contract need be stated. In this respect it would differ from the cases of trover which have been referred to. In my judgment, however, with the possible exception of the £150, the whole of this transaction is put forward as an equitable claim, and not as a legal claim. The statement of claim is not framed with reference to any right in trover or detinue; it is framed with reference to the relief to which the plaintiff would be entitled in equity. Under these circumstances, although I have dealt with the legal argument which has been put forward, I do not think it necessary to pronounce any opinion on that point. I can decide this case on the ground that, with the exception of the £150, it is an equitable action, and apply the principles laid down in *Mason* v. *Gardiner* (3).

With regard, however, to the £150, that may be a claim in an ordinary common law action for money had and received. Is that an action of strict law, having in mind the expression used in *Tregoning* v. *Attenborough* (8) and in *Fitzroy* v. *Gwillim* (5), or is it an equitable action? There is a case of *Moses* v. *Macferlan* (11), where LORD MANSFIELD said (2 Burr. at p. 1012):

> "This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex æquo et bono, the defendant ought to refund; it does

not lie for money paid by the plaintiff, which is claimed of him as payment in point of honour and honesty, although it could not have been recovered from him by any course of law: as in payment of a debt, barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under these circumstances. In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

That I understand to be assented to by TINDAL, C.J., in *Tregoning* v. *Attenborough* (8) which FARWELL, J., in *Bradford Corpn.* v. *Ferrand* (12) ([1902] 2 Ch. at p. 662) referred to without any dissent, and, indeed, with approbation. I do not think it is either æquum or bonum that the plaintiff, who has had the benefit of the £1,075, is relying on the illegality of the contract, wants his money, and cannot get it except under the exception, should recover it without being put on terms by which both parties may be restored to the positions they occupied before the transaction commenced. I propose to make an order to the following effect: Upon payment by plaintiff to the defendants by Mar. 1, 1907, of the £1,075 (less the £150 paid for the renewal of the bills and the sums of £50 and £5 17s. mentioned in the account, which the defendants agree to give up) on the premiums on the £3,000 policy paid by the defendants, let the defendants deliver up to the plaintiff the bills of exchange and the conveyances of Nov. 22, 1905, and the £3,000 policy. In default of the plaintiff making these payments the action will be dismissed, except so far as relates to the mortgage to Greene. It is not disputed that the defendants are entitled to the benefit of that security, and in that respect the plaintiff will have the usual redemption decree. There will be no order as to cost except that on redemption the defendants will have the usual mortgagee's costs.

Solicitors: *Sharp & Saunders*; *Morris & Co.*

[*Reported by* W. HUNTER BOND, ESQ., *Barrister-at-Law.*]

A

R. *v.* MELLADEW

[Court of Appeal (Sir Richard Henn Collins, M.R., Cozens-Hardy and Farwell, L.JJ.), December 6, 7, 20, 1906]

B [Reported [1907] 1 K.B. 192; 76 L.J.K.B. 262; 96 L.T. 189; 71 J.P. 125; 23 T.L.R. 207; 51 Sol. Jo. 169; 5 L.G.R. 177; 2 Konst. Rat. App. 530]

Rates—Rateable occupation—Intention of alleged occupier—Governing factor in determining whether rateable occupancy established—Warehouse—Premises empty and closed, but owner ready to re-open for business when opportunity C *offered.*

In dealing with the question of liability to pay rates occupation, which is the basis of liability, necessarily varies with the nature of the rateable subject-matter. The acts necessary to establish occupancy of a dwelling-house may be very different from those which might be required to establish occupation of a non-habitable hereditament. The intention of the alleged occupier in D respect of the hereditament is a governing factor in determining the question whether rateable occupancy has been established.

A ratepayer owned a warehouse which he let as a whole or in floors, or he would take charge of goods there at a weekly rent per package or per ton. During certain rating periods no goods were stored in the warehouse, the weights, scales, and trucks in use there were stored in an adjoining warehouse, E but were ready to be taken out at a moment's notice, and the supply of water which was used for the hydraulic lifts in the warehouse was cut off, though at any moment it could be turned on again. During these periods the ratepayer was ready at all times to receive applications for the hire of storage room and to re-open the warehouse and store goods there.

Held: during the periods in question the ratepayer had retained control of F the premises and had throughout intended to use them for his business whenever the opportunity offered, and, therefore, in respect of those periods he was in occupation of the warehouse so as to be liable to be rated in respect of it.

Bootle Overseers v. *Liverpool Warehousing Co.* (1) (1901), 85 L.T. 45, distinguished.

G **Notes.** Applied: *Borwick* v. *Southwark Corpn.*, [1909] 1 K.B. 78. Considered: *London County Council* v. *Hackney Borough Council*, [1928] All E.R.Rep. 614. Distinguished: *Associated Cinema Properties, Ltd.* v. *Hampstead Borough Council*, [1944] 1 All E.R. 436. Considered: *Re London and North Eastern Rail. Co's Appeal*, [1946] K.B. 27; *Robinson* v. *Taylor*, [1948] 1 All E.R. 291. Applied: *Hewson, Chapman & Co., Ltd.* v. *Rating Authority for the Borough of Grimsby* H (1953), 51 L.G.R. 649. Referred to: *Shepherd's Bush Improvements* v. *Hammersmith Borough Council* (1910), 102 L.T. 819; *Liverpool Corpn.* v. *Chorley Union Assessment Committee*, [1911–13] All E.R.Rep. 194; *Hackney Borough Council* v. *Metropolitan Asylums Board* (1924), 131 L.T. 136; *Arbuckle Smith & Co., Ltd.* v. *Greenock Corpn.*, [1960] 1 All E.R. 568.

As to rateable occupation, see 32 Halsbury's Laws (3rd Edn.) 16 et seq.; and I for cases see 38 Digest (Repl.) 476 et seq.

Cases referred to:

(1) *Bootle Overseers* v. *Liverpool Warehousing Co.*, *Same* v. *Webster* (1901), 85 L.T. 45; 65 J.P. 740; 17 T.L.R. 550, D.C.; 38 Digest (Repl.) 477, *14.*

(2) *Allan* v. *Liverpool Overseers* (1874), L.R. 9 Q.B. 180; 43 L.J.M.C. 69; 30 L.T. 93; 38 J.P. 261; 22 W.R. 330; 38 Digest (Repl.) 499, *165.*

(3) *Staunton* v. *Powell* (1867), 15 W.R. 362; 38 Digest (Repl.) 479, **166.*

(4) *Gage* v. *Wren* (1902), 87 L.T. 271; 67 J.P. 32; 18 T.L.R. 699, D.C.; 38 Digest (Repl.) 488, *94.*

(5) *Southend-on-Sea Corpn.* v. *White* (1900), 83 L.T. 408; 65 J.P. 7; 17 T.L.R. 5, D.C.; 38 Digest (Repl.) 488, *93.* A

(6) *R.* v. *Inhabitants of Mirfield* (1808), 10 East, 219; 1 Bott. 212; 103 E.R. 758; 38 Digest (Repl.) 678, *1273.*

Also referred to in argument:

Harter v. *Salford Overseers* (1865), 6 B. & S. 591; 34 L.J.M.C. 206; 29 J.P. 647; 11 Jur.N.S. 1036; 13 W.R. 861; 122 E.R. 1313; 38 Digest (Repl.) 619, *877.* B

R. v. *Bradshaw* (1860), 2 E. & E. 836; 29 L.J.M.C. 176; 6 Jur.N.S. 629; 8 W.R. 435; 121 E.R. 313; sub nom. *R.* v. *Warwickshire Justices*, 2 L.T. 233; 24 J.P. 727; 18 Digest (Repl.) 393, *1427.*

Smith v. *New Forest Union Assessment Committee* (1889), 61 L.T. 870; 54 J.P. 324; 6 T.L.R. 31; sub nom. *Crowther-Smith* v. *New Forest Union*, Ryde, Rat. App. (1886–90) 311, C.A.; 38 Digest (Repl.) 480, *39.* C

Bursledon Overseers v. *Clarke* (1897), 61 J.P. 261, D.C.; 38 Digest (Repl.) 485, *75.*

R. v. *Inhabitants of Bedworth* (1807), 8 East, 387; 103 E.R. 391; 38 Digest (Repl.) 558, *469.*

R. v. *St. Luke's Hospital* (1760), 2 Burr. 1053; 1 Wm. Bl. 249; 97 E.R. 703; 38 Digest (Repl.) 540, *361.*

Bristol Poor Governors v. *Wait* (1834), 1 Ad. & El. 264; 6 C. & P. 591; 3 Nev. & M.K.B. 359; 2 Nev. & M.M.C. 254; 3 L.J.M.C. 71; 110 E.R. 1207; 38 Digest (Repl.) 396, *1455.* D

R. v. *Verrall* (1875), 1 Q.B.D. 9; 45 L.J.M.C. 29; 24 W.R. 139; sub nom. *Verrall* v. *Croydon Union*, 33 L.T. 379; sub nom. *Croydon Union* v. *Verral*, 40 J.P. 550; 38 Digest (Repl.) 620, *883.*

Holywell Union and Halkyn Parish v. *Halkyn Drainage Co.*, [1895] A.C. 117; 64 L.J.M.C. 113; 71 L.T. 818; 59 J.P. 566; 11 T.L.R. 132; 11 R. 98, H.L.; 38 Digest (Repl.) 470, *7.* E

Appeal by a rates collector, authorised by the rating authority, from a decision of the Divisional Court (Lord Alverstone, C.J., Kennedy and Ridley, JJ.).

The collector had obtained a rule nisi for a mandamus to the justices of Liverpool to state a Case for the opinion of the court. Upon cause being shown, it was agreed that, instead of a Case being stated, the facts stated in the affidavits filed in support of the rule should be taken as though they were stated in the form of a Special Case, and the Divisional Court upon this statement of the facts held that the decision of the justices was right. When the collector's appeal came on before the Court of Appeal, the court was of opinion that the facts did not sufficiently appear from the affidavits, and, accordingly, the case was adjourned and the justices were asked to state the facts in the form of a Special Case. F G

The facts were then stated as follows: On Nov. 10, 1904, the collector preferred a complaint at petty sessions under the Liverpool Corporation Acts, 1862 and 1893, the Liverpool Improvement and Waterworks Act, 1871, and the Local Government Board's Provisional Order Confirmation (No. 10) Act, 1895 (Session 2), stating that one Melladew was a person duly rated and assessed and liable to pay in respect of certain premises (being a warehouse), known as No. 3, Neptune Street, situate within the city, the general rate and water rate, and also a water rent, all duly made for the city, on Feb. 3, 1904, and also the above-mentioned rates, all duly made for the city, on Feb. 7, 1900, and that he had not within fourteen days after demand in writing by the collector paid the amount due in respect thereof -namely, £22 9s. 1d. and £7 4s. 5d. respectively—and that the same remained unpaid. Pursuant to the complaint the collector applied for a distress warrant, but the justices refused to issue a distress warrant, and dismissed the complaint. When the complaint was heard it was proved or admitted that (a) The allowance and due publication of the rates had been made, and there had been a demand and non-payment of a portion of the rates. The unpaid balance for the year 1900 was £7 4s. 5d., and for the year 1904 £14 4s. 3d., and if those sums were found to be due the ratepayer Melladew was the person liable to pay them. (b) With the H I

A exception of the periods from Oct. 1, 1900, to Dec. 12, 1900, and from Feb. 25, 1904, to July 13, 1904, the ratepayer admitted that he was in occupation of the warehouse during the years for which the said rates and rent were made. (c) During those two periods the warehouse had no goods in it and was closed, and the ratepayer offered to allow the collector to keep the keys of the warehouse and invited him to inspect the premises. (d) The warehouse was a self-contained one, and
B consisted of several floors, and the ratepayer carried on the business of a warehouse keeper there and at adjoining and neighbouring warehouses by letting either the whole of each warehouse or separate floors or rooms in the same or receiving goods at a certain rent per ton or per package per week. The warehouse formed one of a block of warehouses in Neptune Street, all under the management of the ratepayer and under the control of one warehouseman in his employ. (e) On Feb. 25, 1904,
C a letter was sent by registered post by the ratepayer to the superintendent collector of rates for the city, stating:

"No. 3, Neptune Street, warehouse. Please note that we have this day gone out of occupation of the above warehouse. We invite inspection."

On July 13, 1904, a letter was written by the ratepayer to the superintendent
D collector of rates, stating:

"Warehouse, No. 3, Neptune Street. Will you please note that we have re-opened the above warehouse this day?"

On or about Oct. 18, 1900, and Dec. 12, 1900, letters in similar terms were sent by the ratepayer to the superintendent collector of rates. (f) A bill was posted on the
E premises during each of the two periods. The words in the bill posted on the premises in the 1900 period were as follows:

"To let. Apply to J. B. Melladew & Son, 1, Fenwick Court."

The words in the bill posted on the premises in the 1904 period were as follows:

"To let. Apply to J. B. Melladew & Son, 41, Old Hall Street."

F (g) During those two periods the supply of water at high pressure for working the hydraulic lift in the premises was, pursuant to a notice given by the defendant to the Hydraulic Power Co., cut off, the ratepayer thereby saving the minimum charges payable to that company for the supply of water pressure during such period as the lift was not being used. The ratepayer was able to get the supply put on at any moment upon notice being given to the company. (h) During those two
G periods the weights, scales, and trucks used for weighing and trucking goods were removed to and stored in an adjoining warehouse next door, but having no communication with the one in question, and in the occupation and use of the ratepayer, but they were there very handy and could be got whenever they were required. (i) Throughout the rating years 1900 and 1904 the ratepayer continued to carry on the business of warehouse keeper in Neptune Street and elsewhere in
H Liverpool. Subject to the facts stated in paras. (g) and (h) the warehouse was ready for the receipt of goods at any moment, and the ratepayer was at all times throughout the said periods prepared to receive applications for the hire of storage room, and ready and willing to re-open the warehouse and receive goods into it, provided that enough goods were offered to fill half the whole capacity of the warehouse, this being the smallest quantity for which he thought it worth while com-
I mercially to open the warehouse. With this proviso he was prepared to re-open the warehouse and to let either the whole of it or separate floors or separate rooms, or to let floor space at a tonnage or package rent. Subject to the above-mentioned minimum limit, the ratepayer throughout the two periods was willing to receive goods at the warehouse. The justices were of opinion that *Bootle Overseers* v. *Liverpool Warehousing Co.* (1) was applicable; that they had nothing to do with the principle of assessment; that the ratepayer, by giving the notice contained in the letters referred to in para. (e) and by offering to give up the key of the warehouse, did not intend to re-open it without giving the rating authority due notice;

that the words of the bill referred to in para. (f) had no special meaning attached to them by trade usage, local custom, or otherwise; and that the question of occupation was one of fact for them to decide. They, therefore, held that the ratepayer was not in occupation of the premises during the two periods, dismissed the complaint, and refused to issue the distress warrant asked for. This decision was affirmed by the Divisional Court and the rate collector appealed.

Pickford, K.C., and *Leslie Scott* for the rate collector.
Macmorran, K.C., and *A. H. Maxwell* for the ratepayer.

Cur. adv. vult.

Dec. 20, 1906. **SIR RICHARD HENN COLLINS, M.R.,** read the following judgment:—This is an appeal from a decision of the Divisional Court affirming the order of justices refusing to enforce the payment of certain rates in respect of a warehouse in Liverpool, alleged to have been in the occupation of the ratepayer in the present case during the period covered by the rates. The matter comes before us upon a Special Case stated by the justices at the request of this court upon a former hearing, when the court was differently constituted. The ratepayer contends that he was out of occupation of the premises during a portion of the periods covered by the rates in question and claims exemption under a local statute during the time that he was thus out of occupation. We have to consider whether on the facts stated the justices were right in point of law in holding that the ratepayer was not in occupation during the periods named. The Divisional Court held that the question was concluded by its decision in *Bootle Overseers* v. *Liverpool Warehousing Co.* (1), on which the justices had purported to act, and accordingly refused to interfere with their decision.

It is important to remember in dealing with questions of liability to pay rates that occupation, which is the basis of liability, necessarily varies with the nature of the rateable subject-matter. The acts necessary to establish occupancy of a dwelling-house may be very different from those which might be required to establish occupation of a non-habitable hereditament. It is, I think, clear from a comparison of many authorities that the intention of the alleged occupier in respect to the hereditament is a governing factor in determining the question whether rateable occupancy has been established. For instance, the physical presence, actual or constructive, of the alleged occupant upon the hereditament may be consistent with the position of licensee or lodger as well as with that of an occupier in the sense required to establish rateability. Blackburn, J., in *Allan* v. *Liverpool Overseers* (2) said (L.R. 9 Q.B. at p. 192):

> "In order to ascertain this we must see what was the intention of the parties."

So in a question where an owner who had put up his house to let and had placed or left furniture in it, that eminent judge, Christian, J., says (15 W.R. at p. 363):

> "The presence of furniture has its chief bearing on the case with reference to the animus habitandi. . . . If a man leaves furniture in a house, or sends furniture to a house, the presumption is in favour of the animus revertendi or habitandi"

see *Staunton* v. *Powell* (3). So in the case of the tenant of a boarding-house (*Gage* v. *Wren* (4)), which could only be carried on profitably for a short period in the year, who at the end of the season had withdrawn the furniture with the exception of a few tenant's fixtures and fitted mats, but who had never relinquished the intention of returning to re-open the house as a boarding-house in the coming season, it was held that she had never ceased to occupy so as to be liable for rates; Lord Alverstone, C.J., and Darling, J., relied, it would seem, exclusively on the intention to be inferred from the nature of the business, and Channell, J., expressed entire agreement with them, though he also relied on the fact of the chattels left behind as evidence of actual occupation: see also *Southend-on-Sea*

Corpn. v. *White* (5). Darling, J., invoked the analogy of fruit trees which may possibly call for no active interference until the fruit is ripe, but yet are to be deemed as occupied during the period that the fruit is ripening. The like principle has been applied to saleable underwoods which were cut only at intervals of twenty years: *R.* v. *Inhabitants of Mirfield* (6).

To come to the case before us, the business of a warehouseman need not involve the actual presence on the premises either of the warehouseman himself or of any representative or of any movable chattels. If he has the necessary appliances ready for use when the demand for storage comes, he is in a position to do business to which the physical occupation of the premises is indispensable. If he holds himself out to let storage space not involving a demise of the whole warehouse, and by securing exclusive control over the premises has put himself in a position forthwith to give the accommodation required, is he to be deemed as not the occupier until some customer has been found to deposit goods for storage? And when he has secured customers and his warehouse has afterwards again become empty, is he to be deemed as having ceased to occupy? I cannot think that this can be so. I am aware that ownership is distinct from occupation, and that an owner does not make himself rateable by trying to let a house which he has ceased to inhabit. But the principle involved in that proposition does not apply to the case of the tenant of a vacant warehouse who retains control over it for the purpose of letting storage room. In the case of the owner seeking to find a tenant in the case put, no assertion of occupation by him is involved. If he gets a tenant he substitutes the occupation of another person for his own. The warehouseman in getting a customer supplies visible evidence of his own occupation. In the case of the owner who tries to let, the intention is not to occupy. In the case of the warehouseman it is exactly the reverse. It seems to me on the facts found by the justices, which I need not repeat, that the intention of the ratepayer here was as far as possible to avoid the semblance of occupation while carefully guarding the substance. He has carefully retained the control, while his continuous intention has been to utilise the premises for the purpose of his business whenever the opportunity offered. With regard to *Bootle Overseers* v. *Liverpool Warehousing Co.* (1), on which the court below seem to have acted, I think it is distinguishable, as the court found there a bona fide intention

> "not to occupy, not to carry on the business of the respondents in those particular premises":

see per Bigham, J. (85 L.T. at p. 48). Here the justices have found for us the facts as to intention in the paragraphs above cited, and have requested our opinion whether their decision was correct in point of law. For the reasons I have given I think it was not. I think the appeal must be allowed.

COZENS-HARDY, L.J.—I have had the opportunity of reading and considering the judgment of the Master of the Rolls. I entirely agree with it, and do not desire to add anything to it.

FARWELL, L.J., read the following judgment:—This is a Case stated by justices, and raises the question whether the defendant "ceased to be occupier" of a certain warehouse in Liverpool within the meaning of s. 31 of the Liverpool Improvement Act, 1858, and s. 37 of the Liverpool Corporation Act, 1893.

The question is one of actual, not beneficial, occupation. It is not disputed that property that is in fact unoccupied is not liable to be rated, but it is contended (i) that this warehouse was unoccupied; and (ii) that in any case this is a question of fact for the justices. Whether premises are or are not unoccupied is in many cases a mixed question of fact and of law; there may be visible physical occupation by the person rated or his servant or his goods and chattels, and such occupation may be of part of an undivided tenement; and if in such a case occupation is found as a fact by the justices no appeal will lie. But these do not exhaust all the cases of occupation. Rateable property has many varieties; of some the normal use is by

personal occupation—e.g., a dwelling-house, of others by occupation by live or dead stock—e.g., a linhay used as a shelter for cattle, or a barn; and the nature of the property and its mode of use must be considered in each case. The test appears to me to be: Has the person to be rated such use of the tenement as the nature of the tenement and of the business connected with it renders it reasonable to infer was fairly within his contemplation in taking or retaining it? In many trades, and certainly in a warehouseman's, the trader must necessarily contemplate the occupation for considerable periods of parts of his premises as spare room. If and so long as he uses the premises for the purposes of his business he is in occupation of it for rating purposes: see the judgment of DARLING, J., in *Gage* v. *Wren* (4). In the present case the warehouse is used for the purposes of a warehouseman's trade, and is full, half full, or empty from time to time according to the fluctuations of trade; but it appears to me impossible to hold that it fluctuates in point of rateability in like manner. Floors or separate warehouses for the time being empty do not thereupon cease to be rateable and continue free until used, even although there are no chattels, and nothing but landlord's fixtures therein, because the warehouseman has the use of them as spare room for the purposes of his trade. If he shuts them up altogether and gives up his business in connection with them they cease to be rateable; but if and so long as he carries on his business there and holds them ready for use in and as part of such continuing business he remains rateable.

The question must be whether they are kept in such a state as to be capable at any time of being used in a continuing business. Treating this as the test, *Bootle Overseers* v. *Liverpool Warehousing Co.* (1) was rightly decided, because the business in connection with the warehouses in that case ceased to be carried on; the warehouses were shut up and withdrawn absolutely from their owner's trade. But in the present case the contrary is the fact; it is true that the water is cut off, but it can be turned on again at a moment's notice. It is also true that the weights and scales and trucks were moved into the owner's warehouse next door, but they could be got in again as soon as required. Provided it was worth his while commercially, the owner was prepared to re-open the warehouse and to let either the whole of it or separate floors, or to let floor space at a tonnage or package rent. Under these circumstances I find it impossible to say that the defendant has ever given up the use of this warehouse, or withdrawn it from his business so as to have ceased to occupy it within the meaning of the Act. He has merely kept it as spare room.

Then it is said that the justices have found non-occupation as a fact. I do not so read the Case. They refer to the decision in *Bootle Overseers* v. *Liverpool Warehousing Co.* (1) as governing this matter, but its applicability is a question of law, or at least of mixed law and fact, and the question left to us is whether as a matter of law they came to a correct decision. I read the Case as amounting to a statement that the justices conceived that the *Bootle Case* (1) established a principle, and that such principle is applicable to the present case. In my opinion, they have come to an erroneous conclusion, and this appeal should be allowed.

Appeal allowed.

Solicitors: *F. Venn & Co.*, for *Pickmere*, Liverpool; *Wyatt & Co.*, for *Whitley & Co.*, Liverpool.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

WILLIAM BRANDT'S SONS & CO. *v.* DUNLOP RUBBER CO.

[House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten, Lord James of Hereford and Lord Lindley), April 6, 7, August 3, 1905]

[Reported [1905] A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 21 T.L.R. 710; 11 Com. Cas. 1]

Chose in Action—Assignment—Equitable assignment—Form—No need of formal wording—Letter from creditor to debtor requesting payment of debt to third person—Effect of Supreme Court of Judicature Act, 1873, *s.* 25 (6).

An equitable assignment, to be valid, need not, on the face of it, purport to be an assignment nor be in the language of an assignment. It may be addressed to the debtor. It may be couched in the language of command, or it may be a courteous request. It may assume the form of a mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor disregards such a notice he does so at his peril.

The provisions of s. 25 (6) of the Supreme Court of Judicature Act, 1873, [now s. 136 (1) of Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 427)] do not render invalid and inoperative an equitable assignment, which would have been good before the passing of the statute, because it fails to comply with the provisions of the statute, e.g., where no notice of the assignment is given to the debtor.

A letter addressed by a creditor to his debtor requesting the debtor to sign and send to a third person an attached letter in which the debtor stated that he would pay the amount of the debt to the third person was sent by the creditor to the third person who transmitted it to the debtor. The debtor signed the attached letter and returned it to the third person. By mistake, however, the debtor paid the debt to a fourth person.

Held: there was a good equitable assignment of the debt to the third person, to whom the debtor must pay the money over again.

Notes. Applied: *Shaw* v. *Moss Empires and Bastow* (1908), 25 T.L.R. 190; *Wilson* v. *Ragosine* (1915), 84 L.J.K.B. 2185. Considered: *German* v. *Yates* (1915), 32 T.L.R. 52; *Performing Right Society* v. *London Theatre of Varieties*, [1924] A.C. 1; *Harmer* v. *Armstrong*, [1932] All E.R.Rep. 778; *Timpson's Executors* v. *Yerbury*, [1936] 1 All E.R. 186; *Coleridge-Taylor* v. *Novello & Co.*, [1938] 2 All E.R. 318; *Re Warren, Wheeler* v. *Mills*, [1938] 2 All E.R. 331. Applied: *James Talcott, Ltd.* v. *John Lewis & Co. and North American Dress Co.*, [1940] 3 All E.R. 592. Considered: *Re Owen, Owen* v. *I.R.Comrs.*, [1949] 1 All E.R. 901; *Letts* v. *I.R.Comrs.*, [1956] 3 All E.R. 588. Referred to: *Continental Caoutchouc and Gutta Percha Co.* v. *Kleinwort* (1904), 90 L.T. 474; *Kleinwort* v. *Dunlop Rubber Co.* (1907), 97 L.T. 263; *Saunderson* v. *Clark* (1913), 29 T.L.R. 579; *Re Williams, Williams* v. *Ball*, [1917] 1 Ch. 1; *Re Gunsbourg, Ex parte Trustee* (1919), 88 L.J.K.B. 479; *Re Steel Wing Co.*, [1920] All E.R.Rep. 292; *National Provincial and Union Bank of England* v. *Lindsell*, [1921] All E.R.Rep. 308; *Re Pinto Leite & Nephews, Ex parte Visconde Des Olivaes*, [1928] All E.R.Rep. 371; *Allgemeine Versicherungs Gesellschaft Helvetia* v. *German Property Administrator* (1931), 144 L.T. 705; *The Zigurds* (1932), 49 T.L.R. 193; *Williams* v. *Atlantic Assurance Co.* (1932), 37 Com. Cas. 304; *Official Assignee of Madras* v. *Mercantile Bank of India, Ltd.*, [1934] All E.R.Rep. 237; *Fleetwood-Hesketh* v. *I.R.Comrs.*, [1935] All E.R.Rep. 682; *King* v. *Michael Faraday & Partners, Ltd.*, [1939] 2 All E.R. 478; *Re Wale, Wale* v. *Harris*, [1956] 3 All E.R. 280.

As to equitable assignments, see 4 Halsbury's Laws (3rd Edn.) 492 et seq.; and for cases see 8 Digest (Repl.) 573 et seq.

Cases referred to: A

(1) *Re Row, Ex parte South* (1818), 3 Swan. 392; 36 E.R. 907, L.C.; 8 Digest (Repl.) 553, *75.*

(2) *Jones* v. *Farrell* (1857), 1 De G. & J. 208; 3 Jur.N.S. 751; 44 E.R. 703, L.C. & L.JJ.; 8 Digest (Repl.) 618, *593.*

(3) *Diplock* v. *Hammond* (1854), 5 De G.M. & G. 320; 2 Eq. Rep. 738; 23 L.J.Ch. 550; 23 L.T.O.S. 181; 2 W.R. 500; 43 E.R. 893, L.JJ.; 8 Digest (Repl.) 575, *250.* B

Also referred to in argument:

Burn v. *Carvalho* (1839), 4 My. & Cr. 690; 9 L.J.Ch. 65; 3 Jur. 1141; 41 E.R. 265, L.C.; 8 Digest (Repl.) 575, *242.*

Hopkinson v. *Forster* (1874), L.R. 19 Eq. 74; 23 W.R. 301; 8 Digest (Repl.) 578, *262.* C

Brice v. *Bannister* (1878), 3 Q.B.D. 569; 47 L.J.Q.B. 722; 38 L.T. 739; 26 W.R. 670, C.A.; 8 Digest (Repl.) 553, *78.*

Harding v. *Harding* (1886), 17 Q.B.D. 442; 55 L.J.Q.B. 462; 34 W.R. 775; 2 T.L.R. 856, D.C.; 8 Digest (Repl.) 569, *211.*

Durham Brothers v. *Robertson*, [1898] 1 Q.B. 765; 67 L.J.Q.B. 484; 78 L.T. 438, C.A.; 8 Digest (Repl.) 570, *216.* D

Tolhurst v. *Associated Portland Cement Manufacturers (1900)*, *Tolhurst* v. *Associated Portland Cement Manufacturers (1900) and Imperial Portland Cement Co.*, [1903] A.C. 414; 72 L.J.K.B. 834; 89 L.T. 196; 52 W.R. 143; 19 T.L.R. 677, H.L.; 10 Digest (Repl.) 1100, *7602.*

Mercantile Bank of London v. *Evans*, [1899] 2 Q.B. 613; 68 L.J.Q.B. 921; 81 L.T. 376; 15 T.L.R. 535, C.A.; 8 Digest (Repl.) 571, *219.* E

Bell v. *London and North Western Rail. Co.* (1852), 15 Beav. 548; 19 L.T.O.S. 292; 51 E.R. 651; 8 Digest (Repl.) 553, *77.*

Appeal by the plaintiffs in the action from a judgment of the Court of Appeal (Lord Alverstone, C.J., Sir Richard Henn Collins, M.R., and Romer, L.J.), reported [1904] 1 K.B. 387, reversing a judgment of Walton, J., at the trial of the action before him without a jury. F

Haldane, K.C., J. A. Hamilton, K.C., and *Chaytor* for the appellants.

Cripps, K.C., Lush, K.C., and *Schiller* for the respondents.

Their Lordships took time to consider their opinions.

Aug. 3, 1905. **THE EARL OF HALSBURY, L.C.**—I have had the opportunity of reading the opinion which has been prepared by Lord Macnaghten, and I concur in it. G

The following opinions were then read.

LORD MACNAGHTEN.—Owing to the singular mode in which the respondents choose to conduct their business, there is a little confusion about the transaction which led to the present controversy. But the material facts are plain enough, and the case, as it seems to me, is free from difficulty. H

The appellants, Wm. Brandt's Sons & Co., whom I will call Brandts, are bankers in London. Kramrisch & Co., who are now bankrupt, were rubber merchants in Liverpool. Their business was "financed," as it is called, by Brandts, and also by another firm of bankers trading as Kleinwort & Co. The arrangement was precisely the same in both cases. When Kramrisch & Co. made a purchase at home or abroad approved by the bankers, it became the duty of the bankers to provide the necessary funds, and by way of security they took delivery of the goods to themselves. Then when Kramrisch & Co. found a purchaser approved by the bankers, they released the goods and gave Kramrisch & Co. a delivery order, relying on a written undertaking in each case that the price should be paid direct to them, and receiving an engagement in writing that in the meantime Kramrisch & Co. would hold the goods and the proceeds in trust on their behalf and grant them "the sole and absolute lien on said goods and their proceeds" I

until they obtained full payment of the advance, together with their charges. Every transaction was to be dealt with separately and kept distinct. In accordance with this arrangement, Kramrisch & Co., towards the end of 1902, bought a parcel of rubber which they sold to the respondents, the Dunlop Rubber Co., on Dec. 30, 1902. In connection with this purchase Brandts had advanced £3,430. The goods were delivered to Dunlops on Jan. 5, 1903, at their mills in Birmingham, known as Para Mills. With the goods there was sent an invoice on which there was stamped a note requesting Dunlops to remit the amount of the invoice to Brandts. There was a mistake of a few shillings in the figures. The invoice was returned to Kramrisch & Co. for correction. The figures had originally been £3,263 16s. 4d.; the amount as corrected was £3,263 4s. 2d. After some correspondence Kramrisch & Co. sent Dunlops a corrected invoice for that amount, but the stamped direction for remittance to Brandts did not appear on the corrected invoice, and apparently the clerk at Para Mills, whose duty it was to attend to the correspondence, did not keep a copy of the original invoice, or take note of the direction as to payment. When the goods were delivered at Para Mills, Kramrisch & Co. sent to Brandts a printed form consisting of two parts—(i) a letter addressed by Kramrisch & Co. to Dunlops, and (ii) a letter intended to be signed by or on behalf of Dunlops, and to be returned by them direct to Brandts. This letter, which is referred to by Brandts as "the counterpart," was printed on the same sheet side by side with letter (i), but was readily detachable from it. The printed form as filled up in writing with the corrected figures, but without signature by or on behalf of Dunlops, was as follows:

"Kramrisch & Co. Liverpool, 6th Jan., 1903.

Messrs. The Dunlop Rubber Co. Ltd.

Dear Sirs,—We should thank you kindly to sign the attached letter and forward same to Messrs. Wm. Brandt's Sons & Co., London, E.C.

Yours very truly,
Kramrisch & Co."

"Para Mills, Birmingham, 8th Jan., 1903.

Messrs. Wm. Brandt's Sons & Co., 4 Fenchurch Avenue, London, E.C.

Dear Sirs,—Herewith we beg to confirm that we shall remit, subject to approval of goods, the amount of invoice—

£369 1s. 10d. for 8 } Packages raw
£3,263 4s. 2d. for 75 } rubber.

received to-day from Messrs. Kramrisch & Co., Liverpool, when due, direct to your good selves for account of Messrs. Kramrisch & Co."

Brandts sent on this form entire inclosed in the following letter:

"London, 7th Jan., 1903.

Dear Sirs,—Inclosed we beg to hand you a letter received from Messrs. Kramrisch & Co., Liverpool, referring to

8 packages Indiarubber, amounting to £369 2s. 10d.

75 packages Indiarubber, amounting to £3,263 16s. 4d., which Messrs. Kramrisch & Co. advise having forwarded to you.

We request you to kindly return to us the counterpart duly signed by your good selves.

And remain, dear Sirs, yours truly,
Wm. Brandt's Sons & Co.

Dunlop Rubber Co., Ltd., Para Mills, Birmingham."

The "eight packages indiarubber, amounting to £369 2s. 10d.," were the subject of a separate transaction. They may be left out of consideration in the present case. There was no mistake about that parcel, and the price was duly remitted to Brandts. The clerk at Para Mills who had charge of the correspondence there was one A. G. Paterson, who was an assistant under Gooding, the manager at Para Mills. He was intrusted with the company's rubber stamp, which bore

upon it the words "for the Dunlop Rubber Co., Ltd., Para Mills, John Gooding." When Paterson used the stamp he added his initials, A. G. P. Paterson in due course received and opened Brandts' letter of Jan. 7 addressed to the Dunlop Rubber Co. He corrected the figures in the counterpart letter inclosed in it, and advised Kramrisch & Co. that he had made the correction. He signed the counterpart with the company's rubber stamp, adding his own initials, and returned the counterpart so signed to Brandts. But he did not send a copy of the correspondence to the head office in London, from which all cheques were issued. Nor did he inform the head office of what he had done. He merely sent up the corrected invoice. The consequence was that instead of remitting the sum of £3,263 4s. 2d. to Brandts, as specially directed by Kramrisch & Co., the Dunlop Rubber Co., in compliance with a previous general order from Kramrisch & Co., paid the amount by cheque to Kleinwort & Co., who had not financed this particular transaction, and had nothing whatever to do with it. Ultimately Brandts wrote to Dunlops pressing for the remittance, which was then overdue. They replied on Feb. 9, 1903, that the amount had been paid, and added that they held Kramrisch & Co.'s receipt for it.

Then this action was brought by Brandts in the Commercial Court. WALTON, J., decided in favour of the plaintiffs. The Court of Appeal, however, reversed his judgment, and dismissed the action with costs. It was contended at your Lordships' Bar that there was no evidence that a note directing the remittance to be made to Brandts was stamped on the original invoice, which had been lost. Your Lordships thought it right to send for Kramrisch & Co.'s press copy letter-book. On inspection of this book it appeared that the original invoice contained the note in question. WALTON, J., found as a fact that it was there, and I think that he was right. However, it does not seem to me to be a necessary or material part of the plaintiff's case, and I will assume in favour of the respondents that the original invoice did not bear this note. Then it was contended that neither Gooding nor Paterson—Gooding seems to have been abroad at the time—had authority to put the company's rubber stamp on the counterpart letter of Jan. 8, 1903. This again seems to me not to be a necessary or material part of the plaintiff's case. I will assume as the Court of Appeal held, and as WALTON, J., appears to have thought, that neither Gooding nor Paterson had real or apparent authority to commit the company to a direct engagement with Brandts. But, speaking for myself, I am not so clear upon the point. Brandts write to the company a letter addressed to the company at their works, asking the company, in accordance with the request of their creditors, Kramrisch & Co., for remittance of the money which was due to Kramrisch & Co. The expression "we beg to confirm that we shall remit" in letter No. (ii) obviously, as I think, was intended to refer, and must have been understood by Paterson as referring, to the note or direction as to remittance, which, according to the company's evidence, was invariably stamped on the invoice. The Court of Appeal say that neither Gooding nor Paterson had authority to bind the company to a new contract, to "a fresh bargain." But was it a fresh bargain? The company receive a notice which prevents them from paying the debt due to Kramrisch & Co. to anybody but Brandts. An engagement to do what they were bound to do and what they might do with perfect safety is hardly a fresh bargain. If the company, or Paterson on behalf of the company, had replied that the required assurance would not be given or had failed to answer Brandts' request, an injunction would no doubt have been applied for and granted at once, and the company would have had to pay the costs of the action. It was almost a matter of course to give the required assurance. As Mr. Du Cros, the company's managing director, said in cross-examination, if they had been told to pay Brandts they would do so in the ordinary course of business. "It doesn't cost us anything," he added. When Brandts, in answer to a request addressed to the company, received a letter from the company's office purporting to be an answer on behalf of the company—and the only answer that could have been sent without provoking immediate

litigation—Brandts would have been justified, I should have thought, in accepting the reply as authentic and sufficient. Surely it was no concern of theirs to inquire how the routine business of the company was distributed in the company's office. However, I will not pursue the matter further. I put out of consideration both the note on the original invoice and the signature, which purports to be a signature on behalf of the company to the counterpart letter of Jan. 8.

The whole question then depends on the meaning and effect of Brandts' letter of Jan. 7, 1903, and its inclosures. Were these documents, sent as they were to the company and received by the company, notice that Brandts were interested in the money, or what was their meaning? Does a business man who merely wants his debtor to pay the amount of the debt into his bank employ such elaborate machinery as this? Did anybody ever hear of such a complicated process, if that was all that was meant? At any rate, the company's secretary, Mr. Bergin, admits that he never heard of such a thing. The strangest part of this case is that nobody seems to have had the slightest doubt as to the meaning of these documents. WALTON, J., said:

> "That was notice to Dunlops, and, in fact, was more than notice. It was notice to Dunlops that Messrs. Kramrisch had made over to Brandts the right to receive this sum of money, and had given to Brandts power to give a perfectly good receipt and discharge for it. It is more than notice, of course. It is notice plus a request that the bank [?company] would acknowledge that notice by undertaking to pay."

In the Court of Appeal the Lord Chief Justice does not seem to have taken a different view on this point. Although he dismissed the action on the ground that the documents did not amount to an absolute assignment within the section of the Judicature Act on which reliance was placed [see infra], and were, therefore, not a legal or equitable assignment, he thought "the notice would have been a good notice if the assignment had been an absolute assignment," and he thought the documents were "an authority to the Dunlop company to pay the money over on Kramrisch's behalf to Brandts."

I would ask your Lordships to turn to the evidence of Mr. Bergin, who was one of the secretaries of the company, and, as the learned counsel for the company said, "a great deal more than secretary," for, as the learned counsel told the court, "he managed the whole business." Mr. Bergin was asked in cross-examination this question:

> "Supposing that you had received that direction sent on by the Brandts, you would have thought, would not you, that Brandts had a charge or were interested in this money?"

Answer. "I think I would. I would have thought there was some such arrangement." That is the whole case. It is difficult to conceive a plainer case of an equitable assignment, or a clearer case of notice to the debtor. As between Kramrisch & Co. and Brandts the case was complete, and more than complete, without Brandts' letter of Jan. 7 and its inclosures. There was an undertaking that the money should be paid direct to Brandts. There was besides a declaration of trust. There was an engagement to give Brandts "a sole and absolute lien"—that is, sole and absolute control and dominion over the proceeds of the goods. Then Dunlops receive through Brandts a notice, which no man of business could mistake, telling them, on Kramrisch & Co.'s express authority, that they are to pay to Brandts the money which they owe their creditors, Kramrisch & Co. What more could be required? Dunlops disregard that notice, and pay the wrong people. They must pay the money over again, and pay it to the right person.

With the utmost deference to the Court of Appeal, I have great difficulty in following their reasoning. The plaintiff's case was put in two ways. It was presented as a case within s. 25 (6) of the Supreme Court of Judicature Act, 1873 [now Law of Property Act, 1925, s. 136 (1): 20 HALSBURY'S STATUTES (2nd Edn.)

427]. It was also presented as a simple case of equitable assignment perfected by notice. Unfortunately, the stress of the argument was laid on the Judicature Act. The Court of Appeal devoted almost the whole of their attention to it. The substantial question—the only question worth considering—was all but ignored. It was treated as subordinate to the question on the statute and bound up with it. The Lord Chief Justice, with whom the other members of the court agree, says:

> "I come to the conclusion that this document [Brandts' letter of Jan. 7 and its inclosures] does not fulfil that which is necessary in order to entitle the plaintiff to sue, whether suing as equitable or as legal assignee, on the ground that it is not an absolute assignment, or an assignment at all within that section."

Why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute, I confess that I do not understand. The statute does not forbid or destroy equitable assignments, or impair their efficacy in the slightest degree. Where the rules of equity and the rules of the common law conflict, the rules of equity are to prevail. Before the statute there was a conflict as regards assignments of debts and other choses in action. At law it was considered necessary that the debtor should enter into some engagement with the assignee. That was never the rule in equity. It "is certainly not the doctrine of this court," said Lord Eldon, sitting in Chancery in *Re Row, Ex parte South* (1). In certain cases the Judicature Act places the assignee in a better position than he was before. Whether the present case falls within the favoured class may, perhaps, be doubted. At any rate, it is wholly immaterial for the plaintiffs' success in this action. But, says the Lord Chief Justice, the document does not, on the face of it, purport to be an assignment nor use the language of an assignment. An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor disregards such a notice he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor. I think that the documents which passed between Brandts and the company would of themselves, and apart from Kramrisch & Co.'s undertaking and engagement, given to Brandts, have constituted a good equitable assignment.

But the real question is, were they notice to the company that Brandts were interested in the money? As between Kramrisch & Co. and Brandts the assignment was, as I have already said, perfect without them. In a case like this it would, I think, be pedantry to refer to authorities. But as a good many cases appear to have been cited in the courts below, I may perhaps be forgiven if I venture to mention, though only by name, such well-known cases as *Re Row, Ex parte South* (1), *Jones* v. *Farrell* (2), and *Diplock* v. *Hammond* (3). Strictly speaking, Kramrisch & Co., or their trustee in bankruptcy, should have been brought before the court. But no action is now dismissed for want of parties, and the trustee in bankruptcy had really no interest in the matter. At your Lordships' Bar the Dunlop company disclaimed any wish to have him present, and in both courts below they claimed a right to retain for their own use any balance that might remain after satisfying Brandts. It is quite plain how the error in this case arose. It was all due to the mode in which Dunlops conduct their business. At Para Mills, where they have a large establishment, and employ between 1,000 and 1,500 workmen, they have a manager who attends to the practical part of the business. The manager, Mr. Gooding, was called, but he could give very little information. He was abroad when the important letters

came to the office. If he had been at home he would have known nothing about the matter. He was "not interested," as he says, "in these things at all." He only saw the letters which Paterson chose to show him. Everything really depended upon Paterson. Paterson was not called. It was hardly to be expected that the company would wish to see him in the box. He seems to hold a very delicate and responsible position. He opens all the correspondence that comes to Para Mills, and deals with it apparently just as he thinks fit. Some letters he lays before Gooding, some he sends to the head office, and some he puts aside. Unfortunately, he did not think it worth while to send to the head office Brandts' letter of Jan. 7, 1903, and its inclosures. The head office, therefore, knew nothing about this equitable assignment, and they paid the money to the wrong man, because Kramrisch, on a former occasion, had given them a general direction to pay Kleinwort & Co. The difficulty, as Mr. Bergin admitted, was "owing to the neglect of duty at Birmingham." It would be unreasonable to make Brandts suffer for that.

I think that the appeal must be allowed, and the judgment of WALTON, J., restored, with costs here and below. My noble and learned friend, **LORD LINDLEY**, desires me to say that he has read this judgment and concurs in it.

LORD JAMES OF HEREFORD.—Agreeing as I do with the result of the opinion already submitted to your Lordships, I do not propose to repeat a detailed statement of the facts of this case. For the reasons stated by LORD MACNAGHTEN I concur in the view that an equitable assignment of the debt sought to be recovered is established, and that the judgment of the court below erred in dealing with the question as arising under the Judicature Act only. The defect in the parties to the suit can be remedied. But, for myself, I go further and think that the plaintiffs are entitled to recover upon the ground that Dunlops undertook to pay them the amount in question. It seems to me that, when the plaintiffs received the letter from the defendants on Jan. 8, 1903, signed by Gooding, they were entitled to rely and act upon it.

In respect to this question the controlling facts appear to be as follows. The defendants carry on business at two mills, the Para Rubber Mills and the Manor Rubber Mills; their head office is in London. At the Para Mills a Mr. Gooding was the manager, apparently for all purposes; at least there was no other manager. But the course of business between him and his employers, the defendant company, seems to have been that in matters relating to the general financial business of the concern, so far as they had to pass through the Para Mills, Mr. Gooding by himself or a subordinate would seek instructions from the London office, and the result of the evidence is, I think, that he ought to have so done in respect of the transactions under consideration. But in regard to those who were dealing with the Para Mills the question represents a different aspect; they would know nothing of the internal arrangements of the company—they would know nothing probably of the London office. Apparently the course of business was that communications to correspondents in respect of finance would be made from the Para Mills under Gooding's signature. I gather this from the document of Dec. 4, 1902, and from the evidence given by Mr. Du Cros, which was as follows: (Q.) "A person writes a business letter to the Dunlop Rubber Co. at the Para Mills. Whom would that letter be brought before in the ordinary course of business?"—(A.) "The manager, Mr. Gooding." (Q.) "Would Mr. Gooding be the person authorised by the head office to affix the signature to the answer to that letter?"—(A.) "All letters, even the Para Mills letters, are signed by the name of the company—and Mr. Gooding's signature as manager." (Q.) "Therefore a letter addressed to the Para Mills, Birmingham, would be answered by a letter bearing Mr. Gooding's signature or stamp?"—(A.) "Whether dictated by him or not, it would be signed by the stamp of the company with his name." When the plaintiffs communicated with the defendants on Jan. 6 and 7, they wrote to the right place and to the right body—the company. Those communications were,

according to the business arrangements of the company, received and opened by the agents authorised by the company to receive and deal with them. And when the reply was sent on Jan. 8 it was in due form signed by the manager who, subject to receiving authority from the London office, ought in due course so to have signed the reply. Thus the correspondent making an inquiry to the right office receives in due course a reply from the person whose duty it was to receive and reply to such communication. In the case which we are considering the manager, Gooding, having failed to inform the London office of the undertaking of Jan. 8, given by him to the plaintiffs, payment of the larger sum of £3,263 was made in pursuance of previous direction to make payments to another firm, and the company having done so repudiate Gooding's undertaking and refuse to pay the amount in question twice over. If the point stood alone, it would be for your Lordships to determine which of the parties to the litigation should bear such loss. In my opinion, the loss ought to fall upon the defendants. Gooding was the person authorised by the defendants to deal with their correspondence—to receive and reply to letters—that he neglected his alleged duty when he omitted to seek specific orders from London may be the case—but the neglect was that of the defendants' agent and it is more reasonable that the result of it should be borne by his employers than by those who could know nothing of the existence of the alleged duty or of the omission to fulfil it. But this determination of liability depends upon the view that Gooding was held out by the defendants as a person upon whose communications plaintiffs were entitled to rely. To hold otherwise would, I think, tend to encourage a want of confidence in commercial transactions to an extent which would be most undesirable. I, therefore, think that this appeal must be allowed with costs.

Appeal allowed.

Solicitors: *Hollams, Sons, Coward & Hawksley; John B. & F. Purchase.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

SECRETARY OF STATE FOR WAR *v.* WYNNE AND OTHERS

[King's Bench Division (Lord Alverstone, C.J., Wills and Darling, JJ.), October 25, 26, 1905]

[Reported [1905] 2 K.B. 845; 75 L.J.K.B. 25; 93 L.T. 797; 54 W.R. 235; 22 T.L.R. 8; 50 Sol. Jo. 13]

Crown—Property of the Crown—Liability for distress for rent.

Property of the Crown on land occupied by a subject is exempt from distress for rent, and that is for the public good, for much of it is held by the Crown for the advantage and benefit of the public, e.g. goods required for the defence of the country.

Notes. As to the exemption of Crown property from distress, see 7 Halsbury's Laws (3rd Edn.) 246; and for cases see 18 Digest (Repl.) 279.

Cases referred to in argument:

R. v. *Priorem de Okeborne*, Memoranda de Scaccariis, Easter, 22 Edw. 1.

R. v. *Cotton* (1751), Park. 112; 2 Ves. Sen. 288; 145 E.R. 729; 18 Digest (Repl.) 333, *795.*

A.-G. v. *Leonard* (1888), 38 Ch.D. 622; 57 L.J.Ch. 860; 59 L.T. 624; 37 W.R. 24; 4 T.L.R. 479; 18 Digest (Repl.) 333, *796.*

Appeal from a decision of His Honour JUDGE GYE, at Winchester County Court.

The plaintiff, the Secretary of State for War, claimed from the defendants the sum of £30 as damages for having illegally distrained upon a horse, the property of the Crown, on Aug. 8, 1904. The defendant Constance Agnes Wynne was the owner of North Street Farm, Ropley. The defendant Arthur Arnold was her agent. The defendant George Tanner was a bailiff, duly appointed under the Distress Amendment Act. At the hearing in the county court it was proved, on behalf of the plaintiff, that by a letter, dated Oct. 24, 1902, written by the Quarter-master-General at the War Office, the War Office authorities announced their intention of giving a certain number of surplus horses to each officer commanding a Yeomanry regiment, which that officer might lend to members of the Yeomanry on the terms contained in the letter. In accordance with that letter certain horses were distributed in the district, and among others a horse was lent to one H. G. Tibble, a member of the Yeomanry, and was taken by him to North Street Farm, the property of the defendant C. A. Wynne, and in the occupation of H. G. Tibble, as her tenant. On Aug. 7, 1904, there was a sum of £74 due in respect of rent from Tibble to the defendant Wynne, and the defendant Arnold, by a distress warrant, authorised the defendant Tanner to distrain upon the goods, chattels, and effects on the farm for that amount of rent. The defendant Tanner accordingly levied a distress on the farm under the warrant on Aug. 8, and under that distress seized, among other things, the horse in question. All the proper steps were duly taken by the bailiff, and it was admitted that as between the tenant Tibble and the defendants the distress was regular in every way.

On Sept. 4 a request was made by Major Holt, commanding the squadron of Yeomanry in the district, directed to the defendant Tanner, to surrender the horse as being government property. This the defendant Tanner refused to do. On Sept. 26 Captain Granville, the Yeomanry adjutant, made a verbal claim upon the defendant Arnold for the horse, which was refused to be given up. On Sept. 28, after due notice, the horse was sold by the instructions of the defendant Tanner, acting as bailiff, and realized the sum of £9 10s. Further correspondence between the Yeomanry authorities and the defendants Tanner and Arnold ensued, and on Jan. 31, 1905, the Secretary of State for War issued the plaint in this action. His Honour gave judgment for the defendants, and the plaintiff appealed.

Simon, Sutton & J. S. Robertson for the plaintiff.

The respondent did not appear.

LORD ALVERSTONE, C.J.—I regret that this case has not been argued on the other side, because I cannot pretend to recollect, or even ever to have known, all the law there may be in connection with such a matter as this: but I have no doubt that leading counsel for the plaintiff, aided as he has been by very able assistance, has done his best to ascertain what the authorities are, and would have called to our attention anything which he found against him if there had been substantial authorities the other way.

In my opinion, the decision of the learned county court judge was wrong and cannot be maintained. I think, with great respect to his opinion, that he has fallen into the error of thinking that the authorities establish that the Crown must take proceedings in the nature of legal proceedings before its goods can be protected, because at the conclusion of his judgment he says:

> "It is, in my view, not sufficient that a mere claim or demand for the delivery of the goods seized should be made by the Crown. There must, in my opinion, be something equivalent to formal legal process of some kind actually commenced."

It is rather difficult to see, if the Crown's goods are upon a man's property and the Crown claims them, what legal process could be commenced except the claim, or an action founded on the claim as this was. There is no necessity for a writ of extent; not only is there no necessity for it, but a writ of extent would not be

applicable. The learned county court judge does not seem—I daresay owing, as he says, to the small time he was able to give to the matter—quite to appreciate that the authority he has cited is only useful for the purpose which counsel for the plaintiff last mentioned in his argument—viz., of showing that the title of the Crown which is founded on proceedings takes precedence of the right of the landlord, who would otherwise be entitled. It seems to me there is a much broader principle involved here which the learned county court judge overlooked, and that is that the Crown property never was, according to the law of England, subject to these incidents. There is the passage in WOODFALL'S LANDLORD AND TENANT (17th Edn.) p. 496, which seems to me to be a logical deduction:

> "There is no modern decision [regarding distress for rent] as to Crown property; but it is laid down in the old books that a man cannot distrain during the possession of the Crown; and it would seem to follow that Crown property, even though the Crown be not tenant, is privileged on premises demised to a subject."

If, even when the Crown is tenant and owes the rent, the Crown property cannot be taken in distress, it would seem a strange thing that Crown property could be taken for somebody else's rent. Therefore, logically it seems to me that the proposition contended for follows.

If we refer to books of great learning, such as CHITTY'S PREROGATIVE OF THE CROWN and the authorities there cited, it would certainly seem that there are many instances in which Crown goods are exempt from the rights and privileges of other people and the liabilities of other people. I do not refer to them all, because they may rest on different considerations, but one may instance taxes, tolls, rates, and things of that kind. When it is stated in CHITTY'S PREROGATIVE OF THE CROWN that the personal property of the King is not subject to the laws relative to sale in market overt and distress damage feasant, I think two very strong instances are given, because the sale in market overt depends upon an old common law right that by a sale in market overt the purchaser gets a good title, and it must be the exemption of Crown property from that common law right that makes the Crown title to Crown goods superior to that of the purchaser in market overt. I think, also, that an argument in favour of Crown property being liable to distress damage feasant would be very much stronger than an argument as to the liability of Crown property to pay the rent of other persons because the property happens to be their land. I think, therefore, the county court judge is mistaken in thinking that only legal proceedings are the root and foundation of the protection of Crown property from distress, and that the law which has prevailed for centuries regarding the right of a landlord to levy distress at common law is not sufficient to enable the landlord to take Crown property. Therefore, judgment ought to be for the plaintiff.

WILLS, J.—I am of the same opinion. The only observation I wish to add is that, to my mind, the utter absence of direct authority upon the subject, seeing how very far back our books of precedent and our books of abridgment and so on go, is of itself an argument in favour of the proposition of the plaintiff in this case, because if Crown property had been subject to this distress, seeing the immense number of Crown properties that there were in ancient times, and the very considerable number there are still, it would be almost impossible that there should not have been leases and demises which should from time to time have affected the property of the Crown.

DARLING, J.—I am of the same opinion. This is, to my mind, an important and an interesting case, and, but for the fact which my brother WILLS has just pointed out, one would be rather surprised not to find Crown goods among the list of things absolutely privileged from distress. But if one reflects upon what the history of this country has been and why goods are held by the Crown, and who represented the Crown and whose business it was to seize goods, one would

not expect to find that any high sheriff would have ventured to take the goods of William the Conqueror, or of any succeeding monarch. I add a word or two on this matter because there seems to me to be a real principle involved here making it manifest that the goods of the Crown are privileged from distress and ought to be privileged from distress for the public good. Goods of the Crown are held by the Crown for the public advantage, for the benefit of the whole country, and many of those goods by their very nature are held for the defence of the country by the Crown, to whom the defence of the country is confided. This very horse was a horse which had served in the South African war, and might be required at any moment for the defence of this country. It seems to me, therefore, that anyone who had to consider this matter from the beginning would say that among the goods which shall not be liable to be seized for rent due to anybody, whether by the Crown or by anybody else—a fortiori by anybody else—shall be those things which belong to the Crown, because the Crown has to keep the country defended against its enemies.

It is worth noticing, I think, that all goods, with certain exceptions, even the goods of a stranger, are subject, if they be on demised premises, to distraint for rent owing by the tenant of those premises. If the goods of the Crown were not absolutely privileged it must constantly happen that, when an expedition is being sent abroad, horses belonging to the Crown and military stores the property of the Crown would have to be temporarily placed in some town on their way to the seaport, or in sheds or buildings actually at the seaport, and it might well be that those premises where the goods or horses were placed were held by a person who had not paid his rent. Can anyone suppose for a moment that things absolutely necessary to a military expedition should be liable to be seized and held and sold after due observance of all the formalities necessary to distress for rent; and the military expedition perhaps delayed while this enforcement of the civil right went on? I should have been very much surprised if anybody could have pointed to a case in which the goods of the Crown had been held to have been lawfully seized. It seems to me that what could not have been tolerated in the case of an expedition could not be tolerated in the case of this horse, which was held by the Crown manifestly for the purpose to which I have alluded, namely, the defence of the country.

Appeal allowed.

Solicitor: *Solicitor to the Treasury.*

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*]

A

DAVIS *v.* PETRIE

[Court of Appeal (Sir Richard Henn Collins, M.R., Fletcher Moulton and Farwell, L.JJ.), August 3, 1906]

[Reported [1906] 2 K.B. 786; 75 L.J.K.B. 992; 95 L.T. 239; 22 T.L.R. 771; 13 Mans. 344]

B

Bankruptcy—Act of bankruptcy—Deed of assignment for benefit of creditors—Payment by debtor to trustee under deed—Appointment of trustee in bankruptcy—Right of trustee in bankruptcy to recover from trustee under deed—Onus on debtor to prove sum recovered by trustee in bankruptcy from trustee under deed included debt.

C

A trader executed a deed of assignment of his property to a trustee for the benefit of his creditors generally. The trustee, acting under this deed, collected £500 from the trader's debtors, including £21 from the defendant. Within three months of the execution of the deed the trader was adjudicated bankrupt. A trustee in bankruptcy was appointed who called upon the trustee under the deed to account for the sums received by him. The sum of £100 was recovered from the trustee under the deed. The trustee in bankruptcy brought an action to recover the sum of £21 from the defendant.

D

Held: (i) the acceptance of the £100 by the trustee in bankruptcy from the trustee under the deed did not affect his rights against third parties so as to disentitle him from recovering in the action; (ii) as the defendant could not prove that the £100 accepted by the trustee in bankruptcy included any part of the £21, the trustee was entitled to recover the whole sum.

E

Per Fletcher Moulton, L.J.: A debtor to the estate who makes a payment to the trustee under a deed makes it to the wrong person, and is liable to be sued by the trustee in bankruptcy. But if such a debtor can show that the trustee in bankruptcy has in fact been paid the whole, or part, of the debt by recovering that which has been received by the trustee under the deed, he has pro tanto a good defence in the action against him by the trustee in bankruptcy.

F

Judgment of the Divisional Court, [1905] 2 K.B. 528, affirmed.

Notes. Section 46 of the Bankruptcy Act, 1914, meets the difficulty and hardship experienced in this case by providing that a payment to a person subsequently adjudged bankrupt or to his assignee shall be a good discharge to the person paying if the payment is made before the actual date on which the receiving order is made and without notice of the presentation of the bankruptcy petition.

G

Referred to: *Re Simms, Ex parte Trustee*, [1934] Ch. 1.

As to the effect of an act of bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 448, 449; as to payment to bankrupt's assignee, see ibid., pp. 451, 452; and as to the position of trustee if bankruptcy supervenes, see ibid., pp. 618, 619; and for cases, see 5 Digest (Repl.) 1189 et seq. As to payments before receiving order and without notice of petition, see 2 Halsbury's Laws (3rd Edn.) 566. For the Bankruptcy Act, 1914, s. 46, see 2 Halsbury's Statutes (2nd Edn.) 383.

H

Cases referred to:

(1) *Re Mardon*, [1896] 1 Q.B. 140; 65 L.J.Q.B. 111; 73 L.T. 480; 44 W.R. 111; 12 T.L.R. 53; 40 Sol. Jo. 70; 2 Mans. 511; 5 Digest (Repl.) 1190, *9583*.

I

(2) *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch.D. 696; 49 L.J.Ch. 415; 42 L.T. 421; 28 W.R. 732, C.A.; 5 Digest (Repl.) 776, *6615*.

(3) *Re Riddeough, Ex parte Vaughan* (1884), 14 Q.B.D. 25; 33 W.R. 151; 1 Morr. 158, D.C.; 5 Digest (Repl.) 1190, *9586*.

Also referred to in argument:

Re Ely, Ex parte Trustee (1900), 82 L.T. 501; affirmed 48 W.R. 693; 44 Sol. Jo. 483, C.A.; 5 Digest (Repl.) 910, *7537*.

Smith v. *Baker* (1873), L.R. 8 C.P. 350; 42 L.J.C.P. 155; 28 L.T. 637; 37 L.P. 567; 5 Digest (Repl.) 973, *7849*.

Re Carnac, Ex parte Simmonds (1885), 16 Q.B.D. 308; 54 L.T. 439; 34 W.R. 421; sub nom. *Re Rivett-Carnac, Ex parte Simmonds*, 55 L.J.Q.B. 74; 2 T.L.R. 18, C.A.; 4 Digest (Repl.) 227, *2032*.

Re Hirth, Ex parte Trustee, [1899] 1 Q.B. 612; 68 L.J.Q.B. 287; 80 L.T. 63; 47 W.R. 243; 15 T.L.R. 153; 6 Mans. 10, C.A.; 5 Digest (Repl.) 695, *6094*.

Appeal by the defendant from a decision of the Divisional Court (LORD ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.).

The action was brought by the plaintiff, as trustee in bankruptcy of one William Watson, to recover the sum of £21 from the defendant for work done for her by the bankrupt. The defendant pleaded payment under the following circumstances: On June 5, 1903, William Watson, who carried on business as a builder, executed a deed of assignment whereby he assigned all his property to Charles Afford as trustee for the benefit of his creditors generally. On June 6, Afford gave the defendant notice of the assignment, and asked the defendant to pay by return of post the sum of £21 in which she was indebted to Watson's estate. On June 12 the defendant sent Afford a cheque for £21 payable to bearer, and this cheque was paid into the Economic Bank at Norwich to an account standing in the name of Afford's wife, but into and upon which Charles Afford made payments and drew cheques. Charles Afford, as trustee under the deed, collected altogether about £500 from various debtors to Watson's estate, and paid away various sums. On Aug. 20, 1903, a receiving order was made against Watson upon a petition which alleged the execution of the deed of assignment as the act of bankruptcy, and Watson was subsequently adjudicated bankrupt. On Sept. 3 Charles Afford, being desired by the official receiver to send in an account of the money he had received for the bankrupt's creditors and to pay over the balance, sent the official receiver the sum of £100. The county court judge was of the opinion that the payment made by the defendant to the trustee under the deed of assignment was a protected transaction, and he gave judgment for the defendant. On appeal the Divisional Court reversed the decision of the county court judge. The defendant appealed.

Frank Mellor for the defendant.

S. R. Earle, for the plaintiff, the trustee in bankruptcy, was not called on to argue.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal from a judgment of the Divisional Court holding that the defendant had no defence to the plaintiff's claim. Watson, a builder, being in financial difficulties, executed a deed of assignment of all his property to a trustee for the benefit of his creditors. The name of the trustee was Afford. Among the debts due to Watson there was a debt of £21 due from the defendant. Upon the request of the trustee under the deed the defendant paid him £21. Within three months after the execution of the deed of assignment a receiving order was made against Watson, and he was adjudicated bankrupt. His trustee in bankruptcy is now suing the defendant for the debt of £21 which she owed to the bankrupt. In answer to that claim she says she has paid that debt to Afford, the trustee under the deed.

The question is whether that is a good answer to the claim of the trustee in bankruptcy. The trustee in bankruptcy has received from the trustee under the deed a sum of £100, which is about one-fifth of the total sum collected by the trustee under the deed as due to Watson. The first contention put forward on behalf of the defendant is that the trustee in bankruptcy, by accepting that £100 from the trustee under the deed, has made the trustee under the deed his agent for the whole transaction, and is therefore estopped from suing the defendant for the debt which she has already paid to the trustee under the deed. That contention involves this: that in such a matter there must be an election by the trustee

in bankruptcy, and that if the trustee in bankruptcy has elected to treat the trustee under the deed as his agent in a single matter in the whole transaction, he has thereby debarred himself from treating the trustee under the deed as a tort-feasor in any other matter in the transaction, and from claiming payment from any debtor to the bankrupt who has paid to the trustee under the deed the debt due from him to the bankrupt. A

In my opinion, no such proposition can be maintained by a third person. The fact that the trustee under the deed had accounted to the trustee in bankruptcy for money collected by him under the deed does not alter the rights of the trustee in bankruptcy as regards third persons. Suppose an action by a trustee in bankruptcy against a debtor to the bankrupt's estate, and a plea that the trustee in bankruptcy had received from the trustee under the deed a sum of £10, part of the bankrupt's estate, collected by him, and that the defendant had paid the amount sued for to the trustee under the deed. How could the fact that in one particular instance the trustee in bankruptcy had received from the trustee under the deed a sum of money which had nothing to do with the debt due from the defendant be an answer to the claim of the trustee in bankruptcy? To hold that it would be an answer would, in my opinion, be carrying the doctrine of election much too far. That doctrine applies as between two persons, one of whom has elected to act upon one of two alternative views of his rights, and in such a case he could not, as against the other person, or anyone claiming under him, recur to the inconsistent alternative view of his rights. The doctrine is not applicable when dealing with a third person who was no party to the election. B C D

The only question is one of fact, aye or no, was the trustee under the deed the agent of the trustee in bankruptcy; and the mere fact that the trustee in bankruptcy had accepted from the trustee under the deed a sum of money or a chattel which the trustee under the deed had acquired for the estate, would not affect the rights of the trustee in bankruptcy as against third parties who had nothing to say to it. At the very most such a fact could only be a step towards evidence of agency, and in the present case we have no other evidence before us to show that the trustee under the deed was the agent of the trustee in bankruptcy. On that point, therefore, I think that the contention on behalf of the defendant fails. The other point raised was that some proportionate part of the £100 which was handed over to the trustee in bankruptcy by the trustee under the deed ought to be appropriated to the payment of the defendant's debt, and that her debt ought to be thereby reduced to something less than £20. Such a reduction would affect the costs of the action. The onus of showing that that £100 included any part of the £21 paid by the defendant to the trustee under the deed is on the defendant. The £21 was paid by the defendant to the trustee under the deed by means of a cheque, but there is no evidence before us as to what became of the money. The process of appropriating any part of the £100 to the £21 has not been gone through. The defendant's appeal therefore fails and must be dismissed. E F G H

FLETCHER MOULTON, L.J.—I am of the same opinion. The execution by Watson of the deed of assignment for the benefit of his creditors generally was an act of bankruptcy, and the deed would become void as against the trustee in bankruptcy if a bankruptcy petition were presented within three months of its execution. Anyone exercising any right under the deed to receive as trustee for the creditors any portion of the estate would do so at his peril, and those who recognised that right also did so at their peril. If bankruptcy supervened within the three months, the trustee under the deed would become accountable, as was said by VAUGHAN WILLIAMS, J., in *Re Mardon* (1), as trustee de son tort in respect of assets received by him for the bankrupt's estate. The trustee in bankruptcy has the right to require him to give up assets in his hands. A debtor to the estate who makes a payment to the trustee under the deed makes it to the wrong person, and is liable to be sued by the trustee in bankruptcy. But if such a debtor can show that the trustee in bankruptcy has in fact been paid the whole, or part, I

of the debt by recovering that which has been received by the trustee under the deed, he has pro tanto a good defence in the action against him by the trustee in bankruptcy. Take the case of a chattel—a carriage, for instance—in the possession of a bailee from the bankrupt. If the trustee under the deed received it from the bailee and then handed it over to the trustee in bankruptcy, those circumstances would afford an adequate defence to the bailee if he should be sued for the return of the carriage by the trustee in bankruptcy. Exactly the same principle applies to money, though no doubt there would be much more difficulty in tracing what had become of it when handed over to the trustee under the deed than there would be in the case of a chattel such as a carriage. I do not say that recourse might not be had, in the case of money, to the principle of proportionate abatement. But in the present case there is no evidence that, in receiving the £100 from the trustee under the deed, the trustee in bankruptcy received any portion of the £21 which the defendant paid over to the trustee under the deed. The onus of showing that was upon the defendant, and she has not discharged that onus. I cannot see, therefore, any defence to the claim of the trustee in bankruptcy, and I think that the appeal must be dismissed.

FARWELL, L.J.—I am of the same opinion. The case before us becomes quite clear when once it has been realised that it ought to be dealt with on equitable principles. The trustee under the deed knew that the execution of the deed was an act of bankruptcy, and that, on bankruptcy proceedings being taken within three months, the deed would become void as against the trustee in bankruptcy, who would be entitled to call upon him to hand over any property of the bankrupt's estate that was in his possession. It seems to me impossible to hold that a trustee in bankruptcy making that demand upon the trustee under the deed makes an election which would have the wide effect as regards debtors to the estate which is being contended for. It is not necessary in the present case to consider whether a trustee in bankruptcy has such a power of making an election as has been contended before us. Before deciding the point I should like to hear further argument upon the question whether the trustee in bankruptcy had power, under s. 56 of the Bankruptcy Act, 1883 [now s. 55 of the Bankruptcy Act, 1914] to make such an election without the permission of the committee of inspection, or whether such permission was not a condition precedent under s. 57 [now s. 56 of the Bankruptcy Act, 1914]. Here the trustee in bankruptcy called upon the trustee de son tort to hand over any part of the bankrupt's estate which was in his possession, and £100 was accordingly handed over. That only gave to the defendant a right to show that the money paid by her to the trustee under the deed was part of the £100 so handed over to the plaintiff. Since the decision of the Court of Appeal in *Re Hallett's Estate, Knatchbull* v. *Hallet* (2) money held by a person in a fiduciary character is capable of being earmarked. Here there has been no attempt to do anything of that sort, and indeed it would have been very difficult to do it. The £21 was paid by the defendant to the trustee under the deed by means of a cheque on June 12, and the cheque was paid into a banking account. Many other persons paid money to the trustee, who collected in all about £500 of the estate of the bankrupt, and on Sept. 3 paid over to the trustee in bankruptcy the £100 which was all he had remaining in his hands. The result is that the appeal fails. Nothing in our decision touches what was decided in *Re Riddeough, Ex parte Vaughan* (3) which was decided on altogether different equities.

Appeal dismissed.

Solicitors: *Braby & Macdonald*; *Gerald & Arthur Marshall.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

Re WALBRAN. MILNER *v.* WALBRAN

[CHANCERY DIVISION (Joyce, J.), November 2, 18, 1905]

[Reported [1906] 1 Ch. 64; 93 L.T. 745; 54 W.R. 167]

B

Will—Gift to be divided between the children of A. and B.—Gift in equal shares to B. and children of A.

A gift to be equally divided between the "children of A. and B.," where A. and B. are both alive and where they do not have, or are not capable of having, children together, as, e.g., where they are both male persons, is to be construed as a gift to B. individually and to the children of A., B. taking one moiety and the other being divided among the children of A.

C

Notes. Considered: *Re Harper, Plowman* v. *Harper*, [1914] 1 Ch. 70; *Re Prosser, Prosser* v. *Griffith* (1929), 167 L.T. 307; *Re Dale, Mayer* v. *Wood*, [1930] All E.R.Rep. 10; *Re Cossentine, Philp* v. *Wesleyan Methodist Local Preacher's Mutual Aid Association*, [1932] All E.R.Rep. 785; *Re Alcock, Bonser* v. *Seville*, [1945] 1 All E.R. 613. Explained: *Re Hall, Parker* v. *Knight*, [1948] Ch. 437. Considered: *Re Jeeves, Morris-Williams* v. *Haylett*, [1948] 2 All E.R. 961.

D

As to gifts to children of A. and B., see 34 HALSBURY'S LAWS (2nd Edn.) 304, 305; and for cases see 44 DIGEST 845, 846.

Case referred to:

(1) *Re Sibley's Trusts* (1877), 5 Ch.D. 494; 46 L.J.Ch. 387; 37 L.T. 180; 44 Digest 799, *6545*.

E

Also referred to in argument:

Re Featherstone's Trusts (1882), 22 Ch.D. 111; 52 L.J.Ch. 75; 47 L.T. 538; 31 W.R. 89; 44 Digest 845, *6989*.

Hawes v. *Hawes* (1880), 14 Ch.D. 614; 43 L.T. 280; 38 Digest (Repl.) 819, *303*.

F

Lugar v. *Harman* (1786), 1 Cox, Eq. Cas. 250; 29 E.R. 1151; 44 Digest 846, *6994*.

Mason v. *Baker* (1856), 2 K. & J. 567; 69 E.R. 908; 44 Digest 845, *6986*.

Re Davies' Will (1860), 29 Beav. 93; 7 Jur.N.S. 118; 9 W.R. 134; 54 E.R. 561; 44 Digest 845, *6987*.

Fletcher v. *Fletcher* (1880), 7 L.R.Ir. 40; affirmed 9 L.R.Ir. 301; 37 Digest 427, *h*.

G

Adjourned Summons to determine rights of beneficiaries under a will.

By her will, dated Sept. 26, 1903, Jane Walbran, widow, directed her executors to sell certain lands, tenements, and hereditaments situate in Yorkshire, and, after paying all funeral and testamentary expenses and duties, to divide the proceeds of sale into two equal parts. The will then proceeded as follows:

H

"One equal part I leave to John T. Walbran, and the other equal part to be equally divided between the children of Francis M. Walbran and James C. Walbran or their heirs."

The testatrix died on June 26, 1904. Francis M. Walbran, John T. Walbran, and James C. Walbran were all nephews of the testatrix's deceased husband, John T. and James C. Walbran being brothers. At the date of the testatrix's death Francis M. Walbran and James C. Walbran, who were both living, had respectively six children and two children living. Francis M. Walbran had for several years resided apart from his wife and children, and was so residing at the date of the will. This summons was taken out by the executors for the determination of the question who were entitled to the second moiety of the proceeds of sale, and in what shares and proportions.

I

A *Pattison* for the executors.
Romer for James C. Walbran.
Younger, K.C., and *Goldberg* for the children of Francis M. Walbran.
Hughes, K.C., and *Method* for the children of James C. Walbran.

Cur. adv. vult.

B Nov. 18, 1905. **JOYCE, J.,** read the following judgment. The testatrix by her will gave a moiety of the proceeds of sale of certain lands, tenements, and hereditaments

> "to be equally divided between the children of Francis M. Walbran and James C. Walbran or their heirs."

C Just as to determine what is the effect of a gift to A. or B. you must know who A. and B. are (see per JESSEL, M.R., in *Re Sibley's Trusts* (1) (5 Ch.D. at p. 499), so, in order to determine the effect of a gift to the children of A. and B., you must know something about A. and B. The proper grammatical meaning of the expression "the children of A. and B."—the preposition "of" not being repeated before—"B.," and A. and B. not having or being capable of having D children together—is, the children of A. and the individual B., not his or her children. But the expression "the children of A. and B." may mean the children of A. and the children of B.; and in wills must have that meaning if B., to the knowledge of the testator, be dead leaving children still alive. In the present case A. and B. are both alive. Each is a nephew of the testatrix; but A., i.e. Francis Walbran, had deserted or, at all events, was living away from his family. E On the other hand, no reason has been suggested why the testatrix should pass over B., i.e., James Walbran, in favour of his children. I hold that the division is between James, not his children, and the children of Francis. As to the mode of division, the gift is not to the children of A. and B. as tenants in common, or in equal shares, but it is "to be equally divided between" them. In strictness, the word "between," as its etymology suggests, implies, in a case of dividing, division F into two parts, rather than into more. Considering the nature of the gift, it would be strange, not to say capricious, to make a class of one nephew and the children of another and to divide among them in equal shares. Upon the whole, I think that the testatrix intended, and that the will expresses, the division of the property into moieties.

Solicitors: *Williamson, Hill & Co.*, for *D'Angibau & Malim*, Boscombe; *Rawle,* G *Johnstone, & Co.*

[*Reported by* H. W. LAW, ESQ., *Barrister-at-Law.*]

PADDINGTON CORPORATION *v.* ATTORNEY-GENERAL

[House of Lords (The Earl of Halsbury, L.C., Lord Robertson and Lord Lindley), November 14, 1905]

[Reported [1906] A.C.1; 75 L.J.Ch. 4; 93 L.T. 673; 70 J.P. 41; 54 W.R. 317; 22 T.L.R. 55; 50 Sol. Jo. 41; 4 L.G.R. 19]

Burial—Burial ground—Disused burial ground—Erection of "building"—Screen to prevent acquisition by neighbouring buildings of right to light—Disused Burial Grounds Act, 1884 (47 & 48 *Vict.*, *c.* 72), *s.* 3—*Open Spaces Act*, 1887 (50 & 51 *Vict.*, *c.* 97), *s.* 4.

A hoarding or screen erected on a disused burial site for the purposes of preventing the acquisition of a right to light by an adjacent owner is not a "building" the erection of which is unlawful by reason of the provisions of s. 3 of the Disused Burial Grounds Act, 1884.

Local Authority—Open space—Right of authority to erect screen to prevent acquisition by neighbouring buildings of right to light over open space.

The erection of a screen by a local authority to prevent the acquisition of a right to light over an open space administered by them is a proper exercise of their powers.

Notes. The Metropolitan Open Spaces Act, 1881, and the Open Spaces Act, 1887 (except so much of s. 4 as amends the Disused Burial Grounds Act, 1884) were repealed by s. 23 of, and the Schedule to, the Open Spaces Act, 1906. The expression "building" does not appear in the comparable provisions of the latter Act.

Considered: *Rector and Churchwardens of St. Nicholas Acons* v. *L.C.C.*, [1928] All E.R.Rep. 240. Applied: *Stevens* v. *Willing & Co.* (1929), 167 L.T.Jo. 178. Referred to: *Heath's Garage* v. *Hodges* (1915), 14 L.G.R. 195; *Hurley* v. *Stepney Borough Council* (1923), 67 Sol. Jo. 767; *National Trust for Places of Historic Interest or Natural Beauty* v. *Midlands Electricity Board*, [1952] 1 All E.R. 298; *Re St. Mark's Church, Lincoln*, [1956] 2 All E.R. 579.

As to prohibition against building on disused burial grounds, see 4 Halsbury's Laws (3rd Edn.) 88, 89; and for cases see 7 Digest (Repl.) 586. As to right to light, see 12 Halsbury's Laws (3rd Edn.) 582. For the Disused Burial Grounds Act, 1884, s. 3, and the Open Spaces Act, 1887, see 2 Halsbury's Statutes (2nd Edn.) 792, 793, and for the Open Spaces Act, 1906, see ibid. vol. 17, p. 251.

Appeal by the Paddington Corporation and the vicar of Paddington from a decision of the Court of Appeal (Vaughan Williams, Romer and Cozens-Hardy, L.JJ.), reported [1903] 2 Ch. 556, reversing a decision of Buckley, J., reported [1903] 1 Ch. 109.

The churchyard of St. Mary's, Paddington, was a disused burial ground within the meaning of the Metropolitan Open Spaces Acts, 1877, 1881, and 1887, and the Disused Burial Grounds Act, 1884, and was vested in the vicar of Paddington. Under the above-mentioned Acts and by an indenture made between the vicar and the vestry of Paddington, and of a faculty granted by the Bishop of London, Paddington Corporation held and exercised the entire management and control of the churchyard as an open space or recreation ground. One Boyce was the lessee of land adjacent to the churchyard upon which he had built a block of flats, known as St. Mary's Mansions. The block was lighted on one side by windows overlooking the churchyard. Differences arose between Paddington Corporation and Boyce concerning the boundary wall which was to be erected between the flats and the churchyard, and in due course the corporation proposed to erect a screen in front of the flats unless the differences over the boundary wall were resolved satisfactorily within twenty-eight days. Boyce then brought this action, among other things, to restrain the erection of the screen as being

in contravention of the Metropolitan Open Spaces Acts, 1877 to 1881, and the Disused Burial Grounds Act, 1884. The action was dismissed by BUCKLEY, J. On appeal the Court of Appeal reversed his decision and ordered that the corporation and the vicar of Paddington should be perpetually restrained from using the disused burial ground for any purposes other than the statutory purposes, and, in particular, from erecting thereon any building or screen to prevent the access of light coming over the ground to the windows of the flats. The corporation appealed, Boyce's executors being substituted as respondents on the latter's death. The Attorney-General was added as plaintiff at the relation of Boyce.

By the Disused Burial Grounds Act, 1884, s. 3:

> "After the passing of this Act is shall not be lawful to erect any buildings upon any disused burial ground except for the purpose of enlarging a church, chapel, meeting-house, or other place of worship."

By the Open Spaces Act, 1887, s. 4:

> "In the Disused Burial Grounds Act, 1884, and this Act . . . the expression 'building' shall include any temporary or moveable building."

Haldane, K.C., H. Terrell, K.C., and *T. A. Nash* for Paddington Corporation.
C. A. Montague Barlow for the vicar of Paddington.
Astbury, K.C., and *M. Romer* for the respondents.

THE EARL OF HALSBURY, L.C.: I confess that I should have been better satisfied if the parties had thought fit to come to some agreement in this case, but, of course, they have a right to have the judgment of the House, and while, on the one hand, certainly there are public rights involved, on the other, the question, as it is raised here, is a question between a private speculator who wants to make the best of his buildings, and a public body whose only interest is to preserve that which is committed to their charge in as unencumbered a position as that in which they received it.

In the first place, I think it necessary to consider what is the meaning of the prohibition contained in the Act referred to. I am of opinion that it meant what it said, that the space was to remain unbuilt upon. It is no longer to be used as a burial ground, but it is not to be used as building ground. That is the meaning of it; and it appears to me that anything that approaches to the character of a building, whether temporary or permanent, is obviously within the prohibition. I entirely agree with BUCKLEY, J., that in the books there may be found a great variety of cases where, with reference to the subject-matter of the covenant and the meaning of what was in question between the parties, a screen, or some erection of that nature, might be considered a "building" with reference to some covenants, and might not be considered a "building" with reference to others. The subject-matter to be dealt with and the subject to which the covenant is supposed to be applied are all to be looked at in order to see what the word "building" means in relation to that particular subject-matter. It is impossible to give any definite meaning to it in the loose language which is used in some cases. Anything which is in the nature of a building might be within one covenant, and the same erection might not be a building with reference to another covenant. I think that the observation of BUCKLEY, J., was very well founded.

But now I have to look at the word "building" here, with reference to this subject-matter and with reference to what this Act of Parliament was doing. It is very obvious, I think, that what it was intended to do was to keep this disused burial ground from being used as building land, to keep it as a place of exercise, ventilation, and recreation, and what not; to prevent anything from being done in the nature of building which would interfere with or restrict the free and open use of these spaces, as constituted under the statute. But when I look at the question here, I am bound to say that I look at it under more difficulty, because I have not only to consider whether a screen is a building, but I have to consider whether an undescribed screen, of which neither the size nor the

nature has been specified, would be a building within the meaning of the Act of Parliament. All I can say at present is that if the proposition is put in the abstract in that way, without any reference to any concrete facts, it must be put thus, that any screen is a "building" within the meaning of the Act of Parliament. I am not prepared to affirm that proposition, and I think that BUCKLEY, J., was perfectly right. I think that it is not a building; and that decision appears to go to a great part of the argument, because the only mode in which it has been suggested that this injunction should be maintained, namely, that the ground should not be used for any other purpose than that which the Act of Parliament provides, seems to me to add nothing whatever. Any other purpose than what? Any other purpose than open ground, than as a place for recreation, enjoyment, or what not. I find nothing in the letters which have been referred to which indicates the slightest restriction of any one of these purposes in the use of this ground. If we look at what is the real substance of the matter, it is obviously that this public body was doing what every private proprietor would do under the circumstances, because every private proprietor would prevent certain rights from being acquired over this space which would both prejudice the value and prevent the full use of it in the future. If this particular space can be built round, and rights acquired, whatever use might be made of it hereafter, you might have it so completely surrounded by houses of such height that the light and even the ventilation itself might be seriously interfered with by the rights acquired by twenty years' use.

Under these circumstances, it appears to me that this public body was perfectly entitled to prevent this from being done in order to protect that which is under their guardianship. They may, perhaps, be commended for not having actually erected the screen, but having raised the question on a mere threat, because, of course, where the object is simply to prevent the acquisition of a right, it is convenient first of all to test the question of law; and although, as I have pointed out, it is rather inconvenient to have to pronounce judgment upon a hypothetical screen, as to which the learned counsel has indulged his imagination, and has pictured a screen going completely round a space of about a quarter of a mile, yet I think, perhaps, that it was the most convenient form, not to put the screen itself into operation, but to try the question of law whether any screen of any sort or kind would be admissible for the purpose of preventing prejudicial rights from being acquired. I must say that I am sorry that the parties should not have arrived at an agreement between themselves about this matter; but, looking at the whole question, looking at what the meaning of the statute is and at the condition of things that now exists between the parties, I am of opinion that the judgment of the Court of Appeal is unsound. The learned lords justices appear to me to assume a state of things which I do not find to be established here. I think that the judgment of BUCKLEY, J., is perfectly right, and, under the circumstances, I move your Lordships that the judgment appealed from be reversed.

LORD ROBERTSON.—I agree with the Lord Chancellor that the case was rightly decided by BUCKLEY, J. I think that there is great force in his initial observation that it would be an extraordinary proposition that because an open space has been made available to the public for enjoyment in an open condition free from building, the result should be to give immediately, or by the unavoidable operation of the Prescription Act, to the circumjacent owners, as a matter of right, an easement of light which theretofore they had not enjoyed. When the sections are examined, I find it impossible to trace the bringing about of that extraordinary result. In the first place, I think that the vicar has never been ousted of his proprietorial rights; and when I turn to the administration of the body which is charged with preserving the place as an open space, it seems to me that, so far from being extraneous to the scope of that administration, what it is proposed to do is completely within it. I think that the erection of a screen is, or may be, entirely consistent with the purpose of maintaining this place as an

A open space for public enjoyment, and in furtherance of that purpose. No one can say that a recreation ground surrounded by flats seven stories high, and looked into by all the windows of those buildings, is necessarily as good a recreation ground as one more open to the sun and less overlooked. Accordingly, just as COZENS-HARDY, L.J., says that these administrators could erect a toolhouse, that being in furtherance of the primary purpose of the administration, so I think B that this erection is within that purpose. Of course, I do not imply that it is the duty of all administrators of open spaces to surround their open spaces with screens; all that I say is that it is within the rights which have never been taken away from the proprietors and administrators of these grounds; and it may be a step to be taken in furtherance of the purposes with which they are charged. I need hardly say that what I have said bears relation directly to the argument C of COZENS-HARDY, L.J., which indeed was adopted at your Lordships' Bar. On the other question, as to whether any screen is necessarily a building, which, as has been pointed out, is the condition of the argument, I can only say that proposition seems to me to be entirely inconsistent with the most obvious physical facts. On these grounds I think that the judgment of the Court of Appeal was wrong, and the judgment of BUCKLEY, J., right.

D

LORD LINDLEY.—I am entirely of the same opinion. The injunction granted by the Court of Appeal, to my mind, goes a great deal too far. There is not the slightest evidence to warrant the notion that the defendants, or any of them, intended to erect a building on this land, and accordingly the Court of Appeal have put in words which would cover building or screen. Screens are of all E sorts and kinds, and I can imagine screens which obviously are not buildings, and would obviously be justified by the statutory powers conferred upon these public bodies. This open space may be preserved, and primarily ought to be preserved, as a place of recreation, and more or less as a garden. Now, just fancy an injunction to restrain these defendants from planting good-sized trees in front of these windows, which would interfere with already acquired rights of light. F How could it be possible to maintain an injunction to restrain them from such planting? That shows that the Court of Appeal has gone too far. I entirely adopt the view taken by BUCKLEY, J., I think that he has put the true construction on the Acts, and I agree that the appeal ought to be allowed with costs here and below.

Appeal allowed.

G

Solicitors: *John H. Hortin*; *Cheston & Sons.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

FOSTER *v.* WARBLINGTON URBAN DISTRICT COUNCIL

[COURT OF APPEAL (Vaughan Williams, Stirling and Fletcher Moulton, L.JJ.), March 22, 23, 24, 27, 28, April 2, 3, 1906]

[Reported [1906] 1 K.B. 648; 75 L.J.K.B. 514; 94 L.T. 876; 70 J.P. 233; 54 W.R. 575; 22 T.L.R. 421; 4 L.G.R. 735]

B

Sewage—Disposal—Right to discharge into sea—Pollution of oyster bed—Right of owner to damages for nuisance.

Oysters—Oyster bed—Capacity to be property—Pollution by discharge of sewage into sea—Right of owner of bed to damages for nuisance.

There is no common law right entitling a sanitary authority to dispose of sewage by discharging it into the sea.

C

Oyster beds on the foreshore, into which oysters obtained from deeper water are put for fattening, are capable of being the property of an owner.

The plaintiff and his predecessors had occupied oyster beds on the foreshore without interference for more than twenty years when the local sanitary authority discharged sewage into the sea near the beds with the result that the oysters became contaminated and unfit for human food.

D

Held: the occupation proved by the plaintiff gave him sufficient interest in the beds to entitle him to sustain an action for nuisance against the local authority.

Notes. Followed: *Owen* v. *Faversham Corpn.* (1908), 73 J.P. 33. Considered: *Pride of Derby and Derbyshire Angling Association, Ltd.* v. *British Celanese, Ltd.*, [1953] 1 All E.R. 179. Referred to: *Jones* v. *Llanrwst U.D.C.*, [1908–10] All E.R.Rep. 922; *Smeaton* v. *Ilford Corpn.*, [1954] 1 All E.R. 923.

E

As to the pollution of sea fisheries and oyster fisheries, see 17 HALSBURY'S LAWS (3rd Edn.) 376, 379–382; and as to sewage disposal see ibid., vol. 31, pp. 221–224. For cases see 25 DIGEST 34–37, 56, 57, and 41 DIGEST 30.

F

Cases referred to:

(1) *Hobart* v. *Southend-on-Sea Corpn.* (1906), 75 L.J.K.B. 305; 94 L.T. 337; 70 J.P. 192; 54 W.R. 454; 22 T.L.R. 307; 4 L.G.R. 757; settled on appeal, 22 T.L.R. 530, C.A.; 41 Digest 35, *257*.

(2) *Truro Corpn.* v. *Rowe*, [1901] 2 K.B. 870; 70 L.J.K.B. 1026; 85 L.T. 422; 17 T.L.R. 773; on appeal, [1902] 2 K.B. 709; 71 L.J.K.B. 974; 87 L.T. 386; 66 J.P. 821; 51 W.R. 68; 18 T.L.R. 820, C.A.; 25 Digest 9, *52*.

G

(3) *R.* v. *Downing* (1870), 23 L.T. 398; 35 J.P. 196; 11 Cox, C.C. 580, C.C.R.; 25 Digest 33, *310*.

(4) *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 28 W.R. 111, C.A.; 44 Digest 51, *365*.

(5) *A.-G.* v. *Dorking Union Guardians* (1882), 20 Ch.D. 595; 51 L.J.Ch. 585; 46 L.T. 573; 30 W.R. 579, C.A.; 41 Digest 42, *308*.

H

(6) *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

(7) *Tenant* v. *Goldwin* (*or Golding*) (1704), 1 Salk. 21, 360; Holt, K.B. 500; 2 Ld. Raym. 1089; 6 Mod. Rep. 311; 91 E.R. 20, 314; 36 Digest (Repl.) 287, *356*.

I

(8) *Ballard* v. *Tomlinson* (1884), 26 Ch.D. 194; 54 L.J.Ch. 127; 50 L.T. 230; on appeal (1885), 29 Ch.D. 115; 54 L.J.Ch. 454; 52 L.T. 942; 49 J.P. 692; 33 W.R. 533; 1 T.L.R. 270, C.A.; 36 Digest (Repl.) 288, *358*.

(9) *Sturges* v. *Bridgman* (1879), 11 Ch.D. 852; 48 L.J.Ch. 785; 41 L.T. 219; 43 J.P. 716; 28 W.R. 200, C.A.; 36 Digest (Repl.) 251, *32*.

(10) *Bridger* v. *Richardson* (1814), 2 M. & S. 568; 105 E. R. 493; 25 Digest 32, *302*.

(11) *Blundell* v. *Catterall* (1821), 5 B. & Ald. 268; 106 E.R. 1190; 25 Digest 8, *48*.

(12) *Lord Advocate* v. *Young*, *North British Rail. Co.* v. *Young* (1887), 12 App. Cas. 544, H.L.; 44 Digest 75, *559*.

Also referred to in argument:

Duke of Somerset v. *Fogwell* (1826), 5 B. & C. 875; 8 Dow. & Ry.K.B. 747; 5 L.J.O.S.K.B. 49; 108 E.R. 325; 25 Digest 29, *277*.

Maldon Corpn. v. *Woolvet* (1840), 12 Ad. & El. 13; 4 Per. & Dav. 26; 9 L.J.Q.B. 370; 113 E.R. 714; 25 Digest 56, *490*.

Colchester Corpn. v. *Brooke* (1846), 7 Q.B. 339; 15 L.J.Q.B. 59, 173; 5 L.T.O.S. 192; 10 J.P. 217; 9 Jur. 1090; 10 Jur. 610; 115 E.R. 518; 25 Digest 37, *356*.

Hastings Corpn. v. *Ivall* (1874), L.R. 19 Eq. 558; 44 Digest 73, *532*.

Neill v. *Duke of Devonshire* (1882), 8 App. Cas. 135; 31 W.R. 622, H.L.; 25 Digest 7, *41*.

A.-G. v. *Emerson*, [1891] A.C. 649; 61 L.J.Q.B. 79; 65 L.T. 564; 55 J.P. 709; 7 T.L.R. 522, H.L.; 25 Digest 23, *199*.

State v. *Taylor* (1858), 3 Dutch. (27 N.J.Law) 117.

Fleet v. *Hegeman* (1835), 14 Wend. (N.Y.) 42.

Child v. *Greenhill* (1639), Cro. Car. 553; March, 48; 79 E.R. 1077; sub nom. *Greenhill's Case*, W.Jo. 440; 25 Digest 31, *289*.

R. v. *Walford* (1803), 5 Esp. 62, N.P.; 25 Digest 32, *301*.

Rogers v. *Allen* (1808), 1 Camp. 309; 25 Digest 13, *91*.

Gann v. *Whitstable Free Fishers* (1865), 11 H.L.Cas. 192; 20 C.B.N.S. 1; 5 New Rep. 432; 35 L.J.C.P. 29; 12 L.T. 150; 29 J.P. 243; 13 W.R. 589; 2 Mar.L.C. 179; 11 E.R. 1305, H.L.; 25 Digest 38, *360*.

Gammell v. *Woods and Forests Comrs.* (1859), 3 Macq. 419, H.L.; 44 Digest 65, *455*.

Gibson v. *Preston Corpn.* (1870), L.R. 5 Q.B. 218; 10 B. & S. 942; 39 L.J.Q.B. 131; 22 L.T. 293; 34 J.P. 342; 18 W.R. 689; 26 Digest (Repl.) 390, *975*.

Gibraltar Sanitary Comrs. v. *Orfila* (1890), 15 App. Cas. 400; 59 L.J.P.C. 95; 63 L.T. 58, P.C.; 38 Digest (Repl.) 6, *12*.

Cowley v. *Newmarket Local Board*, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 8 T.L.R. 788; 1 R. 45, H.L.; 26 Digest (Repl.) 419, *1290*.

Earl of Harrington v. *Derby Corpn.*, [1905] 1 Ch. 205; 74 L.J.Ch. 219; 92 L.T. 153; 69 J.P. 62; 21 T.L.R. 98; 3 L.G.R. 321; 41 Digest 34, *256*.

Brown v. *Dunstable Corpn.*, [1899] 2 Ch. 378; 68 L.J.Ch. 498; 80 L.T. 650; 63 J.P. 519; 47 W.R. 538; 15 T.L.R. 386; 43 Sol. Jo. 508; 41 Digest 42, *306*.

A.-G. v. *Clerkenwell Vestry*, [1891] 3 Ch. 527; 60 L.J.Ch. 788; 65 L.T. 312; 40 W.R. 185; 41 Digest 42, *304*.

Robinson v. *Workington Corpn.*, [1897] 1 Q.B. 619; 66 L.J.Q.B. 388; 75 L.T. 674; 61 J.P. 164; 45 W.R. 453; 13 T.L.R. 148, C.A.; 42 Digest 752, *1757*.

Ainley v. *Kirkheaton Local Board* (1891), 60 L.J.Ch. 734; 55 J.P. 230; 7 T.L.R. 323; 35 Sol. Jo. 315; on appeal, sub nom. *Kirkheaton District Local Board* v. *Ainley, Sons & Co.*, [1892] 2 Q.B. 274; 61 L.J.Q.B. 812; 67 L.T. 209; 57 J.P. 36; 41 W.R. 99; 8 T.L.R. 663; 36 Sol. Jo. 608, C.A.; 41 Digest 42, *305*.

Somersetshire Drainage Comrs. v. *Bridgwater Corpn.* (1899), 81 L.T. 729, H.L.; 41 Digest 52, *378*.

A.-G. v. *Birmingham, Tame and Rea District Drainage Board* (1881), 17 Ch.D. 685; 50 L.J.Ch. 786; 44 L.T. 906; 46 J.P. 36; 29 W.R. 793, C.A.; 28 Digest (Repl.) 738, *11*.

Hammond v. *St. Pancras Vestry* (1874), L.R. 9 C.P. 316; 43 L.J.C.P. 157; 30 L.T. 296; 38 J.P. 456; 22 W.R. 826; 41 Digest 27, *217*.

Dent v. *Bournemouth Corpn.* (1897), 66 L.J.Q.B. 395; 41 Digest 30, *225*.

Whelan v. *Hewson* (1871), I.R. 6 C.L. 283; 25 Digest 10, *o*.

Paley v. *Birch* (1867), 8 B. & S. 336; 16 L.T. 410; 31 J.P. 548; 25 Digest 33, *309*.

A.-G. v. *Luton Local Board of Health* (1856), 27 L.T.O.S. 212; 20 J.P. 163; 2 Jur.N.S. 180; 25 Digest 36, *336*.

Metropolitan Board of Works v. *London and North Western Rail. Co.* (1881), 17 Ch.D. 246; 50 L.J.Ch. 409; 44 L.T. 270; 29 W.R. 693, C.A.; 41 Digest 44, *321.*

A.-G. v. *Acton Local Board* (1882), 22 Ch.D. 221; 52 L.J.Ch. 108; 47 L.T. 510; 31 W.R. 153; 41 Digest 19, *150.*

Young v. *Davis* (1863), 2 H. & C. 197; 2 New Rep. 205; 9 L.T. 145; 10 Jur.N.S. 79; 11 W.R. 735; 159 E.R. 82, Ex. Ch.; 26 Digest (Repl.) 418, *1280.*

M'Kinnon v. *Penson* (1854), 9 Exch. 609; 23 L.J.M.C. 97; 22 L.T.O.S. 318; 18 J.P. 164; 18 Jur. 513; 2 W.R. 262; 156 E.R. 260, Ex. Ch.; 26 Digest (Repl.) 654, *2995.*

A.-G. v. *Birmingham Borough Council* (1858), 4 K. & J. 528; 22 J.P. 561; 6 W.R. 811; 70 E.R. 220; 25 Digest 34, *331.*

Wilson v. *Halifax Corpn.* (1868), L.R. 3 Exch. 114; 37 L.J.Ex. 44; 17 L.T. 660; 32 J.P. 230; 16 W.R. 707; 7 Digest (Repl.) 299, *208.*

White v. *Hindley Local Board* (1875), L.R. 10 Q.B. 219; 44 L.J.Q.B. 114; 32 L.T. 460; 23 W.R. 651; sub nom. *White* v. *Wigan Local Board*, 39 J.P. 533, D.C.; 26 Digest (Repl.) 532, *2077.*

Sydney Municipal Council v. *Bourke*, [1895] A.C. 433; 64 L.J.P.C. 140; 72 L.T. 605; 59 J.P. 659; 11 T.L.R. 403; 11 R. 482, P.C.; 26 Digest (Repl.) 420, *1293.*

Baron v. *Portslade Urban District Council*, [1900] 2 Q.B. 588; 69 L.J.Q.B. 899; 83 L.T. 363; 64 J.P. 675; 48 W.R. 641; 16 T.L.R. 523, C.A.; 41 Digest 25, *192.*

Malcolmson v. *O'Dea* (1863), 10 H.L.Cas. 593; 9 L.T. 93; 27 J.P. 820; 9 Jur.N.S. 1135; 12 W.R. 178; 11 E.R. 1155, H.L.; 7 Digest (Repl.) 327, *420.*

R. v. *Joliffe* (1823), 2 B. & C. 54; 3 Dow. & Ry.K.B. 240; 1 L.J.O.S.K.B. 232; 107 E.R. 303; 17 Digest (Repl.) 10, *73.*

Young v. *Hitchens* (1844), 6 Q.B. 606; 1 Dav. & Mer. 592; 2 L.T.O.S. 420; 115 E.R. 228; 25 Digest 31, *296.*

Appeal by the defendants from a decision of WALTON, J., at the trial of the action by him without a jury.

The plaintiff was an oyster merchant, and brought the present action against the defendants, an urban district council, claiming damages and an injunction in respect of the nuisance caused to the oyster ponds of which he was the occupier by the discharge of sewage from a sewer which belonged to the defendants. The oyster ponds or "layings" were on the foreshore of Emsworth Creek, a branch of Chichester Harbour. These ponds had been used for the cultivation of oysters throughout the whole of living memory up to the time of the nuisance complained of, and had been occupied by the plaintiff since 1879, in which year he had purchased them. In 1872 the Havant Union, then the local sanitary authority, acting under the advice of an engineer of the name of Ford, constructed a sewer which discharged sewage from some houses at Emsworth into the creek not far from the oyster ponds occupied by the plaintiff; but the amount of sewage so discharged was small. In 1894 the defendant district council was formed, and the duties, liabilities, obligations, and property of the Havant Union as a rural sanitary authority in regard to the district in which Emsworth was situated passed to and were vested in the defendant council. The defendant council then made new sewers for draining Emsworth, and connected them with Ford's sewer. The result of this was that the amount of the sewage discharged from Ford's sewer was greatly increased, and the plaintiff's oyster ponds became contaminated to such an extent as to render the oysters unfit for human consumption. WALTON, J., held that the plaintiff was entitled to judgment for damages to be assessed, but he refused to grant an injunction. The defendants appealed.

Sir R. B. Finlay, K.C., and *Hohler* for the defendants.

Macmorran, K.C., and *William Wills* for the plaintiff.

VAUGHAN WILLIAMS, L.J.—This is an appeal against a decision of WALTON, J., in favour of the plaintiff for damages, which are to be ascertained

A hereafter. The plaintiff is an oyster merchant, who for many years has carried on his business at Emsworth on a large scale, and he has used for the purpose of his business certain oyster beds. The action is brought against the urban district council of Warblington to recover damages in respect of damage which the plaintiff alleges he has sustained with regard to his oysters and oyster beds and his business as an oyster merchant. The cause of damage, as alleged here, is that the de-
B fendants discharged near and on the oyster beds of the plaintiff sewage to such an extent as to render the oysters unfit for human consumption, and there can be no doubt that the oysters were contaminated by the discharge of sewage. Some of these oysters were afterwards eaten at a banquet at Winchester with most lamentable results. The points that are raised in this case I think may shortly be described in this way: First, it is said that the plaintiff had no such property, or
C interest, in the beds or ponds where he deposited his oysters as to give him any right of action against the defendants. Next it is said that, even assuming that the plaintiff had such right or interest by way of occupation or property in these oyster beds as to give him a right of action, yet, if one has regard to the history of the establishment and constitution of the defendant council, the council are under no liability in respect of the sewage having contaminated these oysters. Besides that,
D there was raised a defence based either upon the common law right to discharge sewage into the sea, or upon a prescriptive right vested in this body to discharge sewage into the sea adjoining Emsworth. I shall deal with these points one by one. I propose in my judgment to follow the judgment and findings in fact and in law of WALTON, J., and to express my views as to how far those findings can be justified.

E The first thing that WALTON, J., finds is that the soil of the foreshore in this case belongs to the lord of the manor, being in fact waste of the manor. I think that the finding in fact is right. That is not, of course, sufficient to support any right in the plaintiff, because to begin with, as WALTON, J., points out, assuming the soil to be the soil of the lord of the manor no property or title is thereby given to the plaintiff unless he can show that by grant or by the statute of limitations, or in
F some other way, he has established a right of some kind to the soil upon which the oyster beds, or oyster ponds, are established. Then, of course, the question will also arise, and must arise in a case like the present, as to what rights of fishery there are. WALTON, J., properly, in my judgment, points out that if there is not a right of several fishery in the lord of the manor, the right of the public to fish on the foreshore will have to be taken into consideration. But, in my judgment, and
G I agree here again with WALTON, J., this would not prevent the acquisition of title to a part of the fishery by possession under the statute of limitations, provided the soil of the foreshore were vested in the lord of the manor. WALTON, J., then goes on to describe the character of these ponds, and how they are dug and distinctly marked out, and there does not seem to me to be any dispute of fact as to that part of the case. The manner in which plaintiff used these oyster beds was this. He
H dredged oysters at a distance from Emsworth in deep water, and brought them in and deposited them in these beds, and I think he also imported oysters, and dealt with them in the same way. At all events, oysters belonging to him were put down by him in the ponds to be fattened. For the plaintiff to have a good cause of action against the defendants, it is necessary for him to prove at the very least, that he was in occupation of these beds. WALTON, J., has gone through the documentary
I evidence of various sorts—the presentment of the court baron, ministers' accounts of Henry VII, and a variety of matters of that sort—and he has arrived at the conclusion that not only has the lord of the manor got the soil of the foreshore vested in him, but also that he has a several fishery in this foreshore at that part of the foreshore which is within the ambit of the manor. Under those circumstances the learned judge has come to the conclusion that the lord of the manor has the right not only to the ownership of the soil of the foreshore, but also to the several fishery there. The only importance of the existence of a several fishery for the purpose of this case is that one is free from any difficulty which might arise

from the existence of a public right of fishing. That being so, I do not intend to deal any more with the question of the interest of the plaintiff in these beds. In my judgment, if it were necessary for him to prove title to these beds, he would under these circumstances be able to do so. The circumstances to which I refer are, that the soil at this point belongs to the lord of the manor, and it seems to me that, having regard to the length of time that these ponds have been in the occupation of plaintiff and his predecessors, his title could, if necessary, be proved. But even if title could not be proved, there has been, in my judgment, such an occupation of these beds as to entitle the plaintiff, as against the defendants, who have no interest in the foreshore, to sustain his action against them for the injury which it is alleged has been done by the sewage to the oysters kept in these beds.

The next question is that of the liability of the defendants, and for this purpose one has to go a little into the history of the establishment of this council and its constitution. The council was established in 1894, their predecessors in respect of the district for which they were appointed being the Havant Union. Out of the district under the supervision of the Havant guardians has been carved the district for which the defendants are now the sanitary authority. And it is to be noted that art. 9 of the Confirmation Order establishing the defendant council provides that:

> "On and after the day of the first meeting of the local board for the said local government district all the rights, duties, liabilities, obligations, and property which are attaching to or vested in the guardians of the poor of the Havant Union, acting as a rural sanitary authority, shall, so far as regards the local government district, pass to and vest in the said local board."

So that, as it seems to me, when one has to consider the question of the liability of the defendants, one has to consider not only their liability for their own acts but the question of their liability for the acts of their predecessors. The history of the sewers is something of this sort, and I am basing what I am about to say on the facts which WALTON, J., has found in his judgment. The town of Emsworth is not one in which the population has increased very largely as time has gone on. There was a time when undoubtedly the disposition of the sewage in Emsworth, so far as the houses of the householders were concerned, was carried out very largely by means of privies and cesspits, and the use of water-closets was very little adopted. But in so far as there was sewage carried away in drains on the west side of Emsworth—i.e., the side which abuts on what is called the Sea Side Mill Pond, it was mainly discharged by sewers into that mill-pond, which was a tidal one. Then there came a time, during the period when the Havant guardians were the sanitary authority, in which in consequence of such discharge as there was of sewage into the Sea Side Mill Pond, that pond came to be offensive. The Havant Union were minded to cure this if they could, and consulted Mr. Ford, an eminent engineer versed in these matters, and he recommended that a sewer should be carried along the border of the Sea Side Mill Pond, and that in this way the sewage should be kept out of the mill-pond, and discharged by some floodgates near a place known as the Quay. The object of Mr. Ford's scheme was to prevent the mill-pond being polluted, and in his report he showed in some detail how he proposed to bring about this result without fouling the foreshore. It is plain from the description given by Mr. Ford in his report, put in evidence, that he only hoped to effect this result by means of a penstock, which was to be placed at the lower end of this sewer. But, for some reason or other, this plan of Mr. Ford's was not successful. I do not know why, but it is, I think, common ground that at a date, certainly as early as 1891 or 1892, the penstock, by means of which Mr. Ford expected to be able to free the mill-pond of fouling without bringing about any fouling of the foreshore was found to be a failure and its use was discontinued. What was expected of it was that the sewage in Mr. Ford's sewer should be held back for some nineteen hours out of the twenty-four, and then it should be let loose at such a time before low-water as that the water still remaining to run down should on the ebb tide

carry the sewage so far out into the sea as to render it innocuous. But, as matters turned out, the penstock did not produce this result and sewage was deposited on the foreshore. But according to the finding of the learned judge at the trial the amount of sewage coming down, especially of solid sewage, in those earlier years was comparatively very small. What WALTON, J., said about this is as follows:

> "In my opinion, at that time there were, as I think appears from the evidence, very few, if any, water-closets in Emsworth. There were very few connections from privies or cesspits with drains, and I think that the amount of sewage which found its way into Mr. Ford's sewer, which was made in 1874, at first was inconsiderable. But the defendants, after they were constituted, that is the urban district council, made additions to that sewer, and made considerable increase, by their acts and orders, in the amount of sewage matter which was discharged by the sewer. I think the defendants are responsible for the sewer practically, at any rate so far as the purposes of this case is concerned, as if they themselves had made it."

I agree in that conclusion. We have not here to consider, or at all events to decide, whether or not the defendants would be liable in this action if they had not actively brought about this result. By "actively" I mean by their own acts, as distinguished from any omission on their part to perform their duty in this respect, because I agree with WALTON, J., that it is plain on the evidence that the defendants themselves altered altogether the working and operation of Ford's sewer, because they made new sewers, and those new sewers were connected with Ford's sewer, and they enormously, or very largely, increased the amount of sewage which was introduced into that sewer. As one example of a sewer of that sort, they made, at a point between Northlands and Coldharbour, where there had been for a long time in existence a common cesspit, a new sewer which introduced the sewage from that part of Havant into Ford's sewer, where it had not previously come. They also made a sewer on the bank which lies to the north of plaintiff's oyster beds. That sewer may have been primarily of benefit to the oyster beds, because up to that time there had been two or three sewers which directly discharged nearly into the midst of the oyster beds, and the result of this "pick-up sewer," as it was called, was to carry what used to go through those sewers down into the midst of the oyster beds into Ford's sewer. But it must not be forgotten that though to that extent there was an amelioration in the condition of the oyster beds, there were other sewers which carried additional sewage into Ford's sewer.

Under those circumstances, it seems to me that there is ample evidence that the defendants have brought about the result complained of by their own acts as distinguished from any omission of duty on their part. It is unnecessary, therefore, to decide anything positively as to how far the defendants are liable for acts of omissions to perform their duty as distinguished from acts of commission, causing injury to the plaintiff. There is sufficient evidence here, I think, and WALTON, J., thought so also, of acts of commission by the defendants. We have heard a good deal about the increase in the number of water-closets. It is certainly true that the number was very much increased. It has been said that if once you have got a public sewer the householders would be entitled to discharge the sewage from their houses into this new sewer. There I agree. And it is said in this case that the increase in the number of water-closets was caused more or less by the orders of defendants. Certainly, it was more or less, but I do not think that my decision upon the fact of the defendants having brought about the result by their own acts would be at all altered even if it were proved that it was only to a very small extent that they actually ordered these water-closets. They themselves seem to have been alive to the danger which would accrue from the introduction of the sewage into Ford's sewer, because they tried, not, I think, with any signal success, a system of catch-pits which would prevent the solid sewage being carried into this sewer. As I have said, this state of facts relieves me from considering the question whether if the defendants had not been guilty of such acts of commission, leading

to the damage complained of, as to make them liable, and if what had been proved had been simply an omission to perform their duty in respect of sewering the town, they would have been liable or not, because there is evidence that the injury done was brought about by acts of commission by the defendants. I am also relieved of the necessity, in this set of circumstances, from deciding what is the effect of art. 9 in the Confirmation Order, and whether that would make the defendants liable for the bad, ineffective works laid down by their predecessors. Although relieved from deciding that, I do not wish to suggest in any way that the decision of WALTON, J., as to the effect of art. 9 is in any way wrong or could be called in question.

If we once come to the conclusion that the defendants are primâ facie responsible for the damage done by their sewers to the plaintiff's oyster beds, one has to consider whether there is any ground upon which they can escape this liability. They attempt to escape it by saying that they have a prescriptive right to discharge sewage in the way they have done. I cannot agree to that. If the case had been merely that, having a prescriptive right to discharge sewage on to this foreshore, all that had happened had been that the quantity of sewage had largely increased, by the inhabitants of Emsworth using the sewers to a larger extent than they had done before in the exercise of their right to connect with the sewers, I should not have said that that increase in the quantity carried down the sewer was such an increased user of the right enjoyed by prescription to such an extent as to prevent reliance on the prescription. But, as the thing stands, the user during the last ten years has been altogether different in character, as well as in quantity, from the user in previous years. With regard to prescription, if it did arise in this case, it must be either by common law, based upon a presumed grant—and I have great doubt whether that would apply to a case like the present, which is really a claim of a prescription in gross—or it must have been a prescription based upon immemorial user. But, in my opinion, the claim to prescription fails altogether. Mention was made in the course of the argument of a common law right to discharge sewage in this way into the sea, but I am of opinion that there is no such common law right, and I may say in passing that this view is one which has clearly been expressed by BUCKLEY, J., in his judgment in *Hobart* v. *Southend-on-Sea Corpn.* (1).

The outcome of what I have said at present is that the plaintiff has a sufficient occupation—and I am inclined to think also property—but occupation is sufficient—to entitle him to bring this action. I am of opinion that under the circumstances the defendants have actively brought about the injury which is complained of; and I am also of opinion that they have not succeeded in establishing any prescriptive right or any common law right which is inconsistent with the plaintiff's case. Although this is the conclusion I have come to, it is right that I should say a word or two about some cases which are supposed to militate against the decision of WALTON, J., and to stand in my way in delivering the judgment which I have delivered. I will first take *Truro Corpn.* v. *Rowe* (2), which I do not think has any application to the present case. There the corporation had obtained a lease of the foreshore, and the defendant, who was a fisherman, pleaded that he was entitled to keep his oysters in the oyster beds in question upon three grounds, viz., by virtue of a several fishery, by virtue of local custom, and by virtue of his possession of the ground. But those grounds of defence were subsequently abandoned by him, and the case which he ultimately set up was that he was entitled as a member of the public to fish for oysters on the foreshore. The finding of the jury was that the acts done by him did not constitute actual occupation of the soil, but were only incidental to the fishing of the oysters, and that oyster fishing could not practically be carried on without them. WILLS, J., took that view also, but the Court of Appeal refused to adopt it, and said that the question was whether the defendant had a right to appropriate a section of the foreshore for storing his oysters to the exclusion of the rest of the public, and they held that such a claim could not be supported as a common law right. In the present case it had been found by the learned judge that the acts done by the plaintiff did constitute an actual occupation of the soil,

A and were not merely incidental to the fishing of oysters. It must also be remembered that the learned judge has found as a fact that the soil was the soil of the lord of the manor. If the lord of the manor has the soil he may, primâ facie, grant rights of occupation, and, taking the facts here as being that the plaintiff was in occupation, and that the lord of the manor had the several fishery, the result, in my judgment, will be that *Truro Corpn.* v. *Rowe* (2) has no application whatever B to the case now before us.

The next case which is said to be fatal to the judgment of WALTON, J., is *R.* v. *Downing* (3). The headnote of that case is this (23 L.T. at p. 398):

> "Larceny—Oyster bed in a tidal river—Proof of separate fishery. In support of an indictment for stealing oysters in a tidal river it is sufficient to prove ownership by oral evidence, as, e.g., that the prosecutor and his father, for C forty-five years since 1815, had exercised the exclusive right of oyster fishing in the locus in quo, and that in 1846 an action had been brought to try the right, and the verdict given in favour of the prosecutor."

When one comes to look at the evidence in that case one sees that it divided itself into two parts. One of the witnesses said (ibid.):

D > "I have with my father exercised the exclusive right of oyster fishing over these rights for fifty-five years since 1815. I pay rates for the fishing. The prisoner was in my employ and worked on these fisheries in the lower rights. I hold the exclusive right of oyster fishing."

That is one way in which he puts his claim, and possibly he meant by that that he had a right of several fishery, but it does not seem to me that he necessarily had E one at all. In another part of his evidence he places reliance upon the oyster beds and says that people were not allowed to go on the oyster beds, and he goes to the length of saying that vessels had to ground on the sand in the lower rights. So that I am not certain, as far as that evidence is concerned, whether the claim was based upon a several fishery or upon a private oyster bed or oyster beds. COCKBURN, C.J., in delivering judgment, said (ibid. at p. 399):

F

> "This case is free from any doubt. The prisoner was caught stealing oysters from an oyster bed, by his own acknowledgment. At the trial the prosecutor proved by oral evidence that from the year 1815 to the present time he and his father had been in the possession and enjoyment of the oyster bed, and had asserted an exclusive right thereto; that their exclusive right to this oyster bed G was challenged, and that in 1846 an action was brought to try the right, and a verdict given in favour of the prosecutor, and that since then, down to this time, the prosecutor's right had not been challenged. It was said that this evidence was not sufficient, and that the prosecutor's right ought to be proved by deed. It is quite true that this oyster bed was in a navigable river, where the public had primâ facie a right to fish; but it is equally true that by ancient H grant or prescription a private person may have an exclusive right to a separate fishery therein. Then the only question is, can such an exclusive right be proved by parol."

It is said that the effect of that decision is that it is essential, in order to support a prosecution of that sort, that the prosecutor should prove that he has a right of several fishery. I, myself, should hesitate very much to draw that conclusion from I the evidence or from the words of the judgment of the Lord Chief Justice. It seems to me that reliance was placed upon the exclusive right of the prosecutor to the oyster bed. But, be that how it may be, it seems to me that in a case like the present, where the lord of the manor has the several fishery, it is quite plain that the plaintiff may by prescription or grant or in any other way make a title as against all the world. Under these circumstances there is nothing at all to prevent the plaintiff from not only acquiring a right to use these beds, but from his being within the words "private oyster beds," which words are used again and again in a series of enactments for the protection not only of several fisheries, but, to my mind, of

private oyster beds. I mean that series of enactments which, so far as has been quoted before us, began early in the reign of George III, and culminated in s. 51 and the following sections of the Sea Fisheries Act, 1868. I do not myself think that *R.* v. *Downing* (3) at all conflicts with the judgment of WALTON, J.

I wish to say also a few words about two cases which were much relied on by counsel for the defendants. The first of those two cases is *Glossop* v. *Heston and Isleworth Local Board* (4). If that case is looked at it will be seen that the action was brought in substance for a mandatory injunction to compel the defendant board to carry out their statutory duty by providing a proper system of drainage. It was said that that action could not be properly brought against them, that the plaintiff was claiming an impossible remedy, and was claiming a remedy in the wrong court. It is quite true that in that case it was held that the action for damages would not lie, but I see nothing from the beginning to the end of the judgment which in any way shows that the present action for damages would not lie, especially as it is the active conduct of the defendants which on the facts of this case brought about the injury to the plaintiff. The other case that I wish to refer to is *A.-G.* v. *Dorking Union Guardians* (5). It seems to me that that case does not apply to the present case, and for very much the same reasons. In both cases the substantial object of the action was to compel the defendants to perform their statutory duties. I shall not go through the case at length, but there is just one passage in the judgment of COTTON, L.J., in *Glossop* v. *Heston and Isleworth Local Board* (4) which I think throws a little light upon the present case. The lord justice was dealing with the question of what would have constituted such a user by the defendants in that case of a defective sewer as to make them liable for injury caused by the user of that defective sewer. He was referring to s. 17 of the Public Health Act, 1875 [see now Public Health Act, 1936, s. 30], which begins with the words:

> "Nothing in this Act shall authorise any local authority to make or use any sewer,"

and when he comes to deal with the meaning of "use" in that section, he says (12 Ch.D. at p. 125) that:

> " 'making or using a sewer' means that you must not make a sewer which brings down sewage into the river; you must not use existing sewers for bringing into a stream sewage which you by other means bring into the old sewer."

It seems to me that if you substitute for the words "old sewer" in that sentence the words "Ford's sewer" it describes exactly what has happened in the present case.

In *Hobart* v. *Southend-on-Sea Corpn.* (1) there is a great deal in the judgment of BUCKLEY, J., which confirms the judgment of WALTON, J., in the present case. It is quite true that that case did not raise any question of property, but it did raise among others a question as to the common law right to discharge sewage into the sea, and it did incidentally go into the question of the nature and form of the remedy when sewage is discharged from the land of one man on to the land of another. Of course what was there said has no application to the present case unless we get the first step here, that these oyster beds were the land of the plaintiff. But if they were the land of the plaintiff, then it becomes very material. BUCKLEY, J., says that an action can be brought in such a case by the person who is injured by the discharge of sewage on to his own land from his neighbour's land. He points out that the remedy is of the same nature as the remedy in *Fletcher* v. *Rylands* (6). That case went to the House of Lords, but when it was before the Exchequer Chamber BLACKBURN, J., gave a judgment which is always referred to as being a judgment which most clearly enunciates the principles upon which such an action can be founded. I have not ventured to deal with that case, and I will only say that it will be found discussed in the judgment of BUCKLEY, J. The result is that I think this appeal must be dismissed with costs.

STIRLING, L.J.—I have arrived at the same conclusion as my Lord, and I will state very briefly my reasons for this conclusion. The plaintiff, who is an oyster merchant, has been for the last twenty years and upwards in the occupation of certain ponds, or beds, artificially constructed on a piece of the foreshore. Some of these ponds are boarded at the sides, and others have sides made of concrete, while some are paved with concrete, others having natural bottoms. In these the plaintiff had placed oysters which had been obtained either by dredging elsewhere or by importation. He brings them to the ponds and places them there for fattening. When he put the oysters into the ponds they were his property, and he has excluded everyone else from the ponds. He has from time to time removed the oysters deposited there and sold them and dealt with them as he thought fit. No one has interfered with his occupation of the ponds. What has been done by the plaintiff has been totally different from anything he could have done simply as a member of the public exercising the right of the public in a public fishery. Under these circumstances I think that he had, at the time of bringing the action, such possession of the ponds as entitled him to maintain an action for trespass against a wrongdoer. He alleges that the defendants are wrongdoers, because they have discharged sewage on these ponds or beds and done damage to the oysters. In the defendants, who are the local authority, are vested the sewers of the district over which they have control. Therefore, the position, having regard to the statutes and decisions, is somewhat complicated.

I propose to consider, in the first place, what would be the right of the plaintiff if the defendants were simply private persons in whom the sewers were vested. What happens is this. The sewage from the sewers is discharged continuously into the sea. At low water it runs away, but as the tide comes in it is turned back and overruns the ponds to the damage of the oysters. As against a private person this would be actionable on the principles laid down in *Fletcher* v. *Rylands* (6). The principle was thus stated by BLACKBURN, J., in the Exchequer Chamber (L.R. 1 Exch. at p. 279):

> "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape."

No doubt, the deposit of this sewage on the land of which plaintiff is in occupation is a nuisance. And it is a nuisance in respect of which an action for trespass lies. In support of that I think it is enough to refer to the judgment of HOLT, C.J., in *Tenant* v. *Goldwin* (7), which was very much discussed by BLACKBURN, J., in the judgment that I have referred to. He there sets out (L.R. 1 Exch. at p. 284) in full the reasons for the judgment which are given in the report in SALKELD (1 Salk. at p. 361) where it is said that the reason that HOLT, C.J., gave for his judgment was

> "because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground and it should tumble and roll down upon his neighbour's. That the case might indeed possibly be such, that the defendant might not be bound to repair; as if the plaintiff made a new cellar under the defendant's old privy, or in a vacant piece of ground which lay next to the old privy before, in such case the plaintiff must defend himself. But that cannot be the case here, for then he could not be bound to repair, and upon the words debet reparare he must be acquitted upon the trial. But, on the other side, if A. has two houses, and the house of office on the one is contiguous to the cellar of the other, but defended by a wall, and he sells this house with the house of office, the vendee must repair the wall; so,

if he keeps this and sells the other, he himself must repair the wall of the house of office, for he whose dirt it is must keep it that it may not trespass."

It was suggested in argument that after the sewage had begun to flow on the beds or ponds of plaintiff he ought to have discontinued depositing oysters there, and so he was not entitled to recover damages. I fail to see why that should be so. It seems to me that such an argument is mainly disposed of by reference to *Ballard* v. *Tomlinson* (8), where the doctrine of *Fletcher* v. *Rylands* (6) was applied. There the plaintiff and the defendant were adjoining landowners, each with a deep well on his own land, the plaintiff's land being on a lower level than the defendant's. The defendant turned sewage from his house into his well, and thus polluted the water which percolated to the plaintiff's land. The plaintiff when pumping water from his well brought up sewage with it. PEARSON, J., before whom the case came in the first instance, held that, as the plaintiff had no property in the underground water which came from the defendant's land, he had no right of action against the defendant for polluting such water, and he, therefore, dismissed the plaintiff's action. But in the Court of Appeal that decision was reversed, and it was held the plaintiff had a right of action against the defendant for polluting the source of supply, although, until the plaintiff had appropriated it, he had no property in the percolating water, but he had property in the water he brought to the surface although by artificial means of pumping. I think, therefore, that as against a private individual, the plaintiff would have a right of action. And I do not think although the defendants here are the local board, that this case can be covered by the decision in the *Truro Corpn.* v. *Rowe* (2). There the contest arose between the owners of the foreshore and a person who claimed to be availing himself of a public right of fishing. Here the contest arises, in my view, between the person who is in occupation of a portion of the foreshore and a wrongdoer. Whether the present plaintiff would be able to resist the claims of the owner of the foreshore, whoever he may be, or of the owner of the several fishery, if such a thing exists, or of a member of the public exercising the right of fishing, if there be such a right in the present case, seems to me to be immaterial in the view I take of the facts in this case. I express no opinion on these points, it not being necessary for the decision of the case, but I am not to be understood to differ in any way from what has been said by my Lord.

Another case cited in opposition to the plaintiff's title to relief was *R.* v. *Downing* (3). It was said that the case showed that the plaintiff had no title to relief unless he proved the existence of a several fishery. I cannot agree. It seems to me that the most that was decided in that case was that the prosecutor, who relied upon his being the possessor of a several fishery, was able to establish it by oral evidence without producing any documentary evidence of title. It is not necessary in this case to express any opinion whether there exists a several fishery or not, but I should like to say that I see no evidence of any title to a several fishery in the plaintiff, and I do not rely in any way upon the establishment of such a case. I rely merely upon the occupation of the plaintiff, which is enough, in my opinion, to give him a title to bring an action for trespass.

I pass on now to consider the position of the defendants as a local authority constituted by an order of 1894, under the Local Government Act, 1888, in succession to a previously existing authority which had been constituted under the Public Health Act, 1848, and subsequent Acts. In 1895, when the order constituting the defendants came into force, the defendants found certain sewers which had been made and put in operation by their predecessors. Some of those had been made under the provisions of the Public Health Act, 1848. Section 46 of that Act provided that:

"The local board of health shall cause the sewers vested in them by this Act to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied; and for the purpose of clearing, cleansing, and emptying the same they may construct and place,

either above or under ground, such reservoirs, sluices, engines, and other works as may be necessary, and may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary or to cause the sewage and refuse therefrom to be collected for sale for any purpose whatever, but so as not to create a nuisance."

Therefore, down to the passing of the Public Health Act, 1875, which repealed the Act of 1848, the predecessors of defendants were entitled to cause their sewers to communicate or to be emptied into such places as they thought fit and necessary, so as not to cause a nuisance. The provisions of s. 46 were re-enacted with variations in ss. 19 and 27 of the Act of 1875. Section 19 provides that:

"Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied."

And s. 27, which deals with the receiving and disposing of sewage, contains the words:

"Provided that no nuisance be created in the exercise of any of the powers given by this section" [cf. Public Health Act, 1936, s. 31].

It was contended on behalf of the plaintiff that these sections contain provisions which impose on the defendants the duty of causing the sewers vested in them to be kept so as not to be a nuisance, and the duty of disposing of the sewage so that no nuisance should be created. The contention, I think, is well founded, but I think that the section which is more particularly applicable in the present case is s. 27. On the other hand, the defendants rely on the decisions in *Glossop* v. *Heston and Isleworth Local Board* (4) and *A.-G.* v. *Dorking Union Guardians* (5). In both these cases local authorities, constituted under the Public Health Act, 1875, had succeeded to defective systems of drainage constituted by their predecessors, and they simply allowed the previous user of the sewer to continue, they themselves doing nothing. In that state of things the court refused any relief by way of injunction. Section 17 of the Public Health Act, 1875, was the section chiefly relied upon by the plaintiffs in those cases. In both cases it was laid down that the defendants were not making or using the sewer within the meaning of that section. It was pointed out that in those cases the defendants made no new sewers, nor were they active in exercising any power they had under the Act of turning sewage into a course different from that previously taken. Though in both cases the only point decided was as to the right to an injunction, I think that the judgments in *A.-G.* v. *Dorking Union Guardians* (5) show that the court would have held, if necessary, that there was no right to damages.

In the present case two points were taken on behalf of the defendants. First, it was said that these decisions exactly applied; that the defendants had done nothing themselves, they were not making any new sewers, nor actively exercising any power they had under the Act of turning sewage into a course different from that through which it previously went. I am wholly unable to agree with this contention upon the question of fact. The present defendants unquestionably made additional sewers, and turned the sewage of a portion of their district, that coming from the neighbourhood of New Brighton, into a course different from that in which it previously went. The evidence appears to show that since 1892 the effluent has been altered for the worse, both as regards quantity and quality. I think that this result has been brought about actively by the defendants, and giving the utmost weight to the decisions to which I have referred, I do not think they prevent the court from awarding damages in the present case. It was also said that the real object of the plaintiff was not to recover damages for injury to himself, but that, as was the reason in the two cases cited, the real complaint against the defendants was that they had not put in force the statutory powers that were vested in them to remedy a defective system of drainage which had descended to them from their predecessors. I cannot agree with that contention. I think that in both the cases

which have been cited the real grievance was that the defendants had not put in force the statutory powers vested in them. But it appears to me that the plaintiff here never sought to compel the defendants to put in force the powers of the statute to remedy a defective system of drainage. Some correspondence which passed between the plaintiff and the Local Government Board was referred to in a late stage in the argument. I have referred to it, and it appears to me that in that correspondence the plaintiff was not seeking for any remedy under s. 299 of the Public Health Act, 1875, but was asking the Board to prohibit the connection of a particular drain with a particular sewer. After deliberation the Board replied that they had no power to direct the local board to do what the plaintiff suggested. Further, it was said that the result of the judgment appealed against would be that the defendants would be made to pay damages for that which they were entitled to do in making orders for sanitary purposes. To this the answer seems to be that it was not the case. In exercising the powers given to them by s. 27 the defendants are bound not to create a nuisance to plaintiff, as it appears to me they have done by their acts.

It was also contended that the defendants had acquired a title by prescription to discharge sewage into the sea, but so long as they caused no damage to plaintiff by their acts the plaintiff could not complain, as his legal right would not have been injured. On this point I may refer to the well-known case of *Sturges* v. *Bridgman* (9). It seems to me that on the evidence the damage did not accrue until 1892 at the earliest, and probably only arose at a much later date, while the action was brought in 1902. The contentions on behalf of defendants have failed. There is no appeal against the refusal of the learned judge to grant an injunction. The damages are not yet assessed, and the learned judge has reserved every point that could possibly arise with reference to that amount. Under these circumstances I agree that the appeal must be dismissed.

FLETCHER MOULTON, L.J.—I am of the same opinion. The case has been argued with remarkable ability and energy, and during the argument a number of most important points have been raised. I do not wish to suggest that any of them are irrelevant. They might all have been material for our decision in the case. But the view I take of one or two fundamental points makes it unnecessary that I should refer to many of them. The case itself is a simple one. For a long series of years the plaintiff and his predecessors have been occupiers of certain oyster beds, which are constructions of the nature of artificial ponds high up on the foreshore of the locality into which oysters that have been dredged are brought to be laid down in order that they may fatten, and be taken from these beds to the market. The plaintiff complains that this property, which belongs to him, or of which he is the legal occupier, has been injured by defendants sending sewage into the beds, and thus rendering the oysters unfit for food.

The first question to be decided is whether the plaintiff has the occupation or the possession of these beds in a legal sense. The evidence is quite uncontested that these beds have existed at Emsworth throughout the whole of living memory. One man who was called as a witness was born in 1824, and others were between the ages of sixty and seventy, and nobody suggests that during the whole of the lives of these witnesses these oyster beds have not been used for the purposes I have described. It is an unquestioned principle of our law that where there has been long continued enjoyment, of an exclusive character, of a right or a property there is a presumption that the enjoyment is rightful if it could have had a legal origin. I am satisfied that here there has been exclusive possession of a sufficiently long duration. No more exclusive possession in character could I think be imagined. The surface of the ground is artificially altered to adapt it for the purpose, valuable objects in the shape of oysters are left there, and are taken from those beds again to be sold in the market, and, if the possession were not exclusive, the oysters would be capable of appropriation by other persons. The only question that it is necessary to decide, therefore, for this part of the case is: Can the oyster

beds (using the words in the sense I have described) be a property capable of being recognised by law? The contrary to that is scarcely argued, and could not possibly be maintained. It is quite sufficient for me to refer for this purpose to the section of the Larceny Act, 1861 [repealed by Larceny Act, 1916], which relates to oysters. Section 26 enacts that:

> "Whosoever shall steal any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out, or known as such, shall be guilty of felony, and being convicted thereof, shall be liable to be punished as in the case of simple larceny."

That single section is only one of a very large number of statutory enactments which recognise that oyster beds of this kind can be the property of a private person. Anyone who has had any experience of copyholds knows perfectly well that nothing is a more common incident than "oyster layings" being held by copy of court roll of the manor. These oyster beds, therefore, are capable of being private property. They have been occupied for a long series of years exclusively by the plaintiff and his predecessors, and, therefore, without troubling myself as to how the right may have arisen, I find that the property is proved to be rightfully in the plaintiff.

It may be property in the nature of an occupation—that is to say, that the plaintiff is the rightful occupier of that portion of the soil for that particular purpose. It may be that he is the rightful owner of the beds, but for the purpose of this appeal it is not necessary to distinguish between ownership and occupation. Nevertheless there has been so much argument upon the question of the existence of a several fishery, and of such a fishery being necessarily the basis of a rightful title to the oyster beds, that although it is not necessary for my decision in this case I wish to deal with the point. Counsel for the defendants attempted to attack the plaintiff's title by saying that it was impossible, according to English law, to have oyster beds apart from the existence of a several oyster fishery, and if the several oyster fishery was not proved to exist there could be no rightful title to these beds. I have examined the authorities, and it seems to me that an oyster bed of this kind, which I prefer to call by the older and unambiguous term of an "oyster laying," has nothing to do with a several oyster fishery, and it can exist quite independently of the existence of such a fishery. If we consider what the purpose of such a bed is, one sees that it differs radically from a right of fishing. Rights of fishing signify a right to catch those kinds of animals feræ naturæ which exist in the sea, and no doubt when, as in the case of a several or a common oyster fishery, oysters or oyster spawn are dredged from their natural bed something is being taken and appropriated the property or ownership in which, in the case of a common fishery, has not previously existed in any individual. But an oyster laying does not come into operation until the act of appropriation is finished. It exists only for the purpose of being used in connection with chattels, the property of which is in some individual. Oysters, after being caught, are laid down there for the purpose of improving, and unless the owner, by so laying them down, has committed an act of abandonment, the property still remains in him. It would be absolutely contrary to common sense to suggest that the owner, when laying down oysters in a specially constructed oyster bed with the intention that the oysters shall there get into a state fitter for consumption, intends to abandon them. His very act points to his desire to retain the oysters as his private property. Unless there is some principle of law by which this is taken to be abandonment, there is nothing to lead us to conclude that it is so. I cannot see that there is any principle of law that would require us to treat it as abandonment. Before I look into the legal authorities with regard to this matter I want to point out that this form of cultivation of oysters has nothing whatever to do with the origin of the oysters that have been laid down. It is just as necessary that oyster layings should exist for the purpose of the oysters which are dredged in a public fishery as for those dredged in a several fishery. Moreover, the position where these oyster layings are usually

placed, high on the foreshore, where there are formed shallow ponds, covered by the flux and reflux of the tide, are by no means in places where natural beds of oysters exist. It cannot be said that their existence de facto limits any right to take oysters from their natural beds. They are usually placed on portions of ground belonging to some individual, that is to say, on parts of the waste of the manor in places where fishing for what I may call wild oysters would not take place. In my mind, oysters in oyster layings do not differ substantially in their legal status from lobsters in a lobster pot. Everyone has a right to take lobsters in the sea, unless he is interfering with the rights of a several fishery, but if a person takes a lobster out of a lobster pot, that is not fishing, but taking property that has passed to some individual. And if you go a little further and consider the custom which may be met with on some parts of the coast, I believe, of taking lobsters out of the lobster pots in which they have been caught and placing them in large wicker cages until it is convenient to send them to market, you will see a still closer analogy to these oyster layings. It is quite true that in these cases the lobsters are wholly enclosed, but that is because it is impossible to keep them safely unless they are enclosed. The fact that the mature oyster moves about hardly at all renders it quite unnecessary to confine it in a wholly enclosed space. But oysters in oyster layings are just as much kept in captivity as the lobster in a wicker cage. Unless there is evidence that these oyster layings are not capable of existing except as part of a several fishery, why should we suppose that they must necessarily be part of a several fishery?

I want to look at what assistance we get from legislation, and the cases with regard to this. The first case that I will call attention to is *Bridger* v. *Richardson* (10). It was alleged there that the defendant was guilty of destroying oyster fry because he took it out in a dredge. It was an action of debt to recover a penalty under 3 Jac. 1, c. 12, for taking oyster fry and spat of a size unfit for food. The court there held that the defendant did not come within the purview of the statute, because his object was to take the oysters, not for the purpose of wilfully destroying and wasting them, but for the purpose of laying them down in oyster layings of the kind I have described. Lord Ellenborough in his judgment said (2 M. & S. at p. 572):

> "When I look to the usage as it is to be found in the records of the court, upon questions which have arisen touching the byelaws of the Milton fisheries, I find the habit of taking and removing spawn is extremely ancient; there are, I believe, charters in existence for effectuating that species of fishing, and which existed before the statute of Jac. 1."

There we have a recognition by the courts—and I am quite certain that an examination of many manor court rolls will show that it is abundantly justified—that this habit of having oyster layings for this particular purpose is extremely ancient. How could it exist apart from the existence of a several fishery? It appears to me that it could exist as a reasonable exercise of his ownership of the soil by an individual in whom the soil of the foreshore was vested. It must not be forgotten that where the foreshore has been granted to an individual it is his property just as much as the land on terra firma. His rights over it are subject to the rights of navigation by the King's subjects and to their rights of fishing. But he has great powers of modifying the foreshore for his own purposes. He can build wharves and quays, and can do that which is quite the strongest assertion of absolute ownership, he can reclaim it and exclude the public entirely from it. You will find in *Blundell* v. *Catterall* (11) references to both those matters and to the large extent to which reclamations have been carried on in past times and will be carried on in the future.

In *Lord Advocate* v. *Young* (12) Lord Watson points out that reclamation of the foreshore is an act which strongly demonstrates the title of the person doing it to the foreshore. Had reclamation been a tortious act, he says, he would, of course, have given evidence of no legal right. This use of the foreshore in places where

there is no natural oyster bed would in no way interfere with the rights of the public to fish. The oysters there would not be oysters that were feræ naturæ, since they would be oysters placed there by the owner with the permission of the owner of the soil for the purpose of fitting them for market. I have no doubt that this mode of utilising the foreshore would be for the general benefit of the realm. It would add to the industries of the realm one which in the middle ages was perfectly legitimate, and has been largely carried on from then up to now. In order to test the accuracy of that view I have examined the statutes which from time to time have been passed with regard to oyster fisheries, and they clearly show, it seems to me, that the legislature considered such user of the foreshore not only permissible, but a thing which created a form of private property over which they threw the protection of the law in the most marked manner. The Oyster Fisheries Act, 1808 [repealed], which amended the Oyster Fisheries Act, 1791 [repealed], is full of significance. It provides that anyone who shall knowingly and wilfully steal, take, and carry away any oysters or oyster brood from any oyster bed, or oyster laying, or oyster fishery, being the property of any person or persons, or body or bodies politic or corporate, and sufficiently marked out as such shall be deemed guilty of felony. It seems that the previous Act by referring to several oyster fisheries had given rise to doubt whether taking oysters from oyster layings which were private property could be called a felony. In the amending Act the limitation to several oyster fisheries was dropped, and the Act was applied to oyster beds, oyster layings, and oyster fisheries. It will be found that from and after that time right down to the Larceny Act, 1861, the phrase oyster bed, or oyster laying, or oyster fishery has been rigorously kept, showing that it must be the private property of some individual, and properly marked out as such. Clearly, therefore, there can be oyster layings or beds which cannot properly be called several oyster fisheries. There is a group of three Irish statutes also, in which there is very curious confirmation of my views, and there is no justification for thinking that the common law is different in this respect in Ireland from what it is in England, except so far as it has been altered by statute. In 5 & 6 Vict., c. 106, which is an Act applying to oyster fisheries, it is enacted by s. 11 that

> "if any person shall steal any oysters or oyster brood from any oyster bed or laying, being the exclusive property of any other person or persons, and sufficiently marked out and known as such, every such offender shall be deemed guilty of larceny. . . ."

There the legislature treats stealing from an oyster bed or an oyster laying alone, and says nothing of an oyster fishery. It seems to have been thought that that provision might be considered to go too far, and might justify the appropriation of oyster beds and oyster layings under circumstances under which the law did not otherwise justify it. In an Act passed two years later I find a clause guarding against this misinterpretation. That is the Act of 8 & 9 Vict., c. 108. Section 16 says:

> "And be it enacted and declared that nothing in the first recited Act shall be construed to protect as an exclusive right or private property any oyster bed or oyster fishery lying below the level of the lowest water of spring tides or to subject any person to be deemed guilty of or to be indicted for larceny for taking oysters from any such oyster bed or fishery unless such oyster bed or fishery shall be legally possessed and enjoyed by some person by virtue of charter, grant, patent, or Act of Parliament in and by which such oyster bed or fishery is specially granted, and the limits thereof accurately described, or unless the same has been held and enjoyed by prescription as an exclusive right and private property within limits clearly defined."

It, therefore, says that unless you can prove your title by prescription or by grant (which must mean a lawful grant), or by Act of Parliament, you shall not under the former Act of Parliament claim protection for a bed below the lowest level of low-water, showing that the legislature clearly thought that oyster beds might be

enjoyed and be private property of individuals if they are on that part of the foreshore which is above the lowest level of low-water. Therefore they did not say that the former Act must not be quoted to protect oyster beds on the foreshore, even though they were possessed not by prescription and not by grant nor by Act of Parliament. I think that statute shows that the legislature recognised the fact that the property in oyster beds might be acquired in another way than that which is necessary to the acquirement of a several oyster fishery.

I will only refer to one other very peculiar provision in a statute which supports the same view. That is in 13 & 14 Vict., c. 88, s. 41, which is also in an Irish statute. That act was passed to enable oyster layings to be made more easily, and without quoting it, I may give very shortly its provisions. It says that if people have land bordering on the sea the commissioners may—of course it means out of land belonging to the Crown—grant them portions of the foreshore for the purpose of forming oyster layings thereon. It gives this power to the commissioners with regard to persons having land adjoining the sea. It says nothing about grants to persons who own the foreshore itself. From the language of the section it is perfectly clear that "bordering on the sea" does not mean "owning the foreshore." It seems to me that the fact that the people who would most rightfully be entitled to ask for the assistance of the commissioners to form oyster layings—that is to say, the people who owned the foreshore, are not mentioned in the Act, points to the fact that, without this enactment they would be able to use the land for this purpose. I am, therefore, of opinion that oyster layings placed in a position where there are no natural oysters, and on land which may belong to the occupier, are forms of property recognised by the law, and are quite independent of the existence of several fisheries. With his usual frankness, counsel for the defendants quoted against himself two American cases dealing with this subject which I find decide the question in exactly the same way as I do, and for the reasons I have independently arrived at.

Passing now from that part of the case, I come to the second half, whether there was any interference with the rights of the plaintiff by the defendants. I am of opinion that the order confirmed by the Local Government Board practically made the defendants successors for all purposes to the Havant Union. I think that they have failed to establish their title by prescription as against plaintiff, on the simple ground stated by STIRLING, L.J., viz., that no prescription could commence as against the plaintiff until his property was interfered with, and that there was certainly no evidence that his property was interfered with for twenty years, or whatever be the necessary number of years, before he brought his action. The defendants' case with regard to prescription, therefore, absolutely fails in fact. As for the suggestion that there is a common law right to drain into the sea, I know of none. The right to drain into the sea given by the Public Health Act, 1848, was a most limited one, confined to houses within 100 ft. of the sea, and quite inapplicable to the present case. Then comes the question as to nonfeasance and misfeasance. It seems to me that that point does not arise here at all. The defendants, acting under the powers they possessed, did several acts substantially altering the nature of the outfall from their sewer, and, in my opinion, it was altered to such an extent that the substantial interference with the plaintiff's property commenced with their action. It is no use to say that the pick-up sewer cut off the drains which also interfered with those beds. It is not by any means clear that the rights of drainage which they interrupted by that pick-up sewer were as yet established by prescription. They cannot save themselves from the consequences of having made a new sewer and having made it discharge into Ford's sewer. I am of opinion, therefore, that the judgment of WALTON, J., is correct, and this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Stow, Preston & Lyttelton*, for *Raper, Freeland & Tyacke*, Chichester; *Palmer & Bull*, for *J. W. L. Cooper*, Emsworth.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

Re COLEMAN'S DEPOSITORIES, LTD. AND LIFE AND HEALTH ASSURANCE ASSOCIATION

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Buckley, L.JJ.), June 5, 6, 19, 1907]

[Reported [1907] 2 K.B. 798; 76 L.J.K.B. 865; 97 L.T. 420; 23 T.L.R. 638]

Insurance—Policy—Condition—Insurance against accident effected by cover note—No condition in cover note—Accident before delivery of policy—Applicability of condition in policy.

On Dec. 28 the assured applied to the insurers for an insurance against Workmen's Compensation Act risks, and received from their agent a receipt signed by him and bearing the words "covered from date." On Jan. 2 a workman of the plaintiff's was injured by accident, and became entitled to compensation. On Jan. 10 a policy was delivered to the assured insuring them as from Jan. 1, and containing conditions that "immediate notice" of any accident causing injury to a workman should be given, and that "the observance and performance of the times and terms before set out are the essence of the contract." The assured gave notice of the accident to the insurers on Mar. 14, when the insurers repudiated liability on the ground that the conditions contained in the policy had not been fulfilled.

Held (FLETCHER MOULTON, L.J., dissenting): there was no evidence that the assured knew, or had the opportunity of knowing, the conditions of the policy before the contents of the policy had been communicated to him by the delivery of the document, which did not take place until after the accident, and, therefore, the conditions in the policy did not become applicable to the particular risk, and the insurers were liable.

Notes. Distinguished: *Austin* v. *Zurich General Accident and Liability Insurance Co.*, [1945] 1 All E.R. 316. Referred to: *Koskas* v. *Standard Marine Insurance* (1926), 42 T.L.R. 692.

As to conditions in a policy of insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 217 et seq., and cases there cited.

Cases referred to in argument:

Worsley v. *Wood* (1796), 6 Term Rep. 710; 101 E.R. 785; 29 Digest 334, *2706*.

Mason v. *Harvey* (1853), 8 Exch. 819; 22 L.J.Ex. 336; 21 L.T.O.S. 158; 155 E.R. 1585; 29 Digest 332, *2699*.

Roper v. *Lendon* (1859), 1 E. & E. 825; 28 L.J.Q.B. 260; 5 Jur.N.S. 491; 7 W.R. 441; 120 E.R. 1120; 29 Digest 332, *2701*.

Cassel v. *Lancashire and Yorkshire Accident Insurance Co., Ltd.* (1885), 1 T.L.R. 495; 29 Digest 402, *3182*.

Re Williams and Lancashire and Yorkshire Accident Insurance Co.'s Arbitration (1902), 51 W.R. 222; 19 T.L.R. 82; 47 Sol. Jo. 110; 29 Digest 405, *3199*.

Stoneham v. *Ocean Railway and General Accident Insurance Co.* (1887), 19 Q.B.D. 237; 57 L.T. 236; 51 J.P. 422; 35 W.R. 716; 3 T.L.R. 695; 29 Digest 402, *3183*.

Roberts v. *Security Co.*, [1897] 1 Q.B. 111; 66 L.J.Q.B. 119; 75 L.T. 531; 45 W.R. 214; 13 T.L.R. 79; 41 Sol. Jo. 95, C.A.; 29 Digest 415, *3248*.

Patton v. *Employers' Liability Assurance Corpn.* (1887), 20 L.R.Ir. 93; 29 Digest 402, *3181 vii.*

Mersey Steel and Iron Co. v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 12 Digest (Repl.) 378, *2966*.

Appeal by insurers, the Life and Health Assurance Association, from a decision of BRAY, J., on a Special Case stated by an arbitrator.

On Dec. 28, 1904, a representative of Moran, Galloway & Co., Ltd., insurance brokers, procured the signature of the assured, Coleman's Depositories, Ltd., to a form of application supplied by the association for insurance against workmen's compensation and other risks, took the said form to the Liverpool agent of the association, and on behalf of the assured received from him a form of receipt or covering note signed by the agent. The words "covered from date" were written upon that receipt, and it contained no reference to any conditions. On Jan. 2, 1905, a workman in the employ of the claimants named John Corrin received an injury by accident arising out of and in the course of his employment by the claimants as a workman at their premises. On Jan. 3, 1905, the policy of insurance was duly executed by the association under their common seal, and on or about Jan. 9 or 10 it was received by the brokers, who thereupon credited the association with the amount of the premium, debited them with the commission, and delivered the policy to the assured. On Feb. 16, 1905, the assured paid the brokers the amount of the premium, and on Feb. 28 the brokers settled the balance due from them in respect of the premium on the policy after crediting themselves with the sum due to them from the association in respect of commission. The injuries of John Corrin were not in the first instance supposed to be serious, but at a later period his condition became serious, and he was taken to a hospital, where, on Mar. 15, 1905, he died. No notice of the accident was given by the assured until Mar. 14, the day before the death of the deceased, when verbal notice was given to the Liverpool representative of the association. On Mar. 27, 1905, a written notice of a claim by the widow of John Corrin on behalf of herself and her children, dated Mar. 27, was received by the assured from the solicitors acting for the widow, on or about the date thereof, but that notice was not forwarded to the association by the assured. The association were on Mar. 29 by letter of that date informed by the assured that a claim had been made by a firm of solicitors acting for the widow of the deceased. The association immediately repudiated liability, and refused to have anything to do with the settlement of the claim or with the defence of any action or other proceedings which might be brought to enforce the same. The matter went to arbitration when it was contended by the association that they were not liable to pay the amount of the claim on (inter alia) the following grounds: that the assured had not given immediate notice to the association of the accident, as required by cl. 2 of the policy, and that the giving of such notice was by reason of cl. 7 of the policy a condition precedent to the right of the assured to recover; and that the assured did not forward to the association the written notice of claim received by them within three days after the receipt thereof as required by cl. 2, and that the forwarding of such notice of claim was by reason of cl. 7 of the policy a condition precedent to the right of the assured to recover. The arbitrator determined that those grounds afforded a good defence to the claim, a decision which was reversed by Bray, J. The insurance association appealed.

The policy of insurance contained the following clauses:

"2. The employer shall give immediate notice to the association of any accident causing injury to a workman, and the employer shall also forward to the association every written, or information as to any verbal, notice of claim received within three days after the receipt of such notice, and shall give all information and assistance required by the association; and the medical or other agent of the association shall be admitted at all reasonable times to see and examine the nature of any injury sustained, and, in the event of death, to make a post-mortem examination of the body. The employer shall not settle any claim, or admit any liability, or hold any communication with the workman injured with reference to his claim, without the consent in writing of the association; and the association shall be entitled to take the absolute conduct and control of all proceedings against the employer (including arbitrations), and to use the name of the employer to enforce, for the benefit of the

A association, any order made for costs or otherwise, or any claim for indemnity against third parties; and, if required, the employer shall be bound to assign any such order or claim to the association. . . . 7. The observance and performance by the employer of the times and terms above set out, so far as they contain anything to be done by the employer, are the essence of the contract."

B *Tobin*, K.C., and *Wightman Powers* for the association.
Cuthbert Smith for the insured employer.

Cur. adv. vult.

June 19, 1907. The following judgments were read.

C **VAUGHAN WILLIAMS, L.J.**—In this judgment I shall call the insurance company "the association" and Messrs. Coleman "the employer."

BRAY, J., decided this case mainly on the ground that he could not construe the word "essence" in cl. 7 of the policy, as being equivalent to condition precedent, and that it means only this, that it shall be of the essence of the contract—that is to say, the employer shall be bound to do all those things within the time D named or otherwise be liable for damages, if any have been incurred by the association. I do not differ from this conclusion of BRAY, J., although I have great doubt. I prefer to base my judgment on the other points made by counsel for the employer, notwithstanding that BRAY, J., says that he should be slow to decide this case on those two points alone. The association, as BRAY, J., says,

E "chose to act as we know all companies do; they agreed that the risk should be covered as from a certain date—that is, the date of the receipt of the proposal. They chose to do that, and they did not send a copy of the policy to the assured. They did not say that the risk should be covered in accordance with or subject to the terms of the policy. They say it should be covered. How is the assured to know of these conditions unless they inform him?"

F It appears from the award that the policy was executed by the association on Jan. 3, 1905, but was not received by the brokers until about Jan. 9 or 10, and that the brokers thereupon credited the association with the amount of the premium and debited them with the commissions, and delivered the policy to the employer. No point is made that the premium was not paid in accordance with the custom, so that the risk was accepted by the association and the employer covered as from G Dec. 28, 1904. On Jan. 2, 1905, a workman in the employ of the employer, named John Corrin, received an injury by accident arising out of and in the course of his employment. The injuries of John Corrin were not in the first instance supposed to be serious, but at a later period his condition became serious, and he was taken to a hospital, where on Mar. 15, 1905, he died. On Mar. 27 a written notice of a claim by the widow of John Corrin on behalf of herself and H her children was received by the employer from the solicitors acting for the widow on or about the date thereof, but the notice was not forwarded to the association by the employer, who, however, on Mar. 29 gave notice, without forwarding the claim received by him, by which he informed the association by letter of that date that such a claim had been made by solicitors acting for the widow. The association immediately repudiated liability and refused to have anything to do with the I settlement of the claim or with the defence of the action.

Thereupon the difference between the association and the employer went to arbitration in accordance with cl. 6 of the policy. The arbitrator made his award, and on that award BRAY, J., gave judgment for the employer. No notice of the accident was given by the employer until Mar. 14, 1905, the day before the death of the deceased, when verbal notice was given to the Liverpool representative of the association. It is obvious on these facts that notice was not given as provided by cl. 2 of the policy, for that clause says that the employer shall give immediate

notice to the association of any accident causing injury to a workman, and the employer shall also forward to the association every written, or information as to any verbal, notice of claim received within three days after the receipt of such notice. It could not have been in the contemplation of the parties that this condition as to immediate notice should apply until the contents of the policy had been communicated to the employer. I hold that, on the face of the award, there is no evidence that the employer knew, or had the opportunity of knowing, the conditions of the policy, and that the onus is on the association; and, in my opinion, the risk undertaken by the association for the period prior to the delivery of the policy did not impose upon the employer the obligation to give immediate notice of the accident to Corrin on Jan. 2, 1905, prior to the receipt by the employer of the policy or of information of its containing such a condition or obligation. The only question in this case is the obligation of this condition as to immediate notice. As to the condition as to forwarding notice of claim received by the employer within three days of the receipt of such notice, I agree with BRAY, J., that there was no obligation to forward such notice after the association had repudiated. The result is that, in my opinion, this appeal should be dismissed.

FLETCHER MOULTON, L.J.—This is an appeal from a judgment of BRAY, J., upon an award stated in the form of a Special Case in respect of a claim made by Coleman's Depositories, Ltd. (whom I shall term "the employer"), against the Life and Health Assurance Association (whom I shall term "the association") under a policy of insurance. This policy, which was issued by the association to the employer, covered the compensation which the employer might have to pay to his workmen for injury caused by accident when in his employ. The period during which the policy is expressed to be in force was from noon of Jan. 1, 1905, until noon of Jan. 1, 1906. By cl. 6 of the policy any difference arising between the association and the employer under it is to be referred to arbitration, and it is expressly stipulated that the obtaining of an award by such arbitrator shall be a condition precedent to any right to recover by legal proceedings. The award in question was by an arbitrator under this clause, and he finds that a workman of the employer received an injury from an accident occurring on Jan. 2, 1905, while he was in his employ. The question for us to decide is whether under the terms of the policy the association are liable to indemnify the employer in respect of the compensation which he has properly paid to the representative of the workman, in accordance with the provisions of the Workmen's Compensation Act, 1897. The association contend that the employer has failed to perform the obligation resting on him with regard to giving notice to the association of the accident, and that they are discharged from liability under the policy by reason of this default on his part. The only default relied upon for this purpose by the association on the hearing before us is based on the provisions at the commencement of cl. 2 of the policy, which reads as follows:

> "The employer shall give immediate notice to the association of any accident causing injury to workmen."

They naturally and properly claim that we should read in connection therewith cl. 7 of the policy, which is in the following terms:

> "The observance and performance by the employer of the times and terms before set out, so far as they contain anything to be done by the employer, are the essence of the contract."

The facts of the case are as follows: An accident occurred on Jan. 2, 1905, on the premises of the employer used by him for storing, he being a furniture remover and warehouseman. The injuries to the workman were not in the first instance supposed to be serious, but they showed themselves to be so later. No notice of the accident was, however, given by the employer to the association until Mar. 14, which was the day before the workman died from the consequences of the accident. No reason was assigned for the omission on the part of the

employer to give notice of the accident to the association, and it must be taken to have been deliberate and intentional on his part. Under these circumstances I confess that I am unable to come to any other conclusion than that the employer has wholly failed to fulfil the obligation to be performed by him which was of the essence of the contract. If the default had been a trifling one—that is to say, if some slight delay had taken place in giving the notice stipulated in the policy, different considerations might have arisen. The courts have not always considered that they are bound to interpret provisions of this kind with unreasonable strictness, and although the word "immediate" is no doubt a strong epithet, I think that it might be fairly construed as meaning with all reasonable speed considering the circumstances of the case. But we have here a substantial and persistent breach of a provision obviously of great importance to the association, and which is by the terms of the policy itself declared to be of the essence of the contract—that is to say, to go to the root of it. Moreover, the condition interpreted in this way is a most reasonable one, and I can see nothing which ought to render the court unwilling to enforce the full consequence of the breach. The association, who have to bear the pecuniary consequences of the accident, and who have stipulated that they should at once be informed of it, are entitled to have this obligation performed by the assured in order that they may be able to inquire into the circumstances of the accident while the matter is still fresh. In my opinion, both from the nature of the condition and from the express stipulation of the policy, the prompt giving of this notice is a fundamental condition of recovery under the policy, and if it be not given, the employer is disentitled to claim the benefit of the indemnity in respect of the accident as to which he has failed to give notice.

The learned judge in the court below, for whose opinion I have the greatest respect, would, I think, have come to the same conclusion had the words which I have extracted from the policy stood alone; but he has felt a difficulty in giving to cl. 7 the effect which its words, in my opinion, require us to give it, because it is so general in its terms that it might be claimed to apply to the observance and performance by the employer of a large number of provisions, some of which are evidently of much less importance than others. He has, therefore, come to the conclusion that, because it would seem to render the contract unreasonable if cl. 7 were taken literally, we must, therefore, give to it no effect at all. I cannot agree with this reasoning. In my opinion, it is not open to the employer, who is claiming under the policy, to contend that the policy is unreasonable in its terms. He has accepted it, and he must be bound by its conditions. But if the court should allow itself to be influenced by the comparative unimportance of some of the obligations that are put upon the employer, and should as a matter of construction see its way to limit the effect of cl. 7 to those of the obligations of the employer which are of a more important character to the exclusion of minor matters, it ought not, in my opinion, to affect its judgment in the present case, because we have a practically total breach of the most important of the conditions of the policy. To hold that this does not free the association from liability would be to leave cl. 7 out of the policy altogether, and also, in my opinion, to relieve the employer from the performance of what is by its nature (apart from the special conditions of cl. 7) a condition precedent to his right to recover under the policy.

The assured have contended before us that on the true interpretation of the policy the conditions expressed therein, of which the one in question is the most important, are not to be regarded as conditions precedent, because it is unlikely that the parties could have intended to allow them to operate as a bar to recovery under the policy. But if we are to consider the question of probability at all, this is not a fair way of stating the question. The provisions in question must have some effect given to them, and if we were to allow ourselves to be guided by what it is probable that the parties intended, we should have to ask ourselves the question: "Is it more probable that the parties intended the default in giving

notice to be a matter to be compensated in damages or to be a condition precedent to the claim?" If the question be asked in this form, it is, in my opinion, inconceivable that the parties could have intended that the default in giving notice should be a ground of cross-action for such damages as could be proved to have arisen from it. Every one would know that, although the notice would be of great importance to the association, it would be practically impossible to assign any specific damage to the breach of this obligation, however probable it might be that it had been productive of serious damage. From the nature, therefore, of the stipulation, as well as from the language of the contract, I am of opinion that its performance was a condition precedent to the right to recover, and not a ground of cross-action for breach.

I have now dealt with the only point which in my opinion this court has before it. But during the hearing a further point was raised of a wholly different character, which I will now deal with out of respect to my brethren, who, I understand, consider this point to be one of substance and to be open to the respondents. This point is as follows. The policy was effected on Dec. 28, 1904, through an agent of the association, who obtained the employer's signature to a form of application supplied by the association, and gave to him a receipt or covering note on which were the words "covered from date." This application in form bears no date, but contains the words:

> "The liability of the association does not commence until this proposal has been accepted by the directors and the premium paid."

The policy was actually sealed by the association on Jan. 3, 1905, and it apparently reached the hands of the employer on or about Jan. 9 or 10. It is contended that under these circumstances there is a waiver by the association of all conditions which should have been performed by the employer prior to the day on which the actual document reached his hands. In my opinion, no such point is open to the respondents. The court cannot travel outside the award, and no question of waiver is raised therein; nor is waiver one of the points of law which by his award the arbitrator says that he was requested to raise in his Special Case. These points of law are set out in extenso in the award, and they relate to entirely different matters.

Apart from the question whether the point is open to the employer I confess that I am wholly unable to follow the argument based on the facts to which they refer. The claim is not under any contract made by the covering note, but is a claim under the policy subsequently sealed. It is so expressed in the award, and indeed it was admitted that the arbitration took place by reason of its being such a claim. We have no information as to the reason why the actual document which was sealed on Jan. 3 did not reach the employer until about Jan. 9 or 10. If the employer desired to insist on the policy corresponding with the covering note or starting from the date of sealing, he might perhaps have required that it should date from Dec. 28, 1904, or from Jan. 3, 1905, and expire on Jan. 3, 1906, and might have refused to receive it if it was otherwise made out. He did not do so, but chose to accept it in the form in which it stood with its date and all its conditions, and he cannot be heard to object to any of them when he is making a claim under it. If any question of waiver by the association was to be raised they ought to have had notice of it in the arbitration. For all that we know the employer was aware of the sealing of the policy when it was effected, and certainly it is probable that he was fully aware of the conditions of the policy which he was effecting. But it is not permissible for us to speculate on these matters. If waiver were intended to be set up it should have been raised before the arbitrator, and the association would then have had the opportunity of showing that the circumstances were not such as to create any waiver. They would then, for instance, have been entitled to show as a fact that the employer was aware of the conditions as to notice under the policy which was granted to him, and that the leaving of the policy in the hands of the association was a

A voluntary act on his part. It is immaterial whether or not the association would have succeeded in doing so. It is not for the court to make hypotheses as to circumstances such as these. Waiver must depend upon the intention of the parties and the circumstances which show that intention must be found by the arbitrator if they are to be acted on by the court. Moreover, I see nothing to prevent an adequate performance of the conditions precedent at the date when, B so far as the court is aware, the policy might have been obtained by the employer if he had chosen to ask for it.

For these reasons I am of opinion that the point of waiver is not before us, and that, even if it were before us, there are no findings by the arbitrator which would justify us in deciding in favour of the respondents on it. But I must add that the fact that no such point was made before the arbitrator and no relevant C facts found by him in his award is not my only objection to this contention of the employer. The doctrine that there is some duty on the part of the assurers to get the policy into the physical possession of the assured, and that the rights of the parties under the policy depend on the date at which this is effected, is to me so bewildering and so foreign to any principles of law applicable to written contracts, and so unlike anything to be found in previous decisions as to the D liabilities of parties under contracts such as these, that I am unable to follow it. I fear, therefore, that I am not doing justice to a point which commends itself to my brethren, and, therefore, I shall say no more on the point of law.

BUCKLEY, L.J.—For the purposes of this case the material facts, taken from the award, are as follows. On Dec. 28, 1904, the employers signed a proposal, E and by the hands of Moran, Galloway & Co., as their agents, received the covering note from the insurance company. The premium was duly paid, not (it is true) at that time, but at a later date. The award, however, finds as a fact that as between the insurance company and the assured the premium is to be treated as having been paid. On Jan. 2, 1905, a risk covered by the proposal and covering note resulted in a claim. At that date the assured had no knowledge of the F condition now relied upon. The absence of such knowledge is not stated in the award, but knowledge (if it existed) was a fact for the insurance company to prove, and they have not proved it. On Jan. 9 or 10, the policy was received by Moran, Galloway & Co. and delivered by them to the employer. The policy contained a condition that "the employer shall give immediate notice to the association of any accident."

G The whole matter for decision before us is whether the failure of the employer to comply with that condition affords a good defence to this particular claim. In my opinion, it does not. On Jan. 2 the employer had no knowledge of the condition which was subsequently disclosed by the policy. It was impossible, therefore, that he should comply with a condition which required that he should "give immediate notice to the association of the accident" which occurred on H Jan. 2, for he had at that time no knowledge that it was required of him. The policy, when delivered, was dated Jan. 3, and was to be in force from Jan. 1, 1905. But upon these facts the true inference, in my opinion, is that the insurance office, as regards this risk which had resulted in a claim before knowledge of the condition was created, never imposed that condition. The point is not that there was waiver of a condition which was applicable to this risk. It is that I the condition never became applicable to this risk. Upon this ground I think that the appeal fails.

Under these circumstances it is not necessary to decide the point upon which BRAY, J., gave judgment; but I am far from saying that, in my opinion, the true construction of the policy is not that which he put upon it. The question is one of construction, and upon such a question authorities are of little or no value. Authorities may determine principles of construction, but a decision upon one form of words is no authority upon another form of words. As regards this instrument, the relevant matters are as follows: The stipulation of cl. 2, that the

employer shall give immediate notice, might in the absence of further provision be directory only, or might be essential. The purpose of cl. 7 may be simply to provide that it shall not be directory, but shall be essential. That, however, leaves open the question whether the remedy for non-observance of this essential provision is by way of damages, or whether the condition is a condition precedent. This policy twice uses the expression "condition precedent" —viz., first in the recitals, and, secondly, in cl. 6, and does not use those words in the particular cl. 7 which is under discussion. Moreover, cl. 7 provides by general words that matters of detail, such as that the employer "shall give all information and assistance required," which it is difficult to believe are intended to be conditions precedent, shall be essential. And the policy further, in cll. 3 and 4, provides that "the employer shall not be entitled to recover," or that "no claim shall be covered by this policy," in certain events. But it contains no similar language as regards non-observance of the requirement to give immediate notice. If, therefore, it were, which I think it is not, for the purpose of this decision necessary to construe the policy and determine whether this condition is a condition precedent or not, I should not be disposed to differ from the conclusion at which BRAY, J., arrived. I think the appeal must be dismissed.

Appeal dismissed.

Solicitors: *W. G. Duke*, for *J. Gribbin*, Liverpool; *Field, Roscoe, & Co.*, for *Rutherfords*, Liverpool.

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

POWELL *v.* VICKERS, SONS AND MAXIM, LTD.

[COURT OF APPEAL (Sir Richard Henn Collins, M.R. and Farwell, L.J.), November 13, 1906]

[Reported [1907] 1 K.B. 71; 76 L.J.K.B. 122; 95 L.T. 774; 23 T.L.R. 78; 51 Sol. Jo. 66]

Practice—Payment into court—Recovery by plaintiff of lesser sum—Right to costs of action down to payment in—Payment out of amount recovered—Presumption—Rebuttal by defendant.

A defendant in an action for unliquidated damages denied liability, but paid into court a sum of money in satisfaction of the plaintiff's claim. The plaintiff proceeded with the action and obtained judgment for an amount less than the sum paid into court, **Held:** (i) the plaintiff was entitled to the costs of the action up to the time of the payment in because up to that time there was no defence to the action; (ii) under R.S.C., Ord. 22, r. 6 (c), there was a primâ facie presumption that the plaintiff was entitled to be paid the amount of his judgment out of the money in court, but payment out was always subject to the discretion of the court, and where the only ground put forward by the defendant to defeat the presumption was the probability that his taxed costs would exceed those of the plaintiff, he had not discharged the onus on him to show why the money should remain in court; therefore, the plaintiff was entitled to payment out.

Ridout v. *Green* (1) (1902), 87 L.T. 679, approved.

Notes. The Rules of the Supreme Court as to payment into court have been changed since this decision, but the decision would still appear relevant under

the existing rules; see the "Preliminary Note" to Ord. 22, r. 1, and the notes to r. 6 of Ord. 22 on "General Rules as to costs" in THE ANNUAL PRACTICE.

Referred to: *Barber* v. *Pigden*, [1937] 1 All E.R. 115; *Willcox* v. *Kettell*, [1937] 1 All E.R. 222; *Brown* v. *New Empress Saloons, Ltd.*, [1937] 2 All E.R. 133.

As to payment into and out of court, see 30 HALSBURY'S LAWS (3rd Edn.) 381 et seq.; and for cases on the subject, see DIGEST (PRACTICE) 478 et seq. As to costs after payment into court, see 30 HALSBURY'S LAWS (3rd Edn.) 424.

Cases referred to:

(1) *Ridout* v. *Green* (1902), 87 L.T. 679; 18 T.L.R. 709.

(2) *Wagstaffe* v. *Bentley*, [1902] 1 K.B. 124; 71 L.J.K.B. 55; 85 L.T. 744, C.A.; Digest (Practice) 490, *1672*.

(3) *Wheeler* v. *United Telephone Co.* (1884), 13 Q.B.D. 597; 53 L.J.Q.B. 466; 50 L.T. 749; 35 W.R. 295, C.A.; Digest (Practice) 490, *1671*.

Also referred to in argument:

Buckton v. *Higgs* (1879), 4 Ex.D. 174; 40 L.T. 755; 27 W.R. 803; Digest (Practice) 491, *1675*.

Gretton v. *Mees* (1878), 7 Ch.D. 839; 38 L.T. 506; 26 W.R. 607; Digest (Practice) 488, *1659*.

Berdan v. *Greenwood* (1878), 3 Ex.D. 251; 47 L.J.Ex. 628; 39 L.T. 223; 26 W.R. 902, C.A.; subsequent proceedings (1880), 20 Ch.D. 764 n.; 46 L.T. 524 n., C.A.; Digest (Practice) 481, *1607*.

Goutard v. *Carr* (1884), 13 Q.B.D. 598 n.; 53 L.J.Q.B. 55; 32 W.R. 242; 33 W.R. 295 n., C.A.; Digest (Practice) 491, *1677*.

Appeal by the plaintiff from an order of BUCKNILL, J., affirming the decision of a master.

The action was brought to recover the price of goods sold and delivered and damages for breach of contract by non-acceptance of goods. By their statement of defence the defendants denied liability but paid £2,500 into court as sufficient to satisfy the plaintiff's claim. At the trial of the action the judge, by consent, made an order that the action should be referred to a special referee, who should have all usual powers under the Arbitration Act, 1889, and Ord. 36, and that the costs of the cause and the reference and award should abide the event, but that £1,000 should be paid out of court to the plaintiff forthwith, without prejudice to any question between the parties.

In his award the arbitrator found all the issues raised in the pleadings (apart from the amount of damages) in favour of the plaintiff, and he found that the plaintiff was entitled to damages to the amount of £2,265 8s. 6d., and he awarded that judgment should be entered accordingly. The defendants thereupon took out a summons asking that judgment should be entered in pursuance of the award.

The master made an order that

> "judgment be entered for the defendants in pursuance of the award, and that it be adjudged that the defendants do recover against the plaintiff their costs of the action, reference, and award, to be taxed, and that the plaintiff recover his costs of the issues decided in his favour by the award, to be taxed, such costs to be set off against the defendants' said costs, and that the money in court do remain in court until further order."

This order was affirmed by BUCKNILL, J. The plaintiff appealed.

Order 22 provided:

> Rule 6. When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into court is made, is denied in the defence, the following rules shall apply: . . . (c) If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof, the

money shall remain in court and be subject to the order of the court or a judge, and shall not be paid out of court except in pursuance of an order. If the plaintiff proceed with the action in respect of such claim or cause of action, or any part thereof, and recovers less than the amount paid into court, the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim, and the balance (if any) shall, under such order, be repaid to the defendant."

Hugo Young, *K.C.*, and *R. T. G. Tangye* for the plaintiff.
Disturnal for the defendants.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal from an order made by BUCKNILL, J., at chambers, in which he affirmed the order of the master as to the mode in which judgment should be entered and costs taxed in pursuance of the award of an arbitrator.

An action was brought to recover the price of goods sold and delivered and damages for non-acceptance of goods. The defendants denied liability, and paid £2,500 into court as being sufficient to satisfy the plaintiff's claim. At the trial the action was referred to an arbitrator, the costs of the cause, the reference and the award to abide the event. The arbitrator found all the issues of fact in favour of the plaintiff except as to the amount paid into court, which he found to be more than enough to satisfy the plaintiff's claim, and he ordered judgment to be entered accordingly. Upon an application for judgment the master ordered that judgment should be entered for the defendants in pursuance of the award; and that the defendants should have their costs of the action, the reference, and the award; and that the plaintiff should have the costs of the issues decided in his favour; and that the money in court should remain there until further orders. The plaintiff appealed to the judge at chambers, but his appeal was dismissed. He has now appealed to this court.

The plaintiff does not dispute that judgment was properly entered for the defendants, but he disputes the order that the defendants should have the costs to be taxed of the action, the reference, and the award. That order gives the defendants the whole of the costs of the action, and the plaintiff contends that the order should be modified by letting him have the costs of the action up to the time of the payment into court by the defendants. That contention seems to me to be well founded. In the ANNUAL PRACTICE, 1907, at p. 286, numerous authorities are cited, and the practice is stated to be this:

"If the plaintiff succeeds in recovering from the defendant an amount which carries costs, even though it is less than the sum paid into court, he succeeds on the first of those issues, and is entitled to the whole costs of the action down to payment in, and the subsequent costs of the issue on which he has succeeded."

Then it cites *Wagstaffe* v. *Bentley* (2) which is a decision of this court. That case did not decide the exact point. It was an action to recover damages for injuries alleged to have been caused by the negligence of the defendants. The defendants denied negligence and alleged contributory negligence, and, further, while denying liability, brought into court the sum of £80 as sufficient to satisfy the plaintiffs' claim. The plaintiffs did not accept the money paid into court in satisfaction of their claim, and the action proceeded to trial before LAWRANCE, J., with a jury. A verdict was found for the plaintiffs for £35 damages, and it was ordered that judgment be entered for the defendants, that the plaintiffs should have the costs of the action up to the time of payment into court, that the defendants should have the general costs of the action from that time, and that the plaintiffs should have the costs of the issues found in their favour. There was no appeal as to the terms of that judgment, but a question arose as to the mode of the taxation of costs under it. The question was whether there was only one issue in the action or whether there were two issues. The Court of Appeal held that there were

two issues, one being whether the defendants had been guilty of negligence, and the other being whether the amount paid into court was sufficient; and that the plaintiffs were entitled to their costs on the issue of negligence on which they had succeeded.

That was a decision of the Court of Appeal upon the effect of a form of judgment which was not impugned. Though it is not a decision of this court as to what the form of judgment ought to be, yet it is an authority showing how judgment is ordered to be entered by the judge at the trial of an action. But the matter does not stand there. *Ridout* v. *Green* (1) was an action in which the plaintiff sued for damages for trespass and wrongful conversion of his goods. The defendant Lincoln, while denying liability, paid £5 into court as sufficient to satisfy the plaintiff's claim against himself and also against two other defendants, named Furnace and Wickham, each of whom also paid in 5s. on his own account as sufficient to satisfy the plaintiff's claim against him personally. At the trial before BRUCE, J., with a jury, a verdict was found in favour of the defendant Wickham, but in favour of the plaintiff as against the defendant Lincoln with damages £5, and as against the defendant Furnace with damages one farthing. BRUCE, J., in giving judgment that the defendants Lincoln and Furnace were entitled to judgment and to the costs of the action, said (87 L.T. at p. 680):

> "I think that the order made by LAWRANCE, J., in the case of *Wagstaffe* v. *Bentley* (2) is not inconsistent with the case of *Wheeler* v. *United Telephone Co.* (3). The only point upon which I am in doubt is whether the defendants Lincoln and Furnace are entitled to costs from the commencement of the action or from the time when the payment into court was made. That matter does not seem to have been dealt with in *Wheeler* v. *United Telephone Co.* (3) but it seems to me that it is reasonable that the plaintiff should have his costs of action up to the time of the payment into court, because up to that time there was no defence to the action. Therefore, I make an order in substance the same as the order made by LAWRANCE, J., in *Wagstaffe* v. *Bentley* (2)."

That decision by BRUCE, J., is one directly on the point as to how judgment ought to be entered in a case like the present. I think it would be very undesirable for us to attempt to alter the practice on a point like this, even if we were not altogether satisfied as to its being right. But so far from being dissatisfied with it, I think that it is a practice founded on common sense. Before the Judicature Act, 1873, if a plaintiff did not accept the money paid into court in full satisfaction and discharge of his cause of action, he ran the risk of losing all costs if it were afterwards found that the money paid in was enough to satisfy his claim. That was the effect of s. 73 of the Common Law Procedure Act, 1852. But it seems to me to be good sense to say that, since there was a good cause of action up to the time of the payment of money into court, the plaintiff ought to have the costs of the action up to that time unless, as in the case of s. 73 of the Common Law Procedure Act, 1852, there is any definite statutory provision to the contrary effect. As, under the Judicature Acts, there is no such provision, I think that the judgment ought to be varied in the way which the plaintiff desires, so as to give him his costs of action up to the time of payment into court.

The second objection which the plaintiff has to this order is to that part of it which directs that the money in court shall remain in court until further order. It is said that that direction is in contravention of Ord. 22, r. 6 (c), which provides that

> "the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim."

I agree that the primâ facie intention of the rule is that the money shall be paid out to the plaintiff. It is true that that rule also says that the money shall be subject to the order of the court or a judge and shall not be paid out of court except in pursuance of an order. The effect of the whole rule is to create a presumption in favour of the plaintiff having the money; but though he is primâ

facie entitled to it, yet it is subject to the discretion of the court. Here the only thing brought forward by the defendants to defeat the presumption in favour of the plaintiff was a suggestion that in all probability the amount of the taxed costs due to them would exceed the amount of taxed costs due to the plaintiff. Under the rule the onus lies on the person who wishes to prevent the money being paid out to the plaintiff. That onus has not been discharged, and the plaintiff is therefore entitled to the money. To leave the money in court would give the defendants a security which they have not shown that they are entitled to. The order of BUCKNILL, J., must therefore be modified in this respect also, and £1,265 8s. 6d. of the money in court must be paid out to the plaintiff. The appeal therefore succeeds.

FARWELL, L.J.—I am of the same opinion, and will only add a few words as to Ord. 22, r. 6 (c). It is impossible to construe that rule so as to make the court a mere machine, without any discretion as to ordering the payment of the money out of court. The judge has a discretion which must be exercised according to the evidence before him in each particular case. We have been told that the master considered that the costs due to the defendants would be greater than what is due to the plaintiff, but there was no evidence of that. It was put forward as a mere probability, and that is not enough to deprive the plaintiff of what he is primâ facie entitled to. On the other point I agree with the Master of the Rolls.

Appeal allowed.

Solicitors: *Pepper, Tangye, Young & Co.*, for *Pepper, Tangye & Winterton*, Birmingham; *Bircham & Co.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

THE EUROPA

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill and Bargrave Deane, JJ.), November 5, 6, December 3, 1907]

[Reported [1908] P. 84; 77 L.J.P. 26; 98 L.T. 246; 24 T.L.R. 151; 11 Asp.M.L.C. 19]

Shipping—Seaworthiness—Implied condition—Cargo damaged, not by unseaworthiness, but by cause excepted in charterparty—Right of shipowner to rely on exception.

A shipowner whose ship was unseaworthy at the beginning of the chartered voyage is not liable in damages to the charterer, the owner of cargo on board the vessel, for damage to the cargo occurring, not as the result of the unseaworthiness, but by a peril, e.g., collision, excepted in the charterparty. Seaworthiness is not a condition precedent in a contract of affreightment to the extent that, if the ship be unseaworthy, the shipowner is reduced to the position of a common carrier and liable for all damage occasioned to the cargo, even if such damage be solely caused by an excepted peril and not by the unseaworthiness.

Joseph Thorley, Ltd. v. *Orchis Steamship Co., Ltd.* (1), [1907] 1 K.B. 660, explained and distinguished.

Notes. Considered: *Internationale Guano en Superphosphaatwerken* v. *Macandrew*, [1909] 2 K.B. 360. Approved: *Kish* v. *Taylor, Sons & Co.*, [1911–13] All E.R. Rep. 481. Applied: *The Christel Vinnen*, [1924] P. 61. Considered:

Cosmopolitan Shipping Co. (*Inc.*) v. *Hatton and Cookson, Ltd.* (*Liverpool*) (1929), 143 L.T. 296. Explained: *Hong Kong Fir Shipping Co.* v. *Kawasaki Kisen Kaisha, Ltd.*, [1961] 2 All E.R. 257. Referred to: *Bank of Australia* v. *Clan Line Steamers* (1915), 21 Com. Cas. 13; *Elder, Dempster* v. *Paterson, Zochonis & Co., Ltd.*, [1924] All E.R.Rep. 135; *Tate and Lyle, Ltd.* v. *Hain Steamship Co.* (1934), 151 L.T. 249; *Smith, Hogg & Co.* v. *Black Sea and Baltic General Insurance Co.*, [1940] 3 All E.R. 405; *Monarch Steamship Co.* v. *A/B Karlshamns Oljefabriker*, [1949] 1 All E.R. 1; *Minister of Food* v. *Reardon Smith Line, Ltd.*, [1951] 2 T.L.R. 1158.

As to the implied condition of seaworthiness during loading, see 35 Halsbury's Laws (3rd Edn.) 373–377; and for cases see 41 Digest 471 et seq. See also Carriage of Goods by Sea Act, 1924 (23 Halsbury's Statutes (2nd Edn.) 884).

Cases referred to:

(1) *Joseph Thorley, Ltd.* v. *Orchis Steamship Co., Ltd.*, [1907] 1 K.B. 660; 76 L.J.K.B. 595; 96 L.T. 488; 23 T.L.R. 338; 51 Sol. Jo. 289; 10 Asp. M.L.C. 431; 12 Com. Cas. 251, C.A.; 41 Digest 488, *3185*.

(2) *Balian & Sons* v. *Joly, Victoria & Co., Ltd.* (1890), 6 T.L.R. 345, C.A.; 41 Digest 488, *3189*.

(3) *Boone* v. *Eyre* (1779), 1 Hy. Bl. 273, n.; 1 Wms. Saund. 320c; 2 Wm. Bl. 1312; 126 E.R. 160; 12 Digest (Repl.) 472, *3526*.

(4) *Hotham* v. *East India Co.* (1787), 1 Term Rep. 638; 99 E.R. 1295; 41 Digest 338, *1909*.

(5) *Ritchie* v. *Atkinson* (1808), 10 East, 295; 103 E.R. 787; 41 Digest 650, *4825*.

(6) *Havelock* v. *Geddes* (1809), 10 East, 555; 103 E.R. 886; 41 Digest 325, *1834*.

(7) *Steel* v. *State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp.M.L.C. 516, H.L.; 41 Digest 428, *2693*.

(8) *The Glenfruin* (1885), 10 P.D. 103; 54 L.J.P. 49; 52 L.T. 769; 33 W.R. 826; 5 Asp.M.L.C. 413; 41 Digest 423, *2655*.

(9) *Kopitoff* v. *Wilson* (1876), 1 Q.B.D. 377; 45 L.J.Q.B. 436; 34 L.T. 677; 24 W.R. 706; 3 Asp.M.L.C. 163; 41 Digest 473, *3045*.

(10) *Gilroy, Sons & Co.* v. *Price & Co.*, [1893] A.C. 56; 68 L.T. 302; 7 Asp.M.L.C. 314; 1 R. 76, H.L.; 41 Digest 479, *3121*.

Also referred to in argument:

The Pentland (1897), 13 T.L.R. 430; 41 Digest 479, *3123*.

Stanton v. *Richardson*, *Richardson* v. *Stanton* (1872), L.R. 7 C.P. 421; 41 L.J.C.P. 180; 27 L.T. 513; 21 W.R. 71; 1 Asp.M.L.C. 449; affirmed (1874), L.R. 9 C.P. 390; 43 L.J.C.P. 230; 30 L.T. 643; 2 Asp.M.L.C. 228, Ex. Ch.; affirmed (1875), 45 L.J.Q.B. 78; 33 L.T. 193; 24 W.R. 324; 3 Asp.M.L.C. 23, H.L.; 41 Digest 303, *1651*.

Action for damage to cargo.

The plaintiffs were the charterers of the steamship *Europa* and owners of cargo shipped by them in the ship; the defendants were the owners of the ship. The plaintiffs chartered the *Europa* on Mar. 2, 1906, to load a cargo of sugar at Stettin, and deliver it at Liverpool. It was a term of the charterparty that the owners were not to be held responsible for damage caused by

> "perils of the sea, collisions, and accidents of navigation, or latent defect in or accident to hull, and/or machinery, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other persons employed by the shipowner, or for whose acts he is responsible."

The sugar was loaded at Stettin, and as the *Europa* was entering the dock at Liverpool she collided with the pierhead at the entrance to the dock. This caused a closet pipe on the port side of the ship to break, with the result that water escaped from it into the 'tween deck and damaged the sugar. Further, four old scupper holes in the 'tween deck, from which the pipes to the bilges had been removed, were not tightly plugged, so the water escaped through them into the

lower hold, and damaged the goods. The county court judge held that the damage was in part caused by the unseaworthiness of the ship and in part by the excepted peril, that the warranty of seaworthiness had been broken, that the warranty was a condition precedent which went to the root of the contract, and that the breach of it displaced the contract and disentitled the shipowner to the protection of the exception clause, and he gave judgment for the cargo-owners for the whole damage sustained. The shipowners appealed.

Bailhache and *R. A. Wright* for the shipowners.
Horridge, K.C., and *Greer* for the cargo-owners.

Cur. adv. vult.

Dec. 3, 1907. **BUCKNILL, J.,** read the following judgment of the court.—The question raised on this appeal is a very important one, and we think the exact point has not yet been decided. It is whether a shipowner, whose ship was unseaworthy at the commencement of the chartered voyage, is liable in damages to the charterer, the owner of the cargo on board, not only for injury to his cargo caused directly as the result of that unseaworthiness, but also for injury caused to other portions of the cargo, not as the result of such unseaworthiness, but by a peril of the sea excepted in the charterparty; in other words, whether seaworthiness is a condition precedent in a contract of affreightment, to the extent that, if the ship be unseaworthy, the shipowner is reduced to the position of a common carrier, and liable for all damage occasioned to the cargo, even if such damage be solely caused by an excepted peril, and not by the unseaworthiness. The county court judge, from whose decision this appeal comes, held that he was, and gave judgment against the shipowners for all the damage occasioned to the cargo on the authority of *Joseph Thorley, Ltd.* v. *Orchis Steamship Co., Ltd.* (1). It is contended by the shipowners that *Joseph Thorley, Ltd.* v. *Orchis Steamship Co., Ltd.* (1) did not decide the question, although it must be admitted that the language of Sir Richard Henn Collins, M.R., is capable of being read as amounting to a direct opinion that in such a case the shipowner would be liable, although but for such unseaworthiness the exceptions in the charterparty would have protected him. The point for decision in that case was as to the liability of the shipowner to the cargo-owner where there had been a deviation from the original voyage and damage to cargo during its discharge by the negligence of the ship's stevedore, which negligence was an exception in the bill of lading. The sentence in Sir Richard Henn Collins' judgment on which the cargo-owners rely is at p. 667 of [1907] 1 K.B. Referring to the judgments delivered in the Court of Appeal in *Balian* v. *Joly, Victoria & Co.* (2), The Master of the Rolls said ([1907] 1 K.B. at pp. 667, 668):

> "The principle underlying those judgments seems to be that the undertaking not to deviate has the effect of a condition, or a warranty in the sense in which the word is used in speaking of the warranty of seaworthiness, and, if that condition is not complied with, the failure to comply with it displaces the contract. It goes to the root of the contract, and its performance is a condition precedent to the right of the shipowner to put the contract in suit. . . . I would only add that I am unable to see any reason why the doctrine admittedly applicable in the case of a contract of insurance with respect to the warranty of seaworthiness should not, as regards the undertaking not to deviate, apply equally to a contract of affreightment. It seems to me that the same considerations apply to both cases."

All the members of the Court of Appeal in *Joseph Thorley, Ltd.* v. *Orchis Steamship Co., Ltd.* (1) considered that the decision in *Balian* v. *Joly, Victoria & Co.* (2) governed the principle on which they gave their judgment, and that it was impossible to distinguish between that case and the case which they were deciding so as to render the reasoning upon which the earlier decision was found inapplicable

to the later one. But both were deviation cases, and the exact point decided in *Joseph Thorley, Ltd.* v. *Orchis Steamship Co., Ltd.* (1) was that as between shipowner and cargo-owner the deviation displaced the bill of lading contract altogether, so that it must now be taken that where there has been a deviation it amounts to a non-performance by the shipowner of a condition precedent, the result of which is that it displaces the original contract whether the deviation had any relation to the loss sustained by the cargo-owner or not. We have to decide whether "seaworthiness" is to be classed with non-deviation as a condition precedent, the non-performance of which voids the contract of affreightment, so that in the present case of the *Europa*, she being unseaworthy, even though she had carried all the cargo specified in the bill of lading to the proper destination, yet her owners cannot claim exemption from liability for damage caused, not by the unseaworthiness, but by a peril of the seas or other exception in the bill of lading. Except so far as appears in the judgment of the Court of Appeal in *Joseph Thorley, Ltd.* v. *Orchis Steamship Co., Ltd.* (1) we have not found any case where such a proposition has been enunciated. As between shipowner and charterer it may be that representations or promises made by the one or the other, or by both, may amount to warranties and be also conditions precedent which may give to that one who is not in default a right to treat the representation or promise of the other as a condition precedent, and to refuse to be bound to the performance of his own part of the contract. For example, if a shipowner enters into a charterparty with a merchant to go to a specified port or place and there to load a cargo, and when the ship arrives the charterer finds that the ship is not seaworthy, he may, if he be so minded, refuse to put his goods on board on the ground that the shipowner has not provided a seaworthy ship, and the shipowner could not oblige him to, because he himself had not performed on his part the condition which was precedent to his being able to oblige the charterer to load. But if the cargo was loaded and carried to its destination, even although it was damaged through the unseaworthiness, the remedy in the hands of the charterer is, in our judgment, to sue the shipowner for those damages, in answer to which the shipowner could not avail himself of the charterparty or bill of lading which, had his ship been seaworthy, would have been a protection to him. To that extent they would be useless to him. In our opinion, there must be a time when the charterer or cargo-owner has no longer a right to treat the promise or warranty of the shipowner as a condition precedent, but must rely on his breach of warranty and must then prove that the damage sued for has been caused by the unseaworthiness of the ship at the material time.

In *Boone* v. *Eyre* (3) Lord Mansfield said (1 Hy. Bl. at p. 273):

> "Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent."

That was an action by the plaintiff who had covenanted to convey to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes on it, in consideration of £500 and an annuity of £160 for his life. The plaintiff covenanted that he had a good title to the plantation and was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that, the plaintiff well and truly performing all and everything contained on his part to be performed, he, the defendant, would pay the annuity. Plea, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey. Demurrer, Lord Mansfield, after laying down the law as above, added (ibid.):

> "If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action."

Judgment for plaintiff on the demurrer. In *Hotham* v. *East India Co.* (4) ASHHURST, J., delivering the judgment of the court, said (1 Term Rep. at p. 645): A

> "There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent. . . . The merits, therefore, of the question must depend on the nature of the contract and the acts to be performed by the contracting parties." B

In *Ritchie* v. *Atkinson* (5) it was laid down that the cases where acts stipulated to be done by one party have been held to be conditions precedent to the claim of the other have been where it appeared, upon the face of the contract, to have been the intention of the parties that the one thing should not be done by one party till something else had been done by the other.

Having cited these cases to indicate the nature of a condition precedent C according to the terms of the contract, we will now state the facts in this case. The defendants' steamship the *Europa* was chartered by the plaintiffs to carry a cargo of sugar, in bags, from Stettin to Liverpool and there deliver it—one of the excepted perils mentioned in the charterparty being "collision." When entering the dock at Liverpool, the steamship's port bow collided with the dock wall, the blow breaking a water-closet pipe so that water got through into the 'tween D deck, and many bags of sugar which were stowed there were damaged by the water. In the 'tween deck were two scupper holes (near the w.c. pipe which had been so broken). The pipes which had originally been fixed to and led from these two scupper holes for the purpose of carrying off water from the 'tween deck to the bilges had been removed, and the scupper holes had been imperfectly plugged, with the result that the water from the broken closet pipe got through E the scupper holes and passed direct into the bags of sugar stowed in the lower hold and damaged several of them. It was not disputed that this imperfect plugging existed before the cargo was loaded and before the vessel started from Stettin, and that thereby the vessel was, to that extent, unseaworthy, and that the damage caused to the bags of sugar in the lower hold was caused through that unseaworthiness. The owners of the *Europa* did not dispute their liability F for the damage to the bags of sugar in the lower hold, admitting that it was caused directly by the unseaworthiness, but they disputed their liability for the damage caused to the bags of sugar in the 'tween deck on the ground that such damage was not caused at all by the unseaworthiness but was the direct result of the collision with the dock wall, which collision was an exception in the bill of lading. The county court judge decided, on the authority of *Joseph Thorley Ltd.* v. *Orchis* G *Steamship Co., Ltd.* (1), that as in the charterparty there was a warranty of seaworthiness which had been broken, there had been a non-performance of a condition precedent to the right of the shipowners to sue, displacing the express contract, and that it was immaterial to consider what amount of damage was done to the cargo in the 'tween deck through the collision with the dock wall, and what amount was done in the lower hold through the imperfectly plugged scupper H holes, and he gave judgment for the plaintiffs for £95, which represented the damage in the 'tween deck and also in the lower hold. It will be observed that he decided that the obligation to provide a seaworthy ship continued to be a condition precedent on the part of the shipowner, and that by his failure to perform it the expected peril of collision in the charterparty was no longer a protection to him for that damage which was in no way connected with the ship's unseaworthiness, I because he held the contract to have been entirely displaced.

If this case was one of deviation we should consider we were bound by *Joseph Thorley, Ltd.* v. *Orchis Steamship Co., Ltd.* (1), or if it had been a question between assured and underwriter there would have been no doubt that by the unseaworthiness of the ship the insurer would not have been liable, because the warranty of seaworthiness at the material time having been broken, the contract would thereby have ceased to exist. Is it true to say that the same considerations apply in this case? We have not found any authority for such a proposition,

A unless *Joseph Thorley, Ltd.* v. *Orchis Steamship Co., Ltd.* (1) is one. In Carver's Carriage by Sea (4th Edn.), s. 17, it is put thus:

> "The shipowner remains responsible for loss or damage to goods, however caused, if the ship is not in a seaworthy condition when she commenced the voyage, and if the loss would not have arisen but for that unseaworthiness."

B Section 102A reads:

> "An exception of negligence does not relieve the shipowner from his obligation to supply a ship that is seaworthy and fit for the cargo at the commencement of the voyage. He is liable for a loss caused by unseaworthiness or unfitness, although that may have been due to the negligence of the master and crew, unless there was an express exception relieving him from that unseaworthiness
C or want of fitness which was within the excepted perils."

In Parsons on Shipping (1869 Edn.), p. 320, we find this statement:

> "If the owner promises that his ship shall be staunch and tight and he carries the cargo, but the ship is neither staunch nor tight, this is not a separable promise in the sense in which a promise to carry a full cargo is, for a ship
D must be seaworthy or not seaworthy as a whole, but it is so far separable that the effect of the breach of it does not necessarily extend to the whole cargo, and therefore may not to the compensation for carrying it."

For the above opinion Mr. Parsons quotes *Havelock* v. *Geddes* (6). In that case the shipowner had covenanted with the charterer that he would forthwith make his ship tight and strong for a voyage of twelve months, and keep her so.
E Lord Ellenborough, in giving judgment, said (10 East, at p. 563):

> "And to be sure, if this were a condition precedent, the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, etc., would be a breach of the condition, and a defence to the whole of the plaintiff's demands."

F In *Steel* v. *State Line Steamship Co.* (7) Lord Blackburn said (3 App. Cas. at p. 88):

> "So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though itself a peril of the seas, which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract
G he has provided against it."

The *Glenfruin* (8) was cited during the arguments before us. There the defendants, the owners of cargo, were sought to be made liable for salvage services rendered to the *Glenfruin*, on which the defendants' cargo was being carried, the owners of the salving ship being also the owners of the salved ship. The salvage services were rendered because the *Glenfruin's* shaft broke during the voyage. The defence
H was that the *Glenfruin* was unseaworthy at the time when she began her voyage, and that the bill of lading given for the defendants' cargo, which excepted accidents from machinery—her shaft broke at sea in fine weather—was, therefore, not binding on them, and that the plaintiffs, as owners of the salving and salved ships, were liable to the defendants for all damages and losses occasioned by the unseaworthiness of their ship, the *Glenfruin*, of which losses salvage was one.
I Butt, J., said (10 P.D. at p. 108):

> "I am of opinion that exceptions in the bill of lading have not the effect either of limiting the implied warranty or of otherwise excepting the shipowner from liability to the owners or cargo for damage or loss occasioned by the breaking of the shaft."

A little later he said that the exceptions in the bill of lading had no application to the case of a ship which was unseaworthy at the time of sailing, and the unseaworthiness of which was the efficient cause of the loss or damage.

Kopitoff v. *Wilson* (9) was an action by an owner of goods shipped on board the defendant's ship which was lost while on a voyage from Hull to Cronstadt. The declaration alleged a breach of warranty of seaworthiness of the ship by the defendant, and that the goods were lost by reason of the breach, but it was not argued or suggested that, if the goods had not been lost in consequence of the unseaworthiness, the defendant would still have been liable or that the bill of lading would not have applied. The two questions which were left by BLACKBURN, J., to the jury were, first, whether the ship was seaworthy, and, secondly, whether, if she was not seaworthy, the goods were lost by her unseaworthiness.

Gilroy v. *Price* (10) was a decision on a question of fact, whether the respondents' ship was unseaworthy on sailing, and whether, if so, the bill of lading relieved them notwithstanding as to the goods which were damaged in consequence of such unseaworthiness, and it was held that, the ship being unseaworthy, the respondents lost the protection of the bill of lading as to the damage so caused. It appears to us, therefore, that whenever a cargo-owner has claimed damages from a shipowner for loss occasioned to his goods on the voyage, and the ship was in fact unseaworthy at the material time, the cargo-owner has had to prove that the loss was occasioned through or in consequence of the unseaworthiness, and it has not been sufficient to say merely that the ship was unseaworthy, and, therefore, that he was entitled to recover the loss, although there was no relation between the unseaworthiness and the damage.

We now come to the most anxious part of our judgment, and that is, whether SIR RICHARD HENN COLLINS, M.R., did say in *Joseph Thorley, Ltd.* v. *Orchis Steamship Co., Ltd.* (1), that the same considerations must apply in the case of a warranty of seaworthiness in a charterparty between shipowner and charterer as in the case of a policy of insurance on ship or goods, where such a warranty is made expressly or by implication. The conclusion to which we have come is that he neither said it, nor does it appear to us that he meant to say it. Reading his judgment as a whole, we think he had in his mind the analogy between a deviation and the warranty of seaworthiness in a policy of insurance, and that it so appears from what he said at p. 668 of the report in the LAW REPORTS, and must be taken to refer back to what he said at p. 667, which we have already quoted. He was speaking of two classes of cases only, and not of three, and to our minds this is clear. COZENS-HARDY, L.J., in his judgment, said nothing about a warranty of seaworthiness in the case of the chartering of a ship, neither did FLETCHER MOULTON, L.J. They confined themselves to the case of a deviation and its consequences between shipowner and the holder of the bill of lading. For these reasons we are of opinion that *Joseph Thorley, Ltd.* v. *Orchis Steamship Co., Ltd.* (1) is not a case that can properly be relied on as an authority justifying the judgment of the county court judge from whose decision this appeal comes, and, in our judgment, the cargo-owners in the present case are only entitled to recover from the shipowners in respect of such damage as directly resulted from the want of seaworthiness and not for the damage caused by the water which got into the 'tweendecks through the collision between the ship and the dock wall, which was covered by the excepted perils in the charterparty, and to the protection of which the shipowner was still entitled, notwithstanding the unseaworthiness of the vessel. As the damages have not been ascertained on this basis the matter must be sent back to the county court judge to assess them. The appeal will, therefore, be allowed, with general costs.

Solicitors: *Holman, Birdwood & Co.; Rawle & Co.*, for *Hill, Dickinson & Co.*, Liverpool.

[*Reported by* L. F. C. DARBY, ESQ., *Barrister-at-Law.*]

A

REYNOLDS *v.* ASHBY & SON

[House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten, Lord James of Hereford and Lord Lindley), July 8, 11, 12, August 5, 1904]

B [Reported [1904] A.C. 466; 73 L.J.K.B. 946; 91 L.T. 607; 53 W.R. 129; 20 T.L.R. 766]

Mortgage—Fixtures—Machines in factory bolted to floor—Hire-purchase—Default in payment for machines—Rights of mortgagee against owner of machinery.

C The appellant sold machines to the lessee of a factory under a hire-purchase agreement. The machines were fixed to concrete beds in the floor of the factory by bolts and nuts so that they could be removed without injury to the building. The lessee mortgaged the factory, together with the fixtures, machinery and fittings. Later, he made default in payment to the appellant, who brought an action to recover the machines or their value against the mortgagee who had entered into possession of the factory.

D **Held:** the machines were fixtures which the mortgagee was entitled to retain as against the appellant.

Notes. Distinguished: *Re Allen*, [1907] 1 Ch. 575; *Ellis* v. *Glover and Hobson*, [1908] 1 K.B. 388; *Re Morrison, Jones and Taylor, Cookes* v. *Morrison, Jones and Taylor*, [1914] 1 Ch. 50; *Hamer* v. *London City and Midland Bank* (1918), 87 E L.J.K.B. 973. Considered: *Re Rogerstone Brick and Stone Co., Southall* v. *Wescomb*, [1919] 1 Ch. 110. Referred to: *Crossley* v. *Lee*, post; *Becker* v. *Riebold* (1913), 30 T.L.R. 142; *Horwich* v. *Symond* (1914), 110 L.T. 1016; *Hulme* v. *Brigham*, [1943] 1 All E.R. 204.

As to fixtures, see 23 Halsbury's Laws (3rd Edn.) 489 et seq.; and for cases see 31 Digest (Repl.) 199 et seq. As to rights of mortgagees in fixtures under a F hire-purchase agreement, see 19 Halsbury's Laws (3rd Edn.) 558, 559; and for cases see 35 Digest 309, 310.

Cases referred to:

(1) *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; 66 L.J.Ch. 114; 75 L.T. 610; 45 W.R. 356; 13 T.L.R. 139; 41 Sol. Jo. 154, C.A.; 35 Digest 309, *563*.

(2) *Hellawell* v. *Eastwood* (1851), 6 Exch. 295; Cox, M. & H. 452; 20 L.J.Ex. G 154; 15 J.P. 724; 155 E.R. 554; sub nom. *Halliwell* v. *Eastwood*, 17 L.T.O.S. 96; 31 Digest (Repl.) 205, *3361*.

(3) *Chidley* v. *Churchwardens of West Ham* (1874), 32 L.T. 486; 39 J.P. 310; 38 Digest (Repl.) 627, *933*.

(4) *Tyne Boiler Works Co.* v. *Longbenton Overseers* (1886), 18 Q.B.D. 81; 56 L.J.M.C. 8; Ryde, Rat. App. (1886–90) 241; sub nom. *Tyne Boiler Works* H *Co.* v. *Tynemouth Union*, 55 L.T. 825; 51 J.P. 420; 35 W.R. 110; sub nom. *R.* v. *Tyne Boiler Works Co., Ltd.*, 3 T.L.R. 134, C.A.; 38 Digest (Repl.) 628, *935*.

(5) *Wake* v. *Hall* (1883), 8 App. Cas. 195; 52 L.J.Q.B. 494; 48 L.T. 834; 47 J.P. 548; 31 W.R. 585, H.L.; 31 Digest (Repl.) 225, *3621*.

(6) *Trappes* v. *Harter* (1833), 2 Cr. & M. 153; 3 Tyr. 603; 3 L.J.Ex. 24; 149 I E.R. 712; 35 Digest 305, *540*.

(7) *Lyon & Co.* v. *London City and Midland Bank*, [1903] 2 K.B. 135; 72 L.J.K.B. 465; 88 L.T. 692; 51 W.R. 400; 19 T.L.R. 334; 47 Sol. Jo. 386; 31 Digest (Repl.) 207, *3384*.

(8) *Walmsley* v. *Milne* (1859), 7 C.B.N.S. 115; 29 L.J.C.P. 97; 1 L.T. 62; 6 Jur.N.S. 125; 8 W.R. 138; 141 E.R. 759; 35 Digest 304, *535*.

(9) *Re Gawan, Ex parte Barclay* (1855), 5 De G.M. & G. 403; 26 L.T.O.S. 97; 19 J.P. 804; 1 Jur.N.S. 1145; 4 W.R. 80; 43 E.R. 926; sub nom. *Re Barclay, Ex parte Gawan*, 25 L.J.Bcy. 1, L.C. & L.JJ.; 35 Digest 308, *560*.

(10) *Mather* v. *Fraser* (1856), 2 K. & J. 536; 25 L.J. Ch. 361; 27 L.T.O.S. 41; 2 Jur.N.S. 900; 4 W.R. 387; 69 E.R. 895; 35 Digest 306, *543*. A

(11) *Climie* v. *Wood* (1869), L.R. 4 Exch. 328; 38 L.J.Ex. 223; 20 L.T. 1012, Ex. Ch.; 35 Digest 304, *537*.

(12) *Longbottom* v. *Berry* (1869), L.R. 5 Q.B. 123; 10 B. & S. 852; 39 L.J.Q.B. 37; 22 L.T. 385; 35 Digest 307, *553*.

(13) *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 20 W.R. 990; 35 Digest 304, *538*. B

(14) *Gough* v. *Wood & Co.*, [1894] 1 Q.B. 713; 63 L.J.Q.B. 564; 70 L.T. 297; 42 W.R. 469; 10 T.L.R. 318; 9 R. 509, C.A.; 35 Digest 309, *562*.

(15) *Southport and West Lancashire Banking Co.* v. *Thompson* (1887), 37 Ch.D. 64; 57 L.J.Ch. 114; 58 L.T. 143; 36 W.R. 113, C.A.; 35 Digest 303, *526*.

(16) *Leigh* v. *Taylor*, [1902] A.C. 157; 71 L.J.Ch. 272; 86 L.T. 239; 50 W.R. 623; 18 T.L.R. 293; 46 Sol. Jo. 264, H.L.; 40 Digest (Repl.) 705, *2008*. C

(17) *Fisher* v. *Dixon* (1845), 12 Cl. & Fin. 312; 9 Jur. 883; 8 E.R. 1426, H.L.; 38 Digest (Repl.) 789, *70*.

Also referred to in argument:

Elwes v. *Maw* (1802), 3 East, 38; 102 E.R. 510; 31 Digest (Repl.) 213, *3454*.

Parsons v. *Hind* (1866), 14 W.R. 860; 31 Digest (Repl.) 208, *3391*. D

Hitchman v. *Walton* (1838), 4 M. & W. 409; 1 Horn. & H. 374; 8 L.J.Ex. 31; 150 E.R. 1489; 31 Digest (Repl.) 232, *3674*.

Monti v. *Barnes*, [1901] 1 K.B. 205; 70 L.J.Q.B. 225; 83 L.T. 619; 49 W.R. 147; 17 T.L.R. 88, C.A.; 35 Digest 302, *523*.

Lyde v. *Russell* (1830), 1 B. & Ad. 394; 9 L.J.O.S.K.B. 26; 109 E.R. 834; 31 Digest (Repl.) 217, *3527*. E

Re Nutter, Ex parte Cotton (1842), 2 Mont. D. & De G. 725; 6 Jur. 1045; 35 Digest 303, *531*.

Cullwick v. *Swindell* (1866), L.R. 3 Eq. 249; 36 L.J.Ch. 173; 31 J.P. 228; 15 W.R. 216; 35 Digest 304, *536*.

Boyd v. *Shorrock* (1867), L.R. 5 Eq. 72; 37 L.J.Ch. 144; 17 L.T. 197; 32 J.P. 211; 16 W.R. 102; 35 Digest 306, *547*. F

Cross v. *Barnes* (1877), 46 L.J.Q.B. 479; 36 L.T. 693; 35 Digest 305, *539*.

Sanders v. *Davis* (1885), 15 Q.B.D. 218; 54 L.J.Q.B. 276; 33 W.R. 655; sub nom. *Saunders* v. *Davis*, 1 T.L.R. 499; 35 Digest 310, *569*.

Sheffield and South Yorkshire Permanent Benefit Building Society v. *Harrison* (1884), 15 Q.B.D. 358; 54 L.J.Q.B. 15; 51 L.T. 649; 33 W.R. 144; 1 T.L.R. 61, C.A.; 35 Digest 307, *549*. G

Appeal from a decision of the Court of Appeal (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.), reported [1903] 1 K.B. 87, refusing an application by the plaintiff, the present appellant, for judgment, or a new trial, in an action tried before Lawrance, J., with a jury. The facts are set out in the opinion of Lord Lindley.

Haldane, K.C., Herbert Reed, K.C., and *Rowlatt* for the appellant. H

J. A. Hamilton, K.C., A. Powell, K.C., and *Keeling* for the respondents.

Their Lordships took time for consideration.

Aug. 5, 1905.—The following opinions were read.

THE EARL OF HALSBURY, L.C.—I cannot say that I am satisfied with the mode in which this case has been disposed of. There are various modes by which I things, when they are trade fixtures, can be protected from being absorbed by the owner of the freehold or by a mortgagee, and I should hesitate very much before I agreed that such fixtures as are in question here, which could only be used when fixed, must necessarily belong to the freeholder or to the mortgagee. By an express or implied contract between the parties interested, machinery for the purpose of working in a factory might be protected so that an unpaid vendor who has lent on the hire system machinery to a person who wanted to use it in his mill might make it safe from being absorbed either by creditor or landlord. There is nothing,

however, here from which I can infer either an express or implied contract for the removal of these articles which undoubtedly were fixed; and, under these circumstances, I do not dissent from the conclusion at which your Lordships have arrived. I only desire to say that I agree to affirm this judgment on the special facts which I find and from the absence of any evidence which can alter the rule which has been many times affirmed, on which the learned judge acted when the case was before him.

LORD MACNAGHTEN concurred.

LORD JAMES OF HEREFORD.—In this case, the question for your Lordships' decision is whether certain machines employed for use in a factory had, by virtue of their being fixed to the building, become a portion of it, or whether they were chattels, and so to be regarded as movable property. It appears that the appellant sold certain machines to a person named Holdway, on what is known as a hire-purchase agreement. The appellant knew that the machines would be used under ordinary conditions in a factory then in course of erection. This factory belonged to Holdway, who executed three mortgages on the land on which the factory was being built,

"together with the buildings, fixtures, machinery, and fittings erected thereon."

The respondents were the third mortgagees, but, having paid off the two preceding mortgagees, they are now entitled to the land and building of the factory, the further question being raised whether the machines have or have not become part of the mortgaged property. The purchaser Holdway, the mortgagor of the factory, did not fulfil his contract with the appellant, so that the goods were unpaid for. On the other hand, it must be taken that the appellant was aware that the machines would be used in a factory, and would be fixed in the usual manner to the building. There is also nothing unusual in effecting a mortgage on a factory (whatever that may include) in the terms which I have mentioned. In consequence of Holdway's default, the appellant claimed the machines as his property. The respondents resisted the claim on the ground that, the machines being fixed to the mortgaged building, the property in them passed under the mortgage deed. At the trial which took place before LAWRANCE, J., and a jury, the learned judge held that, as there were no facts in dispute, there was no question for the jury, and, following the decision in *Hobson* v. *Gorringe* (1), held that the contention of the respondents was correct, and directed a verdict for them. The Court of Appeal has confirmed this judgment. In the first instance, I was disposed to think that the question of chattel or fixture, being one of fact, ought necessarily to have been submitted to the jury, but apparently the course taken by the learned judge in treating the question as one of law, or as one of fact on which the jury were bound to accept his directions and apply the law as declared by him, was correct, and certainly was acquiesced in by both parties to the suit. The manner in which the machines were fixed to the buildings has been clearly brought to the notice of your Lordships. This fixing of the machines is to obtain steadiness, and effects the usual condition under which such machines are used.

The authorities controlling the questions respecting the difference between fixtures and chattels are very numerous, and have been raised between different parties. The rights of landlord or tenant, or mortgagor or mortgagee, and liability to being rated, have all brought this question to a legal issue for the determination of our courts. I do not propose to review those authorities in detail, but, having consulted and considered them, I have come to the conclusion that the weight of authority is in favour of the view that these machines must be held to be affixed to the building so as to pass under the mortgage as being a portion of the factory. The cases supporting this view are very numerous, but the principal case now generally referred to is that of *Hobson* v. *Gorringe* (1), the authority on which LAWRANCE, J., acted. Doubtless there are cases and dicta on which the appellant is entitled to rely. *Hellawell* v. *Eastwood* (2), *Chidley* v. *Churchwardens of West Ham* (3), *Tyne Boiler*

Works v. *Longbenton Overseers* (4), *Wake* v. *Hall* (5), and several other cases were relied on at the bar to show that these machines should be regarded as chattels, but in none of these cases did the question come up between mortgagor and mortgagee, and in some of them the decisions are explained on grounds other than those existing in the present case. In the same way, *Trappes* v. *Harter* (6), a case arising out of a mortgage, was decided principally on a question of local custom, and in *Lyon & Co.* v. *London City and Midland Bank* (7), the decision in favour of some chairs being chattels appears to have been correctly decided on the special facts of that case. It was argued at the bar that, as Holdway had not paid for the machines, they remained the property of the appellant, and could not, by any act of Holdway, be dealt with as fixtures. But the argument cannot, I think, prevail. The machines were sold by the appellant for the purpose of being used in the manner in which they were used. In order so to use them, it was necessary that they should be fixed, and so become part of the building.

For these reasons, I feel that, following a great preponderance of authority, your Lordships' judgment should be in favour of the respondents.

LORD LINDLEY.—This is an action brought to recover certain machines bought from the appellant by one Holdway on what is called a hire-purchase agreement. Holdway did not pay the instalments of his purchase money as they became due, and the machines, therefore, never became his property. The appellant knew that the machines were wanted in order to fit up a factory which Holdway was building, and he put the machines into the factory on beds of concrete prepared for them. The machines were worked by steam power transmitted from a steam engine by shafts, wheels, and gearing in the usual way. Each machine was complete in itself. Each was fastened down to its concrete bed by bolts and nuts. The bolts were firmly fixed in the concrete and passed through, and projected beyond, holes in the machine. The nuts were screwed on the ends of the bolts where they projected, and the machines were thus held fast. By unscrewing the nuts, each machine, although heavy, could no doubt be raised up and removed without injury to the building containing it, and without injury to its concrete bed and to the bolts embedded in it. While the factory was being erected, but before any of the machines in question were put into it, Holdway mortgaged to one Burrows the land on which the factory was being built, "together with the buildings, fixtures, machinery, and fittings erected thereon." Holdway afterwards executed a second mortgage to one Hatt, and at a later date he executed a third mortgage to the respondents. The machines in question were put into the factory soon after it was mortgaged to the respondents. After they had been fixed, the second mortgagee took possession, and the respondents then paid off the two prior mortgages, and took transfers of them. The purpose for which the machines were obtained and fixed appears to me unmistakable; it was to complete and use the building as a factory. It is true that the machines could be removed if necessary, but the concrete beds and bolts prepared for them negative any idea of treating the machines when fixed as movable chattels. The question is whether they passed by the mortgage. But for the fact that Holdway had not paid for them the question would not, in my opinion, be open to the slightest doubt. There is a long series of decisions of the highest authority showing conclusively that, as between a mortgagor and a mortgagee, machines, fixed as these were to land mortgaged, pass to the mortgagee as part of the land. The decisions in question begin with *Walmsley* v. *Milne* (8), and include *Re Gawan, Ex parte Barclay* (9), *Mather* v. *Fraser* (10), *Climie* v. *Wood* (11), *Longbottom* v. *Berry* (12), *Holland* v. *Hodgson* (13), *Gough* v. *Wood* (14), and *Hobson* v. *Gorringe* (1). Others were referred to in the argument, but I need only mention *Southport and West Lancashire Banking Co.* v. *Thompson* (15), where it was held that whether the mortgagor is an owner in fee or only a leaseholder (as in this case) is immaterial with reference to the question now under consideration. It is quite impossible to overrule these decisions.

It must be conceded that there are dicta in other cases, and even decisions, which

A show that, for some purposes, even machines more or less like these have been treated as chattels. There is *Hellawell* v. *Eastwood* (2), a case of distress which has been much commented on in later cases, and is of questionable authority; there are rating cases, such as *Chidley* v. *Churchwardens of West Ham* (3) and *Tyne Boiler Works Co.* v. *Longbenton Overseers* (4); there is the case of the miners' huts, *Wake* v. *Hall* (5), which was raised between miners in the Peak district and
B landowners, and turned entirely on a local custom; there is the tapestry case, *Leigh* v. *Taylor* (16), which was raised between a tenant for life and remainderman; there is *Fisher* v. *Dixon* (17), which was raised between the heir and the executors of the deceased owner of the land and the machinery fixed to it. I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them, attention must be paid not only to the nature
C of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last, but not least, to the position of the rival claimants to the things in dispute. In this case, and still regarding the question for the present as concerning the mortgagor on the one side and the mortgagee on the other, it is, in my opinion, impossible to hold that the machines did not pass with the mortgage.

D The only authorities on mortgages which present any difficulty are *Trappes* v. *Harter* (6) and the very recent case of *Lyon & Co.* v. *London City and Midland Bank* (7). *Trappes* v. *Harter* (6) was a reputed ownership case, and turned on the facts stated in a Special Case. The court there held that some trade fixtures did not pass by a mortgage of the property to which they were attached. The Special Case, however, stated facts showing that the machines as fixed were locally
E regarded as chattels, that the partners who put them up so regarded them, and that the mortgagee knew this and so treated them. This accounts for the decision. In *Lyon & Co.* v. *London City and Midland Bank* (7) some chairs were hired from the plaintiffs by the owner of a place of public entertainment in Brighton. The Brighton Town Council required the chairs to be fastened so as not to be easily displaced, and this was done. The chairs were screwed to bars fastened to the
F floor. The building and fixtures were then mortgaged to the defendants. The mortgagees took possession and claimed the chairs, but the court held they did not form part of the property mortgaged, but remained so many chattels. Having regard to the nature of the things fixed, the mode of fixing and the order of the town council, the decision was, in my opinion, quite right, and in accordance with the authorities above referred to.

G I pass now to consider whether, in this case, the fact that the mortgagor Holdway had not acquired the ownership of the machines by paying for them entitles the appellant to recover their value from the respondents. The title to chattels may clearly be lost by being affixed to real property by a person who is not the owner of the chattels. This was pointed out in *Gough* v. *Wood & Co.* (14), and is very old law. Holdway agreed to buy the machines; but the appellant knew what
H he wanted them for, and that, before paying for them, he intended to put them up in his factory and to use them. The appellant knew that the factory was mortgaged, and he ran the risk of the machines being claimed as fixtures. In effect, Holdway was authorised by the appellant to convert the chattels into fixtures, subject to the right of the appellant to enter and retake them if he did not pay them. But, apart from this knowledge and authority, the result would be the same,
I although not so obvious. After the machines were fixed, and before the appellant claimed them, the second mortgagee took possession; the appellant's right to enter and remove the machines, resting as it did on his contract with Holdway, ceased to be exercisable. The appellant has no greater rights against the respondents than he had against the second mortgagee, whose rights the respondents have acquired. The machines had ceased to be chattels belonging to the appellant; they were not chattels wrongfully detained by the respondents. The machines had become fixtures which the appellant was not entitled to remove from the possession of the mortgagees. This was the view taken by both LAWRANCE, J., and by the Court of

Appeal, and was in accordance with *Hobson* v. *Gorringe* (1), which, in my opinion, was correctly decided. There were really no facts in dispute, and nothing would have been gained by leaving any question to the jury. The legal questions raised on the undisputed facts were, in my opinion, rightly decided, and the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors: *Scott, Spalding & Bell*; *Thomas H. E. Foord.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

R. *v.* PINCKNEY. Ex parte PINCKNEY

[Court of Appeal (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), March 12, 1904]

[Reported [1904] 2 K.B. 84; 73 L.J.K.B. 475; 90 L.T. 468; 68 J.P. 361; 52 W.R. 338; 20 T.L.R. 363; 48 Sol. Jo. 328]

Habeas Corpus—Jurisdiction to order issue of writ—Person to whom writ directed out of the jurisdiction.

The court has no jurisdiction to order a writ of habeas corpus to issue directed to a person who, at the date of the order, is out of the jurisdiction.

Notes. As to jurisdiction to grant a writ of habeas corpus, see 11 Halsbury's Laws (3rd Edn.) 27 et seq.; and for cases see 16 Digest (Repl.) 281–283.

Cases referred to in argument:

R. v. *Cowle* (1759), 2 Burr. 834; 2 Keny. 519; 97 E.R. 587; 16 Digest (Repl.) 281, *511.*

Bourn's Case (1619), Cro. Jac. 543; Palm. 54, 96; 79 E.R. 465; sub nom. *Barnes' Case*, 2 Roll. Rep. 157; 16 Digest (Repl.) 281, *500.*

Barnardo v. *Ford*, *Gossage's Case*, [1892] A.C. 326; 61 L.J.Q.B. 728; 67 L.T. 1; 56 J.P. 629; 41 W.R. 333; 8 T.L.R. 728; 36 Sol. Jo. 681; 1 R. 17, H.L.; 16 Digest (Repl.) 280, *492.*

Hobhouse's Case (1820), 3 B. & Ald. 420; 1 State Tr.N.S. App. 1346; 106 E.R. 716; sub nom. *R.* v. *Hobhouse*, 2 Chit. 207; 16 Digest (Repl.) 279, *486.*

R. v. *Barnardo* (1889), 23 Q.B.D. 305; 58 L.J.Q.B. 553; 61 L.T. 547; 54 J.P. 132; 37 W.R. 789; 5 T.L.R. 673, C.A.; 16 Digest (Repl.) 304, *799.*

Ex parte Wyatt (1837), 5 Dowl. 389; Will. Woll. & Dav. 76; sub nom. *R.* v. *Rochfort and Wyatt*, 1 Jur. 84; 16 Digest (Repl.) 282, *518.*

Appeal from an order of the Divisional Court (Lord Alverstone, C.J., Lawrance and Kennedy, JJ.), affirming an order made by Walton, J., at chambers directing that a writ of habeas corpus should issue, but that it should be allowed to lie in the office.

On July 29, 1903, one Pinckney applied to Walton, J., at chambers for a writ of habeas corpus directing the appellant, Mrs. Pinckney, his wife, to produce before the judge at chambers the child who was the issue of their marriage. The judge ordered that the writ should issue. At the time this application was made, the appellant was, with the child, out of the jurisdiction. On Aug. 5, 1903, the return day, Walton, J., quashed the order he had made on July 29, and made a new order directing that the writ should issue, but that it should lie in the office until the appellant should come within the jurisdiction. On appeal by the

A appellant, the Divisional Court thought that the question was one for the discretion of the judge, and refused to interfere with the order of Walton, J.

Mrs. Pinckney appealed.

Montague Lush, *K.C.*, and *A. S. Poyser* for the appellant.

Colefax for the respondent.

B **SIR RICHARD HENN COLLINS, M.R.**—It seems to me that the writ of habeas corpus in this case has been issued under a mistake. There is evidence that the last known place where the appellant was staying was somewhere in France, and that she had expressed an intention to remain out of the jurisdiction. It has hardly been contended that the court has jurisdiction to order a writ of habeas corpus to issue directed to a person who is not within the jurisdiction. C Reliance was placed on a kind of estoppel, because it was said that, at the application to the judge at chambers, no point was taken on behalf of the appellant that she was out of the jurisdiction. But the omission to raise that point would not give the court jurisdiction, if otherwise they had none. There was no jurisdiction to order the writ to issue, and the appeal must be allowed.

D **MATHEW, L.J.**—I am of the same opinion. I agree with that part of the order of Walton, J., by which he quashed his order of July 29, but I cannot agree with his order substituting a new writ which was to lie in the office till it could be served. I think that he had no jurisdiction to make that order. This is not like a case of attachment. A writ of habeas corpus must be served immediately it is issued.

E **COZENS-HARDY, L.J.**—I agree.

Appeal allowed.

Solicitors: *Harries, Wilkinson & Raikes; Futvoye & Baker.*

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

F

G

Re MILLS. Ex parte MILLS

[Court of Appeal (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.), December 15, 18, 1905]

[Reported [1906] 1 K.B. 389; 94 L.T. 41; 54 W.R. 322]

H *Bankruptcy—Petition—Deed of assignment for benefit of creditors—Creditor not entitled to allege deed of assignment as an act of bankruptcy—Petition founded on another act of bankrupt.*

Where a creditor, by his conduct in reference to a deed of assignment in favour of creditors executed by the debtor, is precluded from founding a bankruptcy petition against the debtor based on the deed as an act of bankruptcy, but does not so act that he is bound by the deed, he is entitled to present a I bankruptcy petition based on some other act of bankruptcy.

Dicta of Lord Cairns, L.J., in *Re Stray, Ex parte Stray* (1) (1867), 2 Ch. App. at p. 381, and of Vaughan Williams, L.J., in *Re Woodroff, Ex parte Woodroff* (2) (1897), 76 L.T. at p. 503, applied.

Notes. Followed: *Re Sunderland*, [1911–13] All E.R.Rep. 291. Referred to: *Weston* (*Victor*) (*Fabrics*), *Ltd.* v. *Morgensterns*, [1937] 3 All E.R. 769.

As to assignment for the benefit of creditors, see 2 Halsbury's Laws (3rd Edn.), 260 et seq.; and for cases on the subject, see 4 Digest (Repl.) 139 et seq.

Cases referred to:

(1) *Re Stray, Ex parte Stray* (1867), 2 Ch. App. 374; 36 L.J.Bcy. 7; 16 L.T. 250; 15 W.R. 600, L.JJ.; 4 Digest (Repl.) 141, *1271.*

(2) *Re Woodroff, Ex parte Woodroff* (1897), 76 L.T. 502; 2 Mans. 46, D.C.; 4 Digest (Repl.) 142, *1278.*

(3) *Re Shaw, Ex parte Gill* (1901), 83 L.T. 754; 49 W.R. 264; 45 Sol. Jo. 218, C.A.; 4 Digest (Repl.) 176, *1610.*

(4) *Re A Debtor (No. 20 of 1904), Ex parte The Debtor* (1904), 91 L.T. 664; 53 W.R. 223; sub nom. *Re Goldberg*, 21 T.L.R. 2, D.C.; affirmed 21 T.L.R. 139, C.A.; 4 Digest (Repl.) 176, *1611.*

Also referred to in argument:

Re Rees, Ex parte Alsop (1859), 1 De G.F. & J. 289; 29 L.J.Bcy. 7; 1 L.T. 285; 6 Jur.N.S. 282; 8 W.R. 106; 45 E.R. 370, L.JJ.; 4 Digest (Repl.) 142, *1277.*

Re Mendelssohn, Ex parte Mendelssohn, [1903] 1 K.B. 216; 72 L.J.K.B. 106; 87 L.T. 721; 10 Mans. 9, C.A.; affirmed sub nom. *Mendelssohn* v. *Ratcliff*, [1904] A.C. 456; 73 L.J.K.B. 1027; 91 L.T. 204; 20 T.L.R. 670; 53 W.R. 240; 10 Com. Cas. 14, H.L.; 5 Digest (Repl.) 1255, *10,078.*

Appeal from a receiving order made by a registrar in bankruptcy. At a meeting of the creditors of the debtor on July 21, 1905, H. C. Baines, one of the creditors who was present, took no active part in the meeting except to say by his solicitor that he would probably be disposed to concur in any resolution passed by the general body of the creditors. The meeting was adjourned until July 25, 1905, when Baines was again present, but stated early in the meeting that he was only attending for the purpose of listening, and did not intend to take any active part in the proceedings. A resolution that the debtor, instead of being made bankrupt, should execute a deed of assignment of all his property to a trustee in favour of his creditors was passed, none of the creditors voting against it. The debtor's solicitor then proposed the name of a certain accountant as the trustee of the deed of assignment. The evidence was conflicting as to what part Baines took with respect to this step, but it was contended that, on hearing the name put forward as the proposed trustee, Baines had exclaimed that in any circumstances a nominee of the debtor would not be the right person to appoint as trustee, and had suggested the name of another person, Mr. Oscar Berry; and that his suggestion was adopted on the resolution in which Baines took no part, and on which he refused to vote. On July 27, 1905, the deed of assignment was executed, and shortly afterwards it was duly registered. Baines, having recovered judgment against the debtor in respect of the debt owing to him, served the debtor with a bankruptcy notice in respect of the judgment debt. On Aug. 5, 1905, Baines presented a petition in bankruptcy against the debtor founded on his non-compliance with the bankruptcy notice as an act of bankruptcy. A receiving order against the debtor was made by Mr. Registrar Giffard, on the ground that to hold that Baines was estopped would be to go much further than *Re Shaw, Ex parte Gill* (3) or *Re A Debtor, Ex parte the Debtor* (4); and he was entitled to petition for a receiving order.

The debtor now appealed.

Ernest Pollock, K.C., and *Hansell* for the debtor.

McCall, K.C., and *Cooper Willis* for the petitioning creditor.

VAUGHAN WILLIAMS, L.J.—I propose to deal with this case on the basis that the petitioning creditor did something more than shout out at the meeting that a nominee of the debtor was not a proper person to be appointed trustee of the deed of assignment, but that he did go on to offer his advice that Mr. Berry was a proper person to be appointed, and that his advice was acted on by the meeting. It may be that the effect of that conduct was to make the petitioning creditor in a sense privy to the execution of that deed in so far as he could not afterwards use the execution of the deed as an act of bankruptcy on which to

found a bankruptcy petition against the debtor. But one thing is, to my mind, quite plain, that the petitioning creditor did not so act that he was bound by the deed in any way, and, if he was not bound by the deed, there was nothing to prevent him from recovering any debt that was due to him in any way that he legally could. In my judgment, there was nothing to prevent him from presenting a bankruptcy petition based on some other act of bankruptcy. I did express an opinion to that effect in *Re Woodroff, Ex parte Woodroff* (2), speaking of the other act of bankruptcy as another and independent act of bankruptcy. True, my observation there was not necessary to the decision of that case, but I think that that observation was right, and I am prepared now to act on it. I think so the more, because, when one looks at the judgment of LORD CAIRNS, L.J., in *Re Stray, Ex parte Stray* (1), one finds this passage (2 Ch. App. at p. 381):

> "I have no doubt at all that the facts I have thus stated bring the case entirely within the principle of the cases to which I have referred, and I cannot look on Mr. Goody otherwise than as a person who assented to the execution of this deed, was taking advantage of the deed for the purpose of shielding the estate for a certain length of time, and was willing, if certain other arrangements such as were contemplated could have been made, to take still further advantage from the deed."

Then comes the following important passage (ibid.):

> "I again repeat that I think nothing passed actually to bind Mr. Goody entirely to abide by the deed and to come in under the deed as a person who would take no other proceedings for the recovery of his debt, but what I think Mr. Goody is estopped from saying is, that this deed, at the moment it was executed under the circumstances I have mentioned, was a fraudulent deed, and one of which he can complain for the purpose of alleging an act of bankruptcy committed by the debtor."

In my judgment, the conclusion on which my observation was based in *Re Woodroff, Ex parte Woodroff* (2) is entirely supported by that passage from the judgment of LORD CAIRNS, L.J., which I have just read.

STIRLING, L.J.—I am of the same opinion. I think that, by his conduct, the petitioning creditor put himself in a position which prevented him from alleging that the deed of assignment in favour of the creditors was an act of bankruptcy. But it is quite clear from what is expressly stated by LORD CAIRNS, L.J., in *Re Stray, Ex parte Stray* (1), that a creditor may be in such a position as to be precluded from alleging that, as a matter of fact, such a deed is an act of bankruptcy, and still not be bound by the deed. In the present case, it is perfectly clear from the evidence that the petitioning creditor distinctly refused to be bound by the deed. He is not for the purpose of the petition in this case obliged to allege the execution of this deed as an act of bankruptcy on which he relies. He relies on another act of bankruptcy. It may be that, if an order is made on this petition, the trustee in bankruptcy will be entitled to say that the bankruptcy relates back to and avoids the deed, because the trustee will not be bound by the conduct of the petitioning creditor. But, as regards the petitioning creditor himself, he is not alleging the deed as an act of bankruptcy or saying that it was a fraudulent deed. I think, therefore, that the appeal fails, and must be dismissed with costs.

COZENS-HARDY, L.J.—I agree.

Appeal dismissed.

Solicitors: *Culross & Holt*; *Goldberg, Barrett & Newall.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

WINANS *v.* ATTORNEY-GENERAL

[House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten and Lord Lindley), February 8, 9, and May 10, 1904]

[Reported [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 20 T.L.R. 510]

B

Domicil—Change of domicil—Burden of proof—Abandonment of domicil of origin and choice of new domicil—Proof of fixed and determined intention to make place of new domicil permanent home—Inference of intention from residence.

Where a domicil of origin has been proved it lies on the person who asserts a change of domicil to establish it. To establish a change it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined purpose and intention to make the place of his alleged new domicil his permanent home. Change of domicil is not to be inferred from the mere fact of residence in the new place, nor from an attitude of indifference or a disinclination to move which increases with increasing years, but lengthy residence may be important in questions of domicil, for, if a man goes about and mixes in society over a substantial period, it is possible that a change may come over his mind.

C

D

Per Lord Macnaghten: I think that there is a good deal of force in some observations that were made by Lord Cranworth and Lord Wensleydale in *Whicker* v. *Hume* (1) (1858), 7 H.L.Cas. 124, to the effect that in these days when the tendency of the educated and leisured classes is to become cosmopolitan you must look very narrowly into the nature of a residence suggested as a domicil of choice before you deprive a man of his native domicil.

E

Circumstances in which **held** that no intention to change a domicil of origin had been proved.

Notes. Legacy duty was abolished by the Finance Act, 1949, s. 27 (1)–(3). Considered: *Casdagli* v. *Casdagli*, [1918–19] All E.R.Rep. 462; *Bowie* (or *Ramsay*) v. *Liverpool Royal Infirmary*, [1930] All E.R.Rep. 127; *Peal* v. *Peal* (1930), 143 L.T. 768; *A.-G.* v. *Yule and Mercantile Bank of India*, [1931] All E.R.Rep. 400; *Gatty and Gatty* v. *A.-G.*, [1951] P. 444; *Re Gape's Will Trusts*, *Verey* v. *Gape*, [1952] 2 All E.R. 579. Referred to: *Re James*, *James* v. *James* (1908), 98 L.T. 438; *Waddington* v. *Waddington* (1920), 36 T.L.R. 359; *Lord Advocate* v. *Jaffrey*, [1920] All E.R.Rep. 242; *Rudd* v. *Rudd*, [1923] All E.R.Rep. 637; *Ross* v. *Ross*, [1930] A.C. 1; *Bodrini* v. *Bodrini and Martini*, [1931] All E.R.Rep. 708; *Herd* v. *Herd*, [1936] 2 All E.R. 1516; *Gulbenkian* v. *Gulbenkian*, [1937] 4 All E.R. 618; *I.R.Comrs.* v. *Cohen* (1937), 21 Tax Cas. 301; *Travers* v. *Holley & Holley*, [1953] 2 All E.R. 794; *Stransky* v. *Stransky*, [1954] 2 All E.R. 536; *Carr* v. *Carr*, [1955] 2 All E.R. 61; *Russell* v. *Russell and Roebuck*, [1957] 1 All E.R. 929; *Tennekoon, Comr. for Registration of Indian and Pakistani Residents* v. *Duraisamy*, [1958] 2 All E.R. 479.

F

G

H

As to domicil, see 7 Halsbury's Laws (3rd Edn.) 14–27; and for cases see 11 Digest (Repl.) 326 et seq.

Cases referred to:

(1) *Whicker* v. *Hume* (1858), 7 H.L.Cas. 124; 28 L.J.Ch. 396; 31 L.T.O.S. 319; 22 J.P. 591; 4 Jur.N.S. 933; 6 W.R. 813; 11 E.R. 50, H.L.; 11 Digest (Repl.) 336, *86*.

I

(2) *Munro* v. *Munro* (1840), 7 Cl. & Fin. 842; 7 E.R. 1288, H.L.; 11 Digest (Repl.) 349, *172*.

(3) *Bell* v. *Kennedy* (1868), L.R. 1 Sc. & Div. 307, H.L.; 11 Digest (Repl.) 329, *39*.

(4) *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441, H.L.; 11 Digest (Repl.) 326, *22*.

(5) *Douglas* v. *Douglas*, *Douglas* v. *Webster* (1871), L.R. 12 Eq. 617; 41 L.J.Ch. 74; 25 L.T. 530; 20 W.R. 55; 11 Digest (Repl.) 333, *60*.

(6) *The Lauderdale Peerage* (1885), 10 App. Cas. 692, H.L.; 11 Digest (Repl.) 333, *66.*

(7) *Re Craignish, Craignish* v. *Hewitt,* [1892] 3 Ch. 180; 67 L.T. 689; 8 T.L.R. 451, C.A.; 11 Digest (Repl.) 354, *235.*

(8) *A.-G.* v. *Pottinger* (1861), 6 H. & N. 733; 30 L.J.Ex. 284; 4 L.T. 368; 7 Jur.N.S. 470; 9 W.R. 578; 158 E.R. 303; 11 Digest (Repl.) 359, *275.*

(9) *Haldane* v. *Eckford* (1869), L.R. 8 Eq. 631; 21 L.T. 87; 17 W.R. 1059; 11 Digest (Repl.) 339, *110.*

(10) *Moorhouse* v. *Lord* (1863), 10 H.L.Cas. 272; 1 New Rep. 555; 32 L.J.Ch. 295; 8 L.T. 212; 9 Jur.N.S. 677; 11 W.R. 637; 11 E.R. 1030, H.L.; 11 Digest (Repl.) 332, *56.*

(11) *Re Steer* (1858), 3 H. & N. 594; 28 L.J.Ex. 22; 32 L.T.O.S. 130; 157 E.R. 606; 11 Digest (Repl.) 335, *78.*

(12) *Doucet* v. *Geoghegan* (1878), 9 Ch.D. 441; 26 W.R. 825, C.A.; 11 Digest (Repl.) 337, *94.*

Also referred to in argument:

Hodgson v. *De Beauchesne* (1858), 12 Moo.P.C.C. 285; 33 L.T.O.S. 36; 7 W.R. 397; 14 E.R. 920, P.C.; 11 Digest (Repl.) 332, *55.*

King v. *Foxwell* (1876), 3 Ch.D. 518; 45 L.J.Ch. 693; 24 W.R. 629; 11 Digest (Repl.) 330, *48.*

A.-G. v. *Kent* (1862), 1 H. & C. 12; 31 L.J.Ex. 391; 6 L.T. 864; 10 W.R. 722; 158 E.R. 782; 11 Digest (Repl.) 343, *134.*

Hoskins v. *Matthews* (1856), 8 De G.M. & G. 13; 25 L.J.Ch. 689; 26 L.T.O.S. 210; 2 Jur.N.S. 196; 4 W.R. 216; 44 E.R. 294, L.JJ.; 11 Digest (Repl.) 345, *144.*

Appeal by executors of the will of William Louis Winans from a decision of the Court of Appeal (SIR RICHARD HENN COLLINS, M.R., STIRLING and MATHEW, L.JJ.), affirming a decision of the Queen's Bench Division (KENNEDY and PHILLIMORE, JJ.), on an information by the Attorney-General on behalf of the Crown to recover legacy duty at 10 per cent. on an annuity of £2,000 bequeathed by the testator, who died on June 22, 1897, to his sister-in-law, Ellen de la Rue, or her assigns during her life for her separate use. The courts below decided in favour of the Crown.

Their Lordships took time for consideration.

May 10, 1904. The following opinions were read.

THE EARL OF HALSBURY, L.C.—The short question here is whether Mr. Winans was at the time of his death domiciled in this country. So far as it is a question of law it is simple enough to state; but when the law has been stated a difficult and complex question of fact arises, which it is almost always very hard to solve. The law is plain that where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined purpose to make the place of his new domicil his permanent home. Although many varieties of expression have been used, I believe that the idea of domicil may be quite adequately expressed by the phrase: Was the place intended to be the permanent home?

Mr. Winans was an American citizen; he resided in Russia for some time; he had various residences in England and great sporting leases in Scotland. He married in St. Petersburg a Guernsey lady. He had property in the United States, and he originally came to England upon the recommendation of his medical man. He lived a very long time in England; and if I were satisfied that he intended to make England his permanent home, I do not think that it would make any difference that he had arrived at the determination to make it so by reason of the state of his health, as to which he was very solicitous. It would be enough that for obvious reasons he had determined to make England his permanent

home; but was that his determination? I confess that I am not able very confidently to answer that question either way. I have been in considerable doubt when I view his whole career whether he ever intended finally to remain here. He had invented cigar-shaped boats, in which he took a deep interest as inventor, and also as one who meant to travel back to his own country when his boats succeeded. It may be that your Lordships do not think that he was likely to succeed; but it may be confidently asserted that the inventor thoroughly believed that he would succeed. It is true that great reliance might be placed upon his great acquisition of sporting areas in Scotland, but, on the other hand, they were acquired by him rather as profit-making investments than because he himself was devoted to sport; but even in this, as in some other parts of his conduct, it is difficult to say that a certain inference could be deduced from what he did. Being a man of enormous wealth, he never made a home for himself or his family such as one would have expected if he had really meant to remain permanently in England.

Like all questions of fact dependent upon a variety of smaller facts, it is possible to treat this or that piece of evidence as conclusive, and different minds will attribute different degrees of importance to the same facts. I must admit that I have regarded the whole history of Mr. Winans' life differently at different stages of the argument, and the conclusion to which I have come is that I cannot say that I can come to a satisfactory conclusion either way; but then the law relieves me from the embarrassment which would otherwise condemn me to the solution of an insoluble problem, because it directs me in my present state of mind to consider upon whom is the burden of proof. Undoubtedly, it is upon the Crown; and, as I have said that I cannot bring myself to a conclusion either way whether Mr. Winans did or did not intend to change his domicil, his domicil of origin must remain, and I, therefore, am of opinion that the judgment of the Court of Appeal ought to be reversed.

LORD MACNAGHTEN.—There is, I think, hardly any branch of law which has been more frequently or more fully discussed in this House in comparatively modern times than the law of domicil. Difficulties have arisen, and difficulties must arise now and then, in coming to a conclusion upon the facts of a particular case. But those difficulties, as LORD COTTENHAM said, are

> "much diminished by keeping steadily in view the principle which ought to guide the decision as to the application of the facts."

Domicil of origin, or, as it is sometimes called, perhaps less accurately domicil of birth, differs from domicil of choice mainly in this—that its character is more enduring, its hold stronger and less easily shaken off. In *Munro* v. *Munro* (2) LORD COTTENHAM observed (7 Cl. and Fin. at pp. 876, 877) that it was one of the principles adopted not only by the laws of England but generally by the laws of other countries:

> "that the domicil of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and acquiring another as his sole domicil. . . . Residence alone has no effect per se, though it may be most important as a ground from which to infer intentions."

LORD CAIRNS, L.C., said in *Bell* v. *Kennedy* (3) (L.R. 1 Sc. & Div. at p. 310):

> "The law is, beyond all doubt, clear with regard to the domicil of birth, that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicil is acquired."

The onus of proving that a domicil has been chosen in substitution for the domicil of origin lies upon those who assert that the domicil of origin has been lost.

A As LORD WESTBURY points out (ibid. at pp. 320, 321):

> "Residence and domicil are two perfectly distinct things. . . . Although residence may be some small primâ facie proof of domicil, it is by no means to be inferred from the fact of residence that domicil results, even although you do not find that the party had any other residence in existence or in contemplation."

B LORD CHELMSFORD's opinion in *Udny* v. *Udny* (4) (L.R. 1 Sc. & Div. at p. 455) was that

> "in a competition between a domicil of origin and an alleged subsequently-acquired domicil there may be circumstances to show that however long a residence may have continued no intention of acquiring a domicil may have
C existed at any one moment during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of an intention to retain the domicil of origin, but whether it is proved that there was an intention to acquire another domicil."

Such an intention, I think, is not to be inferred from an attitude of indifference
D or a disinclination to move, increasing with increasing years, least of all from the absence of any manifestation of intention one way or the other. It must be, to quote LORD WESTBURY again, a "fixed and settled purpose." His Lordship said (ibid. at p. 321):

> "Unless you are able to show that with perfect clearness and satisfaction to yourselves, it follows that a domicil of origin continues."

E So heavy is the burden cast upon those who seek to show that the domicil of origin has been superseded by a domicil of choice. And rightly, I think. A change of domicil is a serious matter—serious enough when the competition is between two domicils both within the ambit of one and the same kingdom or country, more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution
F and other things which depend on domicil. To the same effect was the inquiry which LORD CAIRNS proposed for the consideration of the House in *Bell* v. *Kennedy* (3) (ibid. at p. 311). It was this—whether the person whose domicil was in question had "determined" to make, and had in fact made, the alleged domicil of choice

G "his home with the intention of establishing himself and his family there and ending his days in that country."

In a later case (*Douglas* v. *Douglas* (5)) which came before WICKENS, V.-C., who was an excellent lawyer, and, owing to the official position which he long held, peculiarly conversant with cases of this sort, all the authorities were reviewed. The competition there was between a Scottish domicil of origin and an alleged
H English domicil of choice. The learned Vice-Chancellor thought the case "a peculiar and difficult one." He put the question in this way (L.R. 12 Eq. at p. 645):

> "What . . . has to be here considered is whether the testator . . . ever actually declared a final and deliberate intention of settling in England, or whether his conduct and declarations lead to the belief that he would have declared
I such an intention if the necessity of making the election between the countries had arisen."

If the authorities which I have cited are still law, the question which your Lordships have to consider must, I think, be this: Has it been proved "with perfect clearness and satisfaction to yourselves" that Mr. Winans had at the time of his death formed a "fixed and settled purpose"—a "determination," "a final and deliberate intention"—to abandon his American domicil and settle in England? Considering the amount of Mr. Winans' fortune, which was between two and three millions in marketable securities, and the length of his residence in

this country, it is somewhat singular that the evidence offered on the question before your Lordships should be so meagre. There is not a single letter written by or to him, or a memorandum or note of any sort made by him, which bears directly on the point. There is nothing but long-continued residence in England, on the one hand, and some oral declarations and some words in some legal documents, on the other. There is nothing else except such inference as may be drawn from a consideration of Mr. Winans' character and disposition, the life he led here, and the objects which he seems to have had most at heart.

The principal events in Mr. Winans' life may be stated briefly. He was born in the United States in 1823. He lived there till 1850, residing at Baltimore with his father, a railway contractor, and employed in his father's business. Mr. Winans' eldest son, Walter, who was examined in this case, says that when he spoke of Baltimore he always called it "home." In 1850 Mr. Winans went to Russia. He was employed by the Russian government, as his father had been, in equipping railways there on the American system. During the Crimean War he rendered assistance to the Russian government in the construction and equipment of gunboats to be used against the enemy—England and England's ally. In Russia he married a Guernsey lady, the daughter of a gentleman also employed by the Russian government. He had two sons by her. In 1859 his health broke down. There were symptoms of consumption, and he was warned by his doctor that another winter in Russia would probably be fatal. He was advised to winter in Brighton in England. Very reluctantly, under medical orders, he left St. Petersburg and spent the winter in an hotel at Brighton, returning to Russia when the winter was over. In 1860 he took a furnished house in Brighton, No. 2, Chichester Terrace, for a term of five years, determinable at the end of any year. He also took the next house, No. 1, for a term of twenty-one years, determinable at the fifth, seventh, or fourteenth year. He connected the two houses structurally. He held both these houses at the time of his death—the furnished house, No. 2, as tenant from year to year, and No. 1 on a tenancy similar to that on which it was originally taken. From 1860 down to 1870 or 1871 he used to spend the winter at Brighton and about eight months of the year in Russia. In 1870 he gave up his house in St. Petersburg, and took a lease of some shooting in Scotland, apparently for the sake of his sons, for he shot very little himself. From 1871 to 1883 he spent about two months in Russia, two or three months in Kissingen, in Germany, and the rest of the year in Brighton, Scotland, or London. In 1883 he ceased to visit Russia, thenceforward dividing his time between Kissingen, Brighton, London, and Scotland. This mode of life continued until 1893. After that date he spent the whole year in England—in London, Brighton, and the country. He never bought an estate in England for himself or for either of his sons. As far as he was concerned "he preferred living in furnished houses or hotels," so his son says.

Two events in his life referred to in the argument have, I think, no bearing on the question before your Lordships. In 1877, to please his wife, he bought the Crown lease of a house in Palace Gardens. But he never lived there until after 1892. It was shut up, and he tried to dispose of it. When he bought the lease he seems to have made particular inquiries in order to ascertain whether there was anything in the conditions of the lease which might prevent his parting with it at any time he pleased. He never liked to "hamper" himself. Any prudent person would probably have done the same. Then there was his unfortunate experiment in the management and improvement of deer forests in Scotland. He took vast tracts of forest, not, perhaps, altogether for sporting purposes, as sport is understood in this country. After a time he inclosed the ground with miles of fencing to prevent the deer from straying. He had a notion that the value of the forest for letting purposes would be much increased by stopping shooting for some years and allowing the stags a longer term of undisturbed life. However, he got into trouble with the crofters and with his lessors, and he became rather unpopular, both with those by whom deer-stalking is highly esteemed and those to whom deer forests are an abomination. He

thought, too, that he had rather wasted money on the shootings—so he gave up his experiment, and he seems to have got rid of all the Scottish shootings before his death.

In the dearth of evidence by written or oral declaration as to Mr. Winans' intentions, it seems to me to be important to consider what manner of man he was, what were the main objects of his existence and what sort of life he lived in this country. I think that there is a good deal of force in some observations that were made by both LORD CRANWORTH and LORD WENSLEYDALE in *Whicker* v. *Hume* (1) to the effect that in these days, when the tendency of the educated and leisured classes is to become cosmopolitan—if I may use the word—you must look very narrowly into the nature of a residence suggested as a domicil of choice before you deprive a man of his native domicil. Mr. Winans was a person of considerable ability and of singular tenacity of purpose, self-centred and strangely uncommunicative. He was not interested in many things, but whatever he did he did, as his son says, thoroughly. He became completely absorbed in a scheme when he took it up. At the same time he lived a very retired—almost a secluded—life. He took no part in general or municipal politics. He rarely went into society. He had no intimate friends, if, indeed, he had any friends at all, in this country. There is no evidence that he was interested in any charity or charitable or philanthropic institution in England. Although he was on affectionate terms with his two sons he never let them into his secrets. "He always worked his business himself," his son says, "and never brought us into the business affairs in any way." And although at odd times he mentioned his property in America, he never allowed even his eldest son "to understand much about it."

Mr. Winans had three objects in life. His first object was his health. He nursed and tended it with wonderful devotion. He took his temperature several times a day. He had regular times for taking his temperature and regular times for taking his various waters and medicines. Besides the care of his health there were two other objects which engrossed his thoughts. The first was the construction of spindle-shaped vessels commonly called cigar ships. This form of vessel was, as Mr. Winans asserted, an invention of the Winans family. Many patents were taken out for it both in England and in America. It was asserted that vessels of this type would be able to cross the Atlantic without pitching or rolling. In an application to Congress in the year 1892 Mr. Winans represented himself as attached heart and soul to his country and asked for protection for a long term of years in consideration of the great expenditure which he and his family had incurred in perfecting the invention, and the vast benefits that would result from it to the people of the United States. Mr. Winans declared his confident expectation that a fleet of spindle-shaped vessels subsidised by Congress would restore to America the carrying trade which had fallen into the hands of England and other foreign nations, secure to America the command of the sea, and make it impossible for Great Britain to maintain war against the United States. Such a fleet as he described in his application could, he said, "meet war vessels in open sea near the European side and destroy one vessel after another, so that none of them would be able to reach our shores." In the development of his invention Mr. Winans stated that he had incurred an expense equal to nearly 4,000,000 dollars. Mr. Winans's confidence in this project remained unshaken to the end of his life, and he kept an office in Beaufort Gardens where a staff of engineers and draftsmen were engaged in working out the problem.

There was another scheme which Mr. Winans hoped to develop and work in connection with his fleet of spindle-shaped vessels. In 1859 a property in Baltimore, about 200 acres in extent, called Ferry Bar, was purchased on behalf of the Winans family originally for the purpose of being used, as Mr. Winans states in a letter of Jan. 31, 1882, "for the service of the sea-going steamers of the spindle-shaped form." The scheme was that the water frontage should be used for wharves and docks, while a portion of the property should be laid out for the building of first-class houses as a sort of Belgravia. There Mr. Winans intended

to build a big house for himself and control the undertaking, which would make the property, he thought, when developed, worth one million sterling. Nothing practical came of this scheme because the family could not agree among themselves as to how the property was to be developed. So Mr. Winans determined to wait until he could get the whole into his own hands. Then he would develop the property himself in his own way and according to his own ideas. He did not succeed in acquiring the entire interest until just before his death. At the date of his death, his son says, "he was working night and day on it." I find that in the conveyances of the last portion of the Ferry Bar property, which were prepared just before his death, and are dated June 16, 1897, Mr. Winans is described as "of city of Baltimore, but now sojourning in the city of London, England."

Of course, to us these schemes of Mr. Winans' appear wild, visionary, and chimerical. But I have no doubt that to a man like Mr. Winans, wholly wrapt up in himself, they were very real. They were the dream of his life. For forty years he kept them steadily in view. And one was anti-English and the other wholly American. It was in connection with these schemes that the latest and clearest declaration of intention was made by Mr. Winans. Mr. H. Montague Williams, who was his solicitor at Brighton, says that about two years before his death, a time which in cross-examination he fixed in the winter of 1895 or beginning of 1896, Mr. Winans entered into rather a lengthy disquisition about the Ferry Bar property. Mr. Winans told him that he was making arrangements for buying the remaining shares in it—that a good deal of it belonged to him, and that he intended when he had done that to go out to America and live in Baltimore and develop the estate there himself. Mr. Williams says he remembers Mr. Winans particularly saying: "If I do that it will be worth a million pounds," and he adds: "The decided way in which he said 'I shall go out to Baltimore' (or words to that effect) struck me at the time." The only other circumstance to be mentioned is that in his will, dated Feb. 4, 1897, Mr. Winans describes himself as a "citizen of the United States of America."

It was argued on behalf of the Crown that although Mr. Winans may have been prevented by the state of his health from returning to America when he left Russia, and although he could not have safely attempted the voyage in the latter years of his life, yet there was a time in which he might have ventured to cross the Atlantic in an ordinary liner. The obvious answer is that at that time, when divided counsels and family disagreements prevented the development of the Ferry Bar property, he had no object in going to Baltimore. Then it was said that the length of time during which Mr. Winans resided in this country leads to the inference that he must have become content to make this country his home. Length of time is, of course, a very important element in questions of domicil. An unconscious change may come over a man's mind. If the man goes about and mixes in society that is not an improbable result. But in the case of a person like Mr. Winans, who kept himself to himself and had little or no intercourse with his fellow men, it seems to me that at the end of any space of time, however long, his mind would probably be in the state in which it was at the beginning. When he came to this country he was a sojourner and a stranger, and he was, I think, a sojourner and a stranger in it when he died.

On the whole, I am unable to come to the conclusion that Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicil and settling finally in England. I think that up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated. To take the test proposed by WICKENS, V.-C., "If the question had arisen in a form requiring a deliberate or solemn determination," I have no doubt that Mr. Winans, who was, as his son says, "entirely American in all his ideas and sympathies," would have answered it in favour of America. I am, therefore, of opinion that the Crown has not discharged the onus cast upon it, and I think that the order appealed from ought to be reversed.

LORD LINDLEY stated the facts and continued: I take it to be clearly settled, by the *Lauderdale Peerage Case* (6), *Udny* v. *Udny* (4), and *Bell* v. *Kennedy* (3) that the burden of proof in all inquiries of this nature lies upon those who assert that a domicil of origin has been lost, and that some other domicil has been acquired. Further, I take it to be clearly settled that no person who is sui juris can change his domicil without a physical change of place coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicil is an intention to adopt the second residence as home; or, in other words, an intention to remain without any intention of further change except possibly for some temporary purpose: see STORY'S CONFLICT OF LAWS, s. 43, and *Re Craignish*, *Craignish* v. *Hewitt* (7); *A.-G.* v. *Pottinger* (8); and *Douglas* v. *Douglas* (5).

The change of residence here is plain enough, and need not be enlarged upon. The difficulty is about the intention of Mr. Winans with reference to the change. The exact time when he made up his mind to settle here cannot be ascertained. There is no document or conversation which enables anyone to fix the date. But it by no means follows that when he died it cannot be inferred that he must have abandoned all thoughts of going back to America and settling there, and have gradually become content to make his home in this country without contemplating any further change. If this can be established, a change of domicil will be the legal result: *Haldane* v. *Eckford* (9); *Douglas* v. *Douglas* (5). An intention to change nationality, to cease to be an American and to become an Englishman, was said to be necessary in *Moorhouse* v. *Lord* (10); but that view was decided to be incorrect in *Udny* v. *Udny* (4). Intention may be inferred from conduct, and there are cases in which domicil has been changed, notwithstanding a clear statement that no change of domicil was intended: see *Re Steer* (11); and per WICKENS, V.-C., in *Douglas* v. *Douglas* (5). An expressed intention to return for a temporary purpose, or in some possible event which never happens, will not prevail over a clear inference from other circumstances of an intention to remain: see *A.-G.* v. *Pottinger* (8), per BRAMWELL, B.; *Doucet* v. *Geoghegan* (12).

I do not propose to refer at length to the details of Mr. Winans' life. They were elaborately brought to your Lordships' attention by counsel. There is no real controversy about the facts. The question is what inference ought to be drawn from them. Here I have the misfortune to differ from my noble and learned friends who have just addressed the House. I have arrived at the same conclusion as that arrived at by KENNEDY and PHILLIMORE, JJ., and by the Court of Appeal. I cannot myself draw any other inference. Where was his home, his settled permanent home? He had one and only one, and that one was in this country; and long before he died I am satisfied that he had given up all serious idea of returning to his native country. He was an American citizen permanently settled in this country. But, although so settled, he was proud of his nationality and had no intention of changing it. He may at one time have looked back on Baltimore as his possible ultimate home, but he had ceased to do so long before he died. In 1880 he proposed to build a house for himself in Baltimore, but this came to nothing; and none of his later schemes for developing his property there was carried out in his lifetime, nor did those schemes involve any change of residence on his part. A dim hope and expectation of being at some time able to return to America when he had succeeded in constructing a ship to his liking, which he never did, is spoken to by his son; but when last does not appear. I can find nothing to displace the only inference which I can draw from Mr. Winans' conduct for the last twenty or twenty-five years of his life. In my opinion the appeal should be dismissed, with costs. *Appeal allowed.*

Solicitors: *E. H. Quicke*, for *H. Montague Williams*, Brighton; *Sir F. C. Gore*, *Solicitor of Inland Revenue.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

Re BUTTON. Ex parte VOSS

[Court of Appeal (Vaughan Williams, Romer and Stirling, L.JJ.), February 3, 1905]

[Reported [1905] 1 K.B. 602; 74 L.J.K.B. 403; 92 L.T. 250; 53 W.R. 437; 49 Sol. Jo. 296; 12 Mans. 111] B

Bankruptcy—Secured creditor—Valuation of security—Inquiry into correctness of estimate—Trustee's right to redeem—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52) *s.* 6 (2).

Bankruptcy—Receiving order—Refusal—"Sufficient cause"—Prejudice to creditors—Consent by debtor and petitioning creditor to order that debtor should admit act of bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 7 (3). C

When a secured creditor presents a bankruptcy petition against a debtor, and, instead of stating in his petition that he is willing to give up his security for the benefit of the creditors generally, he gives an estimate of the value of the security under the Bankruptcy Act, 1883, s. 6 (2) [now Bankruptcy Act, 1914, s. 4 (2)], provided the estimate is a genuine estimate and not a sham, the court will not, on the hearing of the petition, inquire into its correctness, although the result of the inquiry might be to show that the unsecured balance of the debt was less than the £50 necessary to support the petition. When the petitioning creditor has made such an estimate, the trustee in bankruptcy cannot redeem the security at the value estimated in the petition unless the creditor proves, in which event the creditor cannot take any benefit in the administration in bankruptcy except on the basis of his estimate, at all events in the absence of mistake; and if the creditor states in his petition that he is willing to give up the security if the creditor is adjudged bankrupt, he cannot prove without giving it up. D E

Per Curiam: Even though the debtor and the petitioning creditor have consented to an order that the debtor should admit an act of bankruptcy, it is "sufficient cause" under the Bankruptcy Act, 1883, s. 7 (3), for the court not to make a receiving order that other creditors might be prejudiced. F

Notes. The Bankruptcy Act, 1883, s. 6 (2) and s. 7 (3), have been replaced by the Bankruptcy Act, 1914, s. 4 (2) and s. 5 (3) respectively.

As to petitions by secured creditors, see 2 Halsbury's Laws (3rd Edn.) 298–300 and 501. For cases see 4 Digest (Repl.) 405–406. For the Bankruptcy Act, 1914, ss. 4 and 5, see 2 Halsbury's Statutes (2nd Edn.) 330–335. G

Cases referred to:

(1) *Re Vautin, Ex parte Saffery*, [1899] 2 Q.B. 549; 68 L.J.Q.B. 971; 48 W.R. 96; 43 Sol. Jo. 706; 6 Mans. 391; 4 Digest (Repl.) 405, *3618*.

(2) *Re Lacey, Ex parte Taylor* (1884), 13 Q.B.D. 128; sub nom. *Lacy, Ex parte Taylor*, 1 Morr. 113, D.C.; 4 Digest (Repl.) 405, *3617*. H

Also referred to in argument:

Re Pogose, Ex parte Vanderlinden (1882), 20 Ch.D. 289; 51 L.J.Ch. 760; 47 L.T. 138; 30 W.R. 930, C.A.; 4 Digest (Repl.) 374, *3404*.

Moor v. *Anglo-Italian Bank* (1879), 10 Ch.D. 681; 40 L.T. 620; 27 W.R. 652; 4 Digest (Repl.) 396, *3568*. I

Couldery v. *Bartrum* (1881), 19 Ch.D. 394; 51 L.J.Ch. 265; 45 L.T. 689; 30 W.R. 141, C.A.; 4 Digest (Repl.) 375, *3414*.

Re Otway, Ex parte Otway, [1895] 1 Q.B. 812; 64 L.J.Q.B. 521; 72 L.T. 452; 2 Mans. 174; 14 R. 389, C.A.; 4 Digest (Repl.) 172, *1581*.

Appeal from a receiving order made by Mr. Registrar Giffard on the petition of a judgment creditor, William Voss, alleging that the debtor was indebted to the creditor in the sum of £316 8s. 2d., the amount of a final judgment obtained

by the creditor against the debtor, and interest and costs; that the creditor held security for the payment of that sum, the value of which security he estimated at £265, thus leaving a balance of £51 18s. 2d. unsecured; and that the act of bankruptcy was the failure of the debtor to comply with the requirement of a bankruptcy notice issued at the instance of the creditor.

It was alleged that the total debt was erroneously stated at £316 18s. 2d., and that it should have been stated at £316 15s. 9d. The security for the debt consisted of a charge on certain leasehold premises belonging to the debtor made by him in favour of the petitioning creditor to secure a loan for which the debtor had given a promissory note for £300 payable at four months. On the petition first coming on for hearing on Dec. 20, 1904, it was adjourned by order of the registrar to Jan. 3, 1905, on the terms agreed to between the parties, to the effect that the debtor should admit the petitioning creditor's debt and the act of bankruptcy, and undertake to consent to a receiving order being made on the adjourned hearing in case the debt had not been settled. The creditor then insisted as one of the conditions of the adjournment that the debtor should pay to him within thirteen days £50 and the costs of his petition, and pay or give a security for a debt of another creditor who had a petition on the file. The terms of the arrangement were endorsed on counsel's brief. When the petition came on for hearing on Jan. 3, 1905, the debtor opposed the making of the receiving order. He read two affidavits made by himself, sworn respectively Dec. 20, 1904, and Jan 3, 1905. In the first he alleged that the value of the security held by the creditor was considerably more than sufficient to pay his debt in full; that there had been no proper estimate of the security within s. 6 (2) of the Bankruptcy Act, 1883; and that if the petition should be adjourned he would be able to arrange for a transfer of the security or satisfy the creditor's claim. In the second affidavit he alleged that on Dec. 23 and 28, 1901, the creditor received from the tenant of the premises comprised in the charge sums amounting together to £15 in respect of rent of the premises, and that his claim against the debtor was thus reduced to £36 18s. 2d. It was decided by the registrar that, having regard to the agreement which had been come to between the parties on Dec. 20, 1904, the debtor could not raise the question as to the sufficiency of the petitioning creditor's debt; and he therefore made a receiving order. On Jan. 6. 1905, the registrar stayed the advertisement of the receiving order pending an appeal, the debtor undertaking to enter an appeal forthwith. The debtor appealed.

Tindale Davis for the debtor.

Frank Mellor, for the respondent, was not called on to argue.

VAUGHAN WILLIAMS, L.J.—Having regard to the contents of these affidavits, it seems to me impossible to say that the creditor has not complied with the requirements of s. 6 (2) of the Bankruptcy Act, 1883, as to the valuation of his security. He has given an estimate, and it is admitted that his estimate is such that it is not possible to say that it is a mere sham, and not a substantial estimate. It was urged upon us that the registrar should, when a petitioning creditor estimates his security, inquire whether the estimate is right. I think that the effect of the subsection, which throws upon the creditor the duty of making the estimate, is to avoid the necessity for any such inquiry. It was said that that is not likely to have been the intention of the legislature, because it would enable a malicious or unscrupulous creditor to make a fictitious estimate in his petition, and undervalue his security and obtain a receiving order upon that estimate, though in fact his debt was fully secured, or was so much secured that the unsecured part would not be sufficient to support a bankruptcy petition. The answer to that is that the petitioning creditor makes the estimate at his own risk, and if a bankruptcy comes about it is plain that though s. 6 (2) may not apply in the circumstances stated by WRIGHT, J., in *Re Vautin, Ex parte Saffery* (1), and I am inclined to think that it would not apply, yet when he comes in to

prove the petitioning creditor is bound in this sense that he cannot take any benefit in the administration in bankruptcy except on the basis of the estimate which he made in his petition. I very much doubt whether he ought in any circumstances to be allowed to amend his valuation and come in. It may be that he is not bound in the sense that the trustee in bankruptcy is entitled to redeem the security at that valuation, but that is something which is not the act of the petitioning creditor. In my opinion, the moment we arrive at the conclusion that the estimate is a real estimate and not a sham we ought not to go into the question as to what is the true value after the declaration of the estimated value.

There is the further point as to whether the debtor could in this case go into the question at all whether the petitioning creditor has complied with the statute, because it was said that he was excluded from so doing by the terms of the consent order. In my judgment, the registrar ought always to be careful, although there is a consent order, that a receiving order is not made by reason of that consent in such circumstances as that the other creditors might be prejudiced. That I understand was the ground of the decision in those cases in which the judgment has proceeded on that or some other estoppel. In circumstances like that the court has always held that it ought to refuse to make the receiving order, as that would be a case coming under the words "for other sufficient cause" in sub-s. (3) of s. 7.

There is only one other matter to be dealt with on the second point that was made. It was said that the receiving order ought not to be made in this case, because the creditor by getting such an agreement as was embodied in the consent order was using the bankruptcy law for a purpose for which it was not intended. I am aware that anyone who has any experience of bankruptcy proceedings knows that a petitioning creditor constantly makes use of bankruptcy proceedings for the very purpose of extorting 20s. in the pound for himself from a debtor who has a large number of creditors, with the result that they find themselves in a very disadvantageous position if the petition is prosecuted. Therefore I think that we should always look with some care at a case where an agreement is obtained as a condition of the adjournment of the petition to see whether the petitioning creditor is obtaining any advantage for himself, which he ought not to obtain over the other creditors. But, though that is so, no one would say that every adjournment to give the debtor an opportunity of paying the debt is contrary to the intentions of the Bankruptcy Acts. That may be perfectly fair. The legislature, and those who drafted the rules, have taken effective means to prevent the abuse from frequently occurring. Under r. 169 of the Bankruptcy Rules, 1886–1890, after the expiration of one month from the day appointed for the first hearing of the petition no further adjournment can take place except on certain specified grounds, or for some other sufficient reason to be stated in the order for adjournment.

The result is that on the whole I think that there is nothing in the present case to justify us in saying that the process in bankruptcy was improperly used in order to make it right for us to allow the appeal. The appeal will, therefore, be dismissed.

ROMER, L.J.—I have come to the same conclusion for the same reasons.

STIRLING, L.J.—I am of the same opinion and for the same reasons. I only wish to add a few observations on the important question which has been argued, as to the effect of the estimate by the creditor of the value of his security in his petition. The statute requires a secured creditor either to give up his security for the benefit of the creditors, or to give an estimate of the value of his security. It was said that if the petitioning creditor gives an estimate of the value of his security he is not bound by it, but can when he comes in to prove his debt, without saying that he made a mistake at the time of presenting his petition, prove for his debt putting his security at a different value. I cannot agree. If he states that he is willing to give up his security for the benefit of the creditors if the debtor is adjudged bankrupt and he is adjudged bankrupt, the

creditor is not allowed to prove unless he does give up his security; and if he gives an estimate of its value it would lead to serious consequences, and would be most unjust if he were allowed to depart from that estimate without evidence of mistake, and prove on a different footing—that is to say, if in the same bankruptcy proceedings he were allowed to depart from his own valuation. It is in that sense that I understand the decision in *Re Lacey, Ex parte Taylor* (2). I should be slow to depart from that decision, given twenty years ago by two eminent judges, CAVE and SMITH, JJ., of whom the former had a special knowledge of the bankruptcy law. I should feel no doubt about it, but for the fact that I see that there is a difficulty which might occur, and which was pointed out by WRIGHT, J., in *Re Vautin, Ex parte Saffery* (1). Suppose a petitioning creditor, after obtaining an adjudication, takes no further step in the bankruptcy, and holds his security, I have great difficulty in seeing how his estimate is in that case to be enforced against him. I see the difficulty that WRIGHT, J., did, and I feel the force of his observation that there is nothing in the Act about that, but all that there is goes to show, and justice requires, that a creditor coming in to prove should be bound by his valuation of his security. I reserve the question, which may arise whether he is entitled to alter his estimate if he proves that it was made under a mistake as to the value. That is a point which WRIGHT, J., has decided; but I prefer to reserve consideration of the question until it arises. I entirely agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *M. Edward Williams & Co.*; *R. Voss & Son.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re COHEN

[COURT OF APPEAL (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.), July 21, August 4, 1905]

[Reported [1905] 2 K.B. 704; 74 L.J.K.B. 864; 93 L.T. 659; 54 W.R. 83; 21 T.L.R. 725; 49 Sol. Jo. 712; 12 Mans. 358]

Bankruptcy—Disclaimer—Limitation of time—Period to run from appointment of trustee, not from adjudication—Official receiver—Power to disclaim—Bankruptcy Act, 1883, *s.* 21, *sub-ss.* (1), (2), (4), (6); *ss.* 54, 55 (1)—*Bankruptcy Act*, 1890 (53 *&* 54 *Vict.*, *c.* 71), *s.* 13.

The period of twelve months within which, under the Bankruptcy Act, 1883, s. 55 (1) as amended by the Bankruptcy Act, 1890, s. 13, a trustee of a bankrupt might disclaim onerous property belonging to the bankrupt **held** to commence to run from the date of the certificate of the trustee's appointment and not from the date of the adjudication, as the words "after the first appointment of a trustee" referred to an appointment of a trustee under the Act of 1883, either by the creditors under s. 21 (1) or by the Board of Trade under s. 21 (6), but not to the official receiver becoming the trustee under s. 54 (1) in the interval between adjudication and the appointment of a trustee by the creditors. The official receiver, while acting as trustee under s. 54 (1), may exercise the power of disclaimer under s. 55 without being subject to the limitation of twelve months, but he may be required under s. 55 (4) of the 1883 Act, by any person interested in onerous property, to decide whether he will disclaim or not.

Notes. The Bankruptcy Act, 1883, s. 55 (1), as amended by the Bankruptcy Act, 1890, s. 13. Section 21, s. 54 and s. 55 have been replaced by the Bankruptcy Act, 1914, ss. 19, 53 and 54 respectively.

As to the official receiver acting as trustee in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 367; as to disclaimer, see ibid., pp. 457–463. For cases, see 4 DIGEST (Repl.) 220; 5 DIGEST (Repl.) 1006, 1012. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq.

Case referred to:

(1) *Re Parker, Ex parte Board of Trade* (1885), 15 Q.B.D. 196; 54 L.J.Q.B. 372; 52 L.T. 670; 1 T.L.R. 464; 2 Morr. 158, C.A.; affirmed sub nom. *Turquand* v. *Board of Trade* (1886), 11 App. Cas. 286; 55 L.J.Q.B. 417; 55 L.T. 30; 2 T.L.R. 680, H.L.; 4 Digest (Repl.) 218, *1954*.

Appeal by a trustee in bankruptcy from the refusal of the registrar to extend the period of twelve months for disclaiming onerous property.

An order of adjudication against the debtor was made on Oct. 2, 1902. On Oct. 16 a trustee was appointed by the creditors, and his appointment was certified by the Board of Trade under s. 21 (2) of the Bankruptcy Act, 1883. The bankrupt was possessed of leasehold property in Limehouse subject to onerous covenants. The trustee gave notice to the landlords of his intention to disclaim the bankrupt's interest in the lease, and on Oct. 14, 1903, he executed a disclaimer, which was duly filed in the bankruptcy. When the trustee applied for his release the Board of Trade raised objections to the disclaimer on the ground that the property had not been disclaimed within twelve months "after the first appointment of a trustee," in accordance with s. 55 of the Bankruptcy Act, 1883, as amended by s. 13 of the Bankruptcy Act, 1890. The trustee maintained that the twelve months ran from the date of the certificate of his appointment, and therefore did not expire until two days after the date of his disclaimer; while the Board of Trade contended that the twelve months ran from Oct. 2, 1902, the date of the adjudication, when the official receiver was automatically appointed trustee as on that date under s. 54 (1) so that the disclaimer was too late. The trustee, under the direction of the board, then applied, under s. 13 of the Act of 1890, for leave to extend the time in which to disclaim the property. The application came before MR. REGISTRAR GIFFARD, who refused to grant an extension of time, being of opinion that no extension was necessary, since, according to his view of s. 55 of the Act of 1883, the time for disclaiming ran from the date of the certificate, and not from the date of the adjudication. The trustee appealed.

E. W. Hansell for the trustee.

Cur. adv. vult.

Aug. 4, 1905. **VAUGHAN WILLIAMS, L.J.,** read the following judgment: The question in this case is whether the time for disclaiming runs from the certificate of the appointment of the trustee or from the adjudication.

By s. 55 of the Bankruptcy Act, 1883, as amended by s. 13 of the Act of 1890, the trustee may, by writing signed by him, at any time within twelve months after the first appointment of a trustee disclaim the property. These words seem certainly to refer (in the absence of anything in that Act showing intention) to an appointment of a trustee under s. 21, which provides that, where a debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt, the creditors may, by ordinary resolution, appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt, or they may resolve to leave his appointment to the committee of inspection thereinafter mentioned; and sub-s. (2) provides that the person so appointed shall give security, in the manner prescribed, to the satisfaction of the Board of Trade, and that the board, if satisfied with the security, shall certify that his appointment has been duly made, unless the board objects to the appointment on certain specified grounds. Subsection (4) of the same section provides that the appointment of a

A trustee shall take effect as from the date of the certificate. I am inclined to think that sub-ss. (2) and (4) of this section, as to the giving of security and as to the certificate of appointment, apply only to a trustee "so appointed"—that is, appointed by the creditors as provided by sub-s. (1)—and have no application to the official receiver when he is the trustee. In practice no certificate is given of his appointment; no security is taken from him. It is, however, to be observed that B s. 21 not only provides for the appointment of a trustee by the creditors after an adjudication, but also for the appointment of a trustee by the Board of Trade in cases where a trustee is not appointed by the creditors within four weeks from the date of the adjudication, or where negotiations for a composition or scheme have been closed by the refusal of the creditors to accept, or of the court to approve, the composition or scheme.

C Section 54, by sub-s. (1) provides that until a trustee is appointed the official receiver shall be the trustee for the purposes of the Act, and that immediately on the debtor being adjudicated bankrupt the property of the bankrupt shall vest in the trustee; and sub-s. (2) provides that on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed. This property would seem to vest, having regard to the judgment of LORD SELBORNE in *Turquand* D v. *Board of Trade* (1), independently of any appointment within the meaning of that word as used in s. 21.

But then sub-s. (2) of s. 54—which provides that on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed—in my judgment contrasts the case where the property of the bankrupt vests in the official receiver independently of any appointment of him as trustee, and the case E where the property of the bankrupt passes to a trustee forthwith on his appointment. There can be no doubt but that in sub-s. (2) the word "appointed" is used in the sense in which it is employed in s. 21.

It is true that LORD SELBORNE says in *Turquand* v. *Board of Trade* (1) (11 App. Cas. at p. 289):

> F "A certain time is allowed to the creditors to choose a trustee for themselves. If they do, when that choice is complete it supersedes the earlier official appointment,"

meaning thereby, I think, the appointment of the official receiver as trustee under sub-s. (1) of s. 54. And it is also true that LORD ESHER, M.R., in *Re Parker* (1) says (15 Q.B.D. at p. 203):

> G "Section 20 had said that the property shall 'vest in a trustee'; s. 54 says that the property of the bankrupt shall vest in 'the trustee.' What trustee? There is no one but the official receiver at that moment. 'Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act.' The property of the bankrupt therefore vests in the official receiver who has just been appointed."

H But the use of these expressions by LORD SELBORNE and by LORD ESHER in no way proves that the words "first appointment" in s. 55 do not exclusively refer to an appointment under s. 21. The provisions of sub-s. (1) of s. 54 will necessarily in every case in which the creditors appoint the trustee make the official receiver the trustee before there is a creditors' trustee, because a creditors' trustee is appointed by a meeting called after the adjudication.

I This brings me to s. 55, the disclaimer section, and to the question of the meaning of the words

> "may, by writing signed by him, at any time within [twelve] months after the first appointment of a trustee, disclaim the property."

Subsection (1) of the section runs thus:

> "Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants . . . the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any

act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within [twelve] months after the first appointment of a trustee, disclaim the property."

In my opinion the words "after the first appointment" refer to an appointment under s. 21 either by the creditors or by the Board of Trade under sub-s. (6) of that section. I do not think they refer to the official receiver becoming trustee under sub-s. (1) of s. 54 until a trustee is appointed. It follows that the twelve months provided by sub-s. (1) of s. 55 as amended will run from the certificate of the first appointment of a trustee and not from the date of the official receiver becoming trustee, on the debtor being adjudicated bankrupt, until a trustee is appointed.

It is said that the effect of the court so holding will be that the official receiver being trustee cannot exercise the power of disclaimer at all, and that this is inconsistent with the decision of the House of Lords in *Turquand* v. *Board of Trade* (1) and of the Court of Appeal in *Re Parker* (1), because the judgments both in the Court of Appeal and in the House of Lords, when the House reviewed the decision of the Court of Appeal, in effect decided that—to use the words of Lord Blackburn in his speech (11 App. Cas. at p. 291)—

"Whilst the official receiver is trustee after adjudication he may exercise the powers of a trustee."

But I do not think, nor do we intend that the effect of our decision shall be, that the official receiver on becoming trustee will not have the power to disclaim. One of the powers of the trustee appointed by the creditors is to disclaim. I think that the official receiver, as trustee, can exercise that power. It is said that if the official receiver has that power the twelve months limited for the exercise of it must run from the vesting of the property in the official receiver—that is, from the moment of adjudication; but I do not think that this follows. The official receiver on becoming trustee immediately upon the debtor being adjudicated bankrupt may exercise the power of disclaimer which s. 55 gives to the trustee appointed by the creditors for twelve months from that appointment, without being subject to this limitation in time for the exercise of the power, for that limitation by its very terms runs from a date which has no relation to the trusteeship of the official receiver, because he is never appointed. As the twelve months from the appointment had not at the time of the application for extension expired in this case I think no extension was necessary, and that the extension was properly refused. The result is that Mr. Registrar Giffard is right, and the appeal must be dismissed.

STIRLING, L.J.—I agree. I only wish to say that the only difficulty I have felt arose from the apprehension that some injustice might be done to persons interested in onerous property owing to there being no limit placed upon the time for disclaimer while the official receiver is trustee before a trustee is appointed under sub-s. (1) of s. 54. But that difficulty is, in my opinion, removed when it is considered that sub-s. (4) of s. 55 provides that any person interested in onerous property may require the trustee, which includes, as my Lord has pointed out, the official receiver when trustee under sub-s. (1) of s. 54, to decide whether he will disclaim or not.

COZENS-HARDY, L.J.—I agree.

Solicitor: *Solicitor to Board of Trade.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

A

BANNATYNE *v.* MACIVER AND ANOTHER

[Court of Appeal (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.), November 22, 1905]

[Reported [1906] 1 K.B. 103; 75 L.J.K.B. 120; 94 L.T. 150; 54 W.R. 293]

B

Agent—Principal—Liability for act of agent—Unauthorised borrowing by agent—Money partly used to pay principal's debts—Right of lender to recover from principal.

Where money is borrowed by an agent on behalf of some other person, the lender believing that the agent has authority from his principal to borrow, C then although the act of the agent be unauthorised by his principal, yet if in fact the money borrowed is applied in discharging legal liabilities of the principal, the lender, although unable to sue at common law, is entitled in equity to stand in the same position as regards money so applied as if the money had been originally borrowed from him by the principal.

A business firm appointed an agent to carry on a branch business for them D in L. They opened an account in their name at a bank in L., upon which they authorised the agent to draw. The agent had no authority to borrow money for carrying on the branch business of the firm, but he borrowed money from the plaintiff for the use of the firm, the plaintiff believing that the agent had authority to borrow for them. The money so borrowed was paid in to the account opened in the firm's name at the bank in L., and was used by the agent E in discharging legal debts owing by the firm. In an action by the plaintiff against the firm to recover the money lent by him to their agent,

Held: to the extent to which the money borrowed by the agent had been used in paying legal debts of the firm, the plaintiff was entitled in equity to recover, and an inquiry should be held to ascertain that extent.

F **Notes:** Explained: *Reversion Fund and Insurance* v. *Maison Cosway*, [1913] 1 K.B. 364. Distinguished: *Lloyds Bank, Ltd.* v. *Chartered Bank of India, Australia and China*, [1928] All E.R.Rep. 285. Referred to: *A. L. Underwood, Ltd.* v. *Bank of Liverpool and Martins*, *Same* v. *Barclays Bank*, [1924] All E.R. Rep. 230; *B. Liggett (Liverpool), Ltd.* v. *Barclays Bank, Ltd.*, [1927] All E.R.Rep. 451; *Re Cleadon Trust, Ltd.*, [1938] 4 All E.R. 518.

G As to relations between principal and third persons, see generally 1 Halsbury's Laws (3rd Edn.) 208 et seq.; and for cases see 1 Digest (Repl.) 368–370.

Cases referred to:

(1) *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1882), 22 Ch.D. 61; 52 L.J.Ch. 92; 48 L.T. 33; 31 W.R. 98, C.A.; affirmed sub nom. *Brooks & Co.* v. *Blackburn Benefit Society* (1884), 9 App. Cas. 857; 54 L.J.Ch. 376; H 52 L.T. 225; 33 W.R. 309, H.L.; 12 Digest (Repl.) 555, *4205*.

(2) *Re Wrexham, Mold and Connah's Quay Rail. Co.* [1899] 1 Ch. 440; 68 L.J.Ch. 270; 80 L.T. 130; 47 W.R. 464; 43 Sol. Jo. 277; 6 Mans. 218; sub nom. *Re Wrexham, Mold and Connah's Quay Rail. Co., Ex parte North and South Wales Bank*, 15 T.L.R. 209, C.A.; 10 Digest (Repl.) 1278, *9027*.

(3) *Re Cork and Youghal Rail. Co.* (1869), 4 Ch.App. 748; sub nom. *Re Cork* I *and Youghal Rail. Co., Ex parte Overend, Gurney & Co., Ltd., and London, Hamburg and Continental Exchange Bank*, 39 L.J.Ch. 277; 21 L.T. 735, 18 W.R. 26, L.C. & L.J.; 10 Digest (Repl.) 1272, *8983*.

(4) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 529, 572; 35 E.R. 767, 781; 12 Digest (Repl.) 547, *4156*.

Also referred to in argument:

Baroness Wenlock v. *River Dee Co.* (1887), 19 Q.B.D. 155; 56 L.J.Q.B. 589; 57 L.T. 320; 35 W.R. 822; 3 T.L.R. 603, C.A.; 10 Digest (Repl.) 1278, *9026*.

Reid v. *Rigby & Co.*, [1894] 2 Q.B. 40; 63 L.J.Q.B. 451 10 T.L.R. 418; 10 R. 280; 1 Digest (Repl.) 369, *409.*

Yorkshire Railway Wagon Co. v. *Maclure* (1881), 19 Ch.D. 478; 51 L.J.Ch. 253; 45 L.T. 747; 30 W.R. 288; on appeal (1882), 21 Ch.D. 309; 51 L.J.Ch. 857; 47 L.T. 290; 30 W.R. 761, C.A.; 10 Digest (Repl.) 1275, *9007.*

Re German Mining Co., Ball's Case, Ex parte Chippendale (1854), 4 De G.M. & G. 19; 2 Eq. Rep. 983; 24 L.J.Ch. 41; 23 L.T.O.S. 200; 18 Jur. 710; 2 W.R. 543; 43 E.R. 415, L.JJ.; 10 Digest (Repl.) 985, *6780.*

Debenham v. *Mellon* (1880), 6 App. Cas. 24; 50 L.J.Q.B. 155; 43 L.T. 673; 45 J.P. 252; 29 W.R. 141, H.L.; 27 Digest (Repl.) 182, *1363.*

Smith v. *Craven* (1831), 1 Cr. & J. 500; 1 Tyr. 389; 9 L.J.O.S.Ex. 174; 148 E.R. 1520; 12 Digest (Repl.) 635, *4905.*

Re Hallett's Estate, Knatchbull v. *Hallett* (1880), 13 Ch.D. 696; 49 L.J.Ch. 415; 42 L.T. 421; 28 W.R. 732, C.A.; 1 Digest (Repl.) 655, *2278.*

Jacobs v. *Morris*, [1902] 1 Ch. 816; 71 L.J.Ch. 363; 86 L.T. 275; 50 W.R. 371; 18 T.L.R. 384; 46 Sol. Jo. 315, C.A.; 1 Digest (Repl.) 350, *298.*

New Zealand and Australian Land Co. v. *Watson* (1881), 7 Q.B.D. 374; 50 L.J.Q.B. 433; 44 L.T. 675; 29 W.R. 694, C.A.; 1 Digest (Repl.) 449, *1014.*

Appeal by the plaintiff from a decision of GRANTHAM, J., at the trial of the action without a jury.

The action was brought to recover the sum of £350 on a bill of exchange drawn by the plaintiff and accepted by the defendants, and in the alternative for money lent. The defendants carried on business as a firm of shipowners at Liverpool. In 1901 they established a branch business in London, and they appointed as sole manager of this branch business a man named Hudson. They opened a banking account in their own names at a London bank, and gave Hudson authority to draw upon it. In 1904, upon several different dates, Hudson borrowed money from the plaintiff which he told the plaintiff was for the use of the firm, and the plaintiff lent the money in the belief that Hudson had authority from the defendants to borrow on their behalf. The sums of money so borrowed from the plaintiff amounted in all to £350. They were all given by the plaintiff to Hudson by means of cheques which were paid into the banking account opened in the names of the defendants at the London bank. The amounts of these loans were entered by Hudson in the books of the branch business of the defendants, and the money was used by him wholly or in part in paying debts incurred in the ordinary way in the management of the business. The bill of exchange upon which the plaintiff sued was accepted by Hudson in the name of the defendants.

At the trial of the action before GRANTHAM, J., without a jury, the defendants called evidence to prove that it was no part of the business of an insurance broker to borrow money and contended that, as Hudson had no authority from them to borrow money on their behalf, they were not liable to repay the plaintiff the sums which he had lent; and the learned judge gave judgment for the defendants. The plaintiff appealed.

J. R. Atkin (*Scrutton, K.C.*, with him) for the plaintiff.

Carver, K.C., and *Sims Williams* for the defendants.

SIR RICHARD HENN COLLINS, M.R.—In this case a man of the name of Hudson was acting in London as the representative of the defendants, and was there carrying on a branch of their business in the conduct of which the defendants allowed him considerable latitude. He had an account in the name of the defendants at a London bank. There is no doubt that he had been spending more money than the defendants desired him to spend, and they remonstrated with him, but allowed him to go on with the business, and from time to time supplied him with money to meet his demands. In the course of his carrying on the business a time came when he had used up all the available money at the bank. Pressing demands in relation to the business were being made upon

A him, and he borrowed money from the plaintiff. The plaintiff lent him the money under the impression that it was to be used for the purposes of the defendants' business, and he had no knowledge that Hudson had no authority from the defendants to borrow money for that purpose. Upon the facts before us it is clear that a certain proportion of the money thus borrowed from the plaintiff by Hudson was applied by him in payment of certain liabilities of the B defendants. Upon the present action being brought, it appears that the plaintiff made an application under Ord. 14 to enforce his claim, but it is not necessary to deal with that, because the claim is now rested upon a broader ground. It is said that the plaintiff is entitled in equity to recover from the defendants so much of the money which he lent to Hudson as has been applied in discharging legal liabilities of the defendants, and the plaintiff seeks to have an account C taken and relief given to the extent to which the money that he lent was so applied.

The principle on which the plaintiff's claim is based is that which was stated by LORD SELBORNE, L.C., in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1) in the following words, which were cited and adopted by RIGBY, L.J., in his judgment in *Re Wrexham, Mold, and Connah's Quay Rail. Co.* (2) ([1899] 1 Ch. D at p. 451). LORD SELBORNE said (22 Ch.D. at p. 71):

> "I think the consistency of the equity allowed in the case of *Re Cork and Youghal Rail. Co.* (3) with the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may be shown in this way. The test is: Has the transaction really added to the E liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or another to meet, and have had F the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts."

That is the principle that is said to give the plaintiff the remedy which is claimed in this case. It certainly appears to me that, on the facts before us, a strong G primâ facie case has been made out. Part of the money lent by the plaintiff has found its way into the coffers of the defendants in this sense, that it has been used on their behalf in discharge of their liabilities. That seems to me to bring the case within the principle laid down by LORD SELBORNE, and the plaintiff is to that extent entitled to recover back from the defendants the money which he lent. It is not necessary to decide whether the money could be recovered at H common law as money had and received. We have to apply the general law, legal and equitable. If it can be shown that the money lent by the plaintiff was applied for the benefit of the defendants in paying their legal debts, then the plaintiff is entitled in equity to recover it back. The plaintiff has therefore a right to have an account taken, and to recover such sums as have been spent in that manner. The appeal must be allowed.

I **ROMER, L.J.**—I am of the same opinion. I think that this case is governed by the general principle that I am about to state, which is one that is well recognised at the present day. Where money is borrowed by an agent on behalf of some other person, the lender believing that the agent has authority from his principal to borrow, then, although the act of the agent be unauthorised by his principal, yet if in fact the money borrowed is applied in discharging legal liabilities of the principal, the lender, though unable to sue the principal at common law, is entitled in equity to stand in the same position as regards money

so applied as if the money had been originally borrowed from him by the principal. The true bearing of that principle upon the position of the lender, showing that he is not exactly in the position of a person who is entitled to stand in the shoes of a creditor in all respects so as to be entitled to the benefit of any securities which a creditor would be entitled to, is clearly shown in the case that has been referred to of *Re Wrexham, Mold, and Connah's Quay Rail. Co.* (2).

It was suggested by counsel for the defendants that the principle is limited to the case of companies where the directors are agents of the company and are purporting to borrow on behalf of the company when, by the constitution of the company, the borrowing is unauthorised. It is scarcely necessary to say that there is no reason why the principle should be limited to companies. In fact, it would be more difficult to apply the principle in the case of a company than to an ordinary case of a principal and his agent. When the directors of a company are seeking to borrow money on behalf of the company, a person who is proposing to lend the money might well be supposed to have an obligation imposed on him of inquiring into the position of the company and seeing whether the directors have authority to borrow on behalf of the company. A company on whose behalf a loan is purported to have been made cannot be bound if by its constitution it cannot borrow. The person about to lend the money might well be supposed to be put upon inquiry as to whether the company is in the position of an ordinary individual, for with regard to an individual principal it could not be said that the lender has notice that the principal has only limited powers of borrowing. The distinction suggested by counsel is not supported by any authority, and cannot, I think, be supported on principle. Indeed, it seems reasonably clear that the principle is applicable in other cases than that of a company. Take, for instance, the case of a wife who, without authority from her husband, borrows money for the purpose of paying for necessaries. In such a case the borrowing would not make the husband liable at law, even if the money were in fact applied in paying for necessaries for the wife for which the husband was legally liable. But in equity, if the money borrowed has in fact been so applied, the husband would to that extent be liable to the lender of the money.

The principle to which I have referred clearly governs the present case. The facts here speak for themselves, and it cannot be said that this is a mere speculative application on behalf of the plaintiff, made in the hope that he may perhaps be able to show that a part at least of the borrowed money was used in payment of legal liabilities of the defendants. It appears from the evidence before us that the borrowed money was paid into the credit of the defendants' account, which was kept at a bank by their agent at their branch establishment, and that, immediately after the money had been so paid in, some of the legal debts of the defendants were paid off, there being no other money of theirs in the bank except that which had been borrowed from the plaintiff.

Under these circumstances the proper course to be pursued is for the court to direct an inquiry to be taken in order to ascertain what debts and legal obligations of the defendants were in fact paid off by means of the borrowed money. In ascertaining what those debts were, it will be necessary to bear in mind the point that arose in *Devaynes* v. *Noble, Clayton's Case* (4); that is to say; the plaintiff must prove actual payment of the defendants' debts, and cannot rely on a payment merely by means of an adjustment of accounts. It was suggested that the equitable principle which in my opinion governs this case ought not to be applied if it turns out that, although the money lent was in fact applied in payment of debts of the defendants, the account of the agent with his principals, if it were continued up to the time when this action was brought, would show that the agent was not a creditor of theirs. This consideration does not appear to me to be relevant. It might be relevant if the plaintiff were seeking to enforce a different equity—that is, the right to stand in the shoes of the agent as against his principals. But that is not the equity which the plaintiff is seeking to enforce

in this action. For these reasons I think that the appeal must succeed, and that the inquiry that has been indicated must take place.

MATHEW, L.J., concurred.

Appeal allowed.

Solicitors: *J. S. Wilkinson*; *Charles Russell & Co.*, for *Lightbound, Owen & Co.*, Liverpool.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

KAY *v.* KAY

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnes, J.), May 12, 1904]

[Reported [1904] P. 382; 73 L.J.P. 108; 91 L.T. 360; 20 T.L.R. 521; 53 W.R. Digest, 49]

Divorce—Desertion—Separation of parties through conduct of wife—Refusal of husband to resume cohabitation—Termination of desertion—Presentation by wife of petition for divorce—Costs—Right of wife to costs of issues on charges reasonably made.

In July, 1900, a husband and a wife separated owing to the conduct of the wife, who, in February, 1901, wrote asking the husband to return, but he did not reply. In May, 1902, the wife presented a petition for divorce alleging adultery and cruelty, but not desertion, since at the date of filing the petition, the parties had not lived apart for the period of two years. In December, 1903, the wife filed a supplemental petition for a decree of judicial separation, alleging desertion. The jury found the charges of adultery and cruelty to be unfounded. On the trial of the supplemental petition,

Held: (i) as cohabitation had ceased through the act of the wife, she could not maintain a charge of desertion through the mere refusal of her husband to resume cohabitation; her remedy should be to bring a suit for restitution of conjugal rights: (ii) even if the period of desertion had been running against the husband when the original petition was presented, its presentation would have ended it: and (iii) as to costs, the wife was entitled to the costs on the charge of desertion, which had been brought reasonably, but the husband could set-off the costs on the other charges, which had been brought unreasonably.

Notes. By the Matrimonial Causes Act, 1857, s. 27, it was a ground for dissolution that the husband had been guilty of (inter alia) adultery coupled with such cruelty as without adultery would have entitled the wife to a divorce a mensa et thoro or of adultery coupled with desertion without reasonable excuse, for two years or upwards. The wife having failed to prove adultery, she was unable to obtain dissolution of the marriage, and was forced to petition for judicial separation on the ground of desertion without cause for two years and upwards, under the Matrimonial Causes Act, 1857, s. 16. This section has now been repealed, and the grounds for petition for divorce are now contained in the Matrimonial Causes Act, 1950, ss. 1–2.

Explained: *Dodd* v. *Dodd*, [1906] P. 189. Considered: *Chapman* v. *Chapman and Thomas*, [1938] 1 All E.R. 635; *Jordan* v. *Jordan*, [1939] 2 All E.R. 29. Referred to: *Huntly-Gordon* v. *Huntly-Gordon* (1908), 24 T.L.R. 806; *Stevenson* v. *Stevenson*, [1911] P. 191; *Courage* v. *Courage* (1931), 47 T.L.R. 395; *Bush* v.

Bush, [1938] 4 All E.R. 598; *Cohen* v. *Cohen*, [1940] 2 All E.R. 331; *W.* v. *W.* (*No. 2*), [1954] 2 All E.R. 829.

As to desertion, see generally 12 HALSBURY'S LAWS (3rd Edn.) 241 et seq.; as to costs in divorce cases, see ibid., p. 398 et seq. For cases, see 27 DIGEST (Repl.) 334–337. For the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388 et seq.

Cases referred to:

(1) *Fitzgerald* v. *Fitzgerald* (1869), L.R. 1 P. & D. 694; 38 L.J.P. & M. 14; 19 L.T. 575; 17 W.R. 264; 27 Digest (Repl.) 334, *2784*.

(2) *Bradshaw* v. *Bradshaw*, [1897] P. 24; 66 L.J.P. 31; 75 L.T. 391; 61 J.P. 8; 45 W.R. 142; 13 T.L.R. 82, D.C.; 27 Digest (Repl.) 694, *6637*.

(3) *R.* v. *Leresche*, [1891] 2 Q.B. 418; 60 L.J.M.C. 153; 65 L.T. 602; 56 J.P. 37; 40 W.R. 2; 7 T.L.R. 685; 17 Cox, C.C. 384, C.A.; 27 Digest (Repl.) 346, *2872*.

(4) *Knapp* v. *Knapp* (1880), 6 P.D. 10; 49 L.J.P. 69; 43 L.T. 384; 29 W.R. 80; 27 Digest (Repl.) 361, *2983*.

(5) *Wood* v. *Wood* (1887), 13 P.D. 22; 57 L.J.P. 48; 27 Digest (Repl.) 450, *3820*.

(6) *Lapington* v. *Lapington* (1888), 14 P.D. 21; 58 L.J.P. 26; 59 L.T. 608; 52 J.P. 727; 37 W.R. 384; 27 Digest (Repl.) 361, *2986*.

(7) *Ash* v. *Ash*, [1893] P. 222; 62 L.J.P. 97; 68 L.T. 500; 1 R. 524; 27 Digest (Repl.) 563, *5165*.

Also referred to in argument:

Kettlewell v. *Kettlewell* (1880), 41 L.T. 737; 27 Digest (Repl.) 361, *2984*.

Ward v. *Ward* (1858), 1 Sw. & Tr. 185; 27 L.J.P. & M. 63; 31 L.T.O.S. 238; 6 W.R. 867; 164 E.R. 685; 27 Digest (Repl.) 343, *2840*.

Thompson v. *Thompson* (1858), 1 Sw. & Tr. 231; 27 L.J.P. & M. 65; 31 L.T.O.S. 302; 4 Jur.N.S. 717; 6 W.R. 867; 164 E.R. 706; 27 Digest (Repl.) 341, *2830*.

Parkinson v. *Parkinson* (1869), L.R. 2 P. & D. 25, 27; 39 L.J.P. & M. 14, 21; 21 L.T. 597, 732; 27 Digest (Repl.) 454, *3868*.

Farmer v. *Farmer* (1884), 9 P.D. 245; 53 L.J.P. 113; 33 W.R. 169; 27 Digest (Repl.) 347, *2878*.

Petition of Esther Alice Kay for the dissolution of her marriage with Moses Kay on the grounds of his cruelty, desertion, and adultery. Each of these charges was denied by the husband.

The parties were married in 1892, and lived together at the house of the wife's father until July 7, 1900. Owing to various differences the parties then separated. On Feb. 14, 1901, the wife wrote to her husband through her solicitors, but he never replied to that letter. On May 29, 1902, the original petition for divorce was filed by the wife, the grounds for such divorce being cruelty and adultery. At that time the parties had not been separated for two years. On Dec. 16, 1903, a supplemental petition was filed in which the husband was charged with desertion. At the hearing of the case the jury found that the husband had not been guilty of cruelty or adultery, but that he had deserted his wife since Feb. 14, 1901.

Barnard for the wife.

Priestley, *K.C.*, and *Le Bas* for the husband.

GORELL BARNES, J.—In this case the jury found that the husband had not been guilty of either cruelty or adultery, but that he had deserted his wife since Feb. 14, 1901. Upon these findings the wife asks for a decree of judicial separation. On behalf of the husband it has been argued that the desertion had not commenced two years before the filing of the original petition on May 29, 1902, and that the filing of that petition put an end to any existing desertion; and also that on Feb. 14, 1901, the date from which the jury found the desertion commenced,

A there could be no desertion in law, as the wife and husband were not living together at that time.

Having regard to the admitted facts of the case, one has to ask how the findings of the jury are to be dealt with. The husband and wife had lived together at the house of the wife's father until July 7, 1900. The case put forward for the wife is that the husband then left the wife and has since refused to return to her or make B any provision for her. On the other hand, the husband says that the wife's father turned him out of doors, and that his wife has declined to leave her father's home. The real issue, therefore, is narrowed down to the circumstances under which the separation did actually take place in July, 1900. It is clear that the jury, by their verdict, in fixing the date of the desertion as Feb. 14, 1901, did not believe the wife's version of the incidents which brought about the separation, and I am driven C to the conclusion that the separation was caused by the conduct of the wife and her father.

What was the position of the parties in February, 1901? Cohabitation had ceased, and, according to the principles laid down in *Fitzgerald* v. *Fitzgerald* (1) and *Bradshaw* v. *Bradshaw* (2), cohabitation having ceased owing to the act of the wife, the charge of desertion cannot be maintained. The case of *R.* v. *Leresche* (3) D was most carefully considered in *Bradshaw* v. *Bradshaw* (2), and, although it has been argued for the wife that desertion may commence by a mere refusal on the part of the husband to comply with a request for a resumption of cohabitation, I am unable to follow the argument. If there had been no other difficulty between the parties except the desertion, the wife would have had a remedy against her husband by means of a suit for restitution of conjugal rights. The only means by E which the jury could have come to the conclusion that the desertion commenced on Feb. 14, 1901, was the fact that on that date a letter had been written by the wife's solicitor to the husband asking him to return to her. On that part of the case, therefore, I am clearly of opinion that there was no desertion in law.

On the other part of the case—viz., that two years had not elapsed at the date of the filing of the original petition since the parties had lived together—a large F number of cases have been quoted on each side, and an attempt has been made to extract some principle from them. For the husband it has been urged that the attitude of the wife towards her husband during the two years' separation, must be of a friendly character, and that the mere fact of her filing a petition for divorce during that period, in which petition cruelty and adultery are charged, has brought about a state of affairs of such a character that it would not be possible for the G husband to return to cohabitation. On the other hand, it has been contended that the desertion is a continuing offence, and exists so long as the husband does not take steps to determine it.

It is always necessary to examine what are the circumstances under which the separation has taken place, and what has happened since the separation. In *Knapp* v. *Knapp* (4), Sir James Hannen, P., said (6 P.D. at p. 11):

H

> "There never was a time at which the petitioner was bound to go back and live with him [i.e., her husband] because she was always justified in refusing to do so as long as he continued to live with the woman for whose company he had abandoned her; and therefore as it was in the beginning desertion on his part, and the circumstances had never been changed, that state of things, which was a desertion in the first instance, has continued such for now more than I two years."

In that case, quite apart from the desertion, the wife was not bound to go back, and therefore the filing by her of a petition for divorce did not prevent the desertion running. Again, in *Wood* v. *Wood* (5), which was an undefended case like *Knapp* v. *Knapp* (4), there was never a time when the wife was bound to go to her husband or to receive him back. I do not think that *Lapington* v. *Lapington* (6) has really any bearing upon the present case. There, Butt, J., considered that there was no substantial distinction between an amended and a supplemental petition, and

thought that a cause of action should be in existence before the institution of a suit. In the case before me it is a matter of principle. Desertion is a wilful separation by a respondent from a petitioner without either consent or reasonable cause. In order that desertion may continue for two years it is necessary that the same state of things may be maintained throughout the whole of that period; and if a wife wishes her husband to return and put an end to the desertion, and yet meanwhile files a petition for divorce, charging him with cruelty and adultery—which charges in the present case have turned out to be utterly unfounded—she has by her action placed it out of the power of her husband to do anything. By her own action the wife has shown that she was unwilling that her husband should return to her, and it is impossible to treat her as a woman willing to receive him back as she had put it out of his power to return. That being so, the wife is not entitled to a judicial separation, and the finding of the jury is quite immaterial.

As to the question of costs, that requires serious consideration. The wife asks her full costs on the issue of desertion, and for secured costs on the issues of cruelty and adultery. The husband is willing that the wife should have the costs of the desertion, but he claims to set them off against the costs of the other charges. The principle upon which costs are allowed was very fully discussed in *Ash* v. *Ash* (7). There it was decided that a wife is entitled to the costs of issues as to which she has failed if the charges are reasonably made, but that if the charges are unreasonable she makes them at her own risk and expense. The essence of the principle is that the charges made must have some substance and must be reasonable. It is unnecessary in this case to consider the charge of desertion, as both the jury and myself came to the conclusion that there was really no contest between the parties except as to that issue. The charges of cruelty and adultery, however, were of the most flimsy character and practically uncorroborated. There was, in my opinion, no justification for making the charges at all. Some of them were not even opened to the jury, although they had not been abandoned. These various charges, which have utterly failed, throw a flood of light upon the manner in which this case has been presented, and make it clear that they have been hurled unreasonably, recklessly, and oppressively against the respondent. The petition and the supplemental petition will be dismissed, and whilst the wife will have the costs of the issue as to the desertion, the husband will be allowed to set off the costs of the issues of cruelty and adultery against them.

Solicitors: *Busk, Mellor & Norris*, for *Roland Robinson*, Blackpool; *Ayrton, Biscoe & Barclay*, for *Cobbett, Wheeler & Corbett*, Manchester.

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

A

LLOYDS BANK, LTD. *v.* MEDWAY UPPER NAVIGATION CO.

[Court of Appeal (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), June 8, 1905]

B [Reported [1905] 2 K.B. 359; 74 L.J.K.B. 851; 93 L.T. 224; 54 W.R. 41]

Execution—Receiver—Injunction sought against judgment debtor—Need to show debtor likely to make away with property.

On an ex parte application for the appointment of a receiver by way of equitable execution, an injunction restraining the judgment debtor from dealing C with the property should not be granted, unless upon the facts of the case it is shown that there is a danger that the judgment debtor will make away with the property.

Notes. Although, by the Supreme Court of Judicature Act, 1873, s. 25 (8) (now replaced by s. 45 of the Supreme Court of Judicature (Consolidation) Act, 1925), jurisdiction was given to all Divisions of the High Court to appoint a receiver in D cases where it appeared just or convenient to do so, in practice the jurisdiction was limited by the former practice of the Chancery Division. Now, by s. 36 of the Administration of Justice Act, 1956, the power of the High Court and of the county court to appoint a receiver by way of equitable execution is extended so as to operate in relation to all legal estates and interests in land.

As to equitable execution, see generally 16 Halsbury's Laws (3rd Edn.) 104 E et seq.; as to applications for a receiver, see ibid. 109–110. For cases see 21 Digest 670–672.

Case referred to in argument:

Holmes v. *Millage*, [1893] 1 Q.B. 551; 62 L.J.Q.B. 380; 68 L.T. 205; 57 J.P. 551; 41 W.R. 354; 9 T.L.R. 331; 37 Sol. Jo. 338; 4 R. 332, C.A.; 21 Digest 666, *2460*.

F

Appeal by the defendants against an order of Jelf, J., at chambers refusing to dissolve an injunction.

The plaintiffs had obtained judgment against the defendants for a sum of £2,585 13s. 7d. The defendants were a company incorporated under a special Act of Parliament for the improvement and maintenance of the navigation of the Upper G Medway, and had power to hold lands for the purposes of their undertaking and to take tolls for the use of the navigation. The judgment obtained by the plaintiffs remaining unsatisfied, they applied at chambers for the appointment of a receiver by way of equitable execution, and filed an affidavit as to the defendants' property. In this affidavit they stated that with the exception of a few goods, consisting of office furniture, etc., of the value of £50 or thereabouts, the defendants had no H goods or chattels on which the plaintiffs could cause legal execution to be levied; that the defendants were possessed of and entitled to the tolls and rents arising from the navigation of the upper portion of the river Medway, and also of and to the profits of the business of carriers carried on by them, and of and to other rents and profits incidental to their undertaking; and that the defendants were also possessed of freehold lands and premises, and rents and increment arising therefrom, I which said lands were situated at Tonbridge and certain other places on the river Medway and elsewhere. Upon this an order was made that the defendants should attend the judge in chambers

"on the hearing of an application on the part of the plaintiffs for the appointment of S. W. Burgess, the manager of the plaintiffs' branch at Tonbridge, as receiver in this action without security or remuneration, plaintiffs being answerable for his acts or defaults, to receive the rents, profits, and moneys receivable in respect of the defendants' interest in the following property, namely, the tolls and rents arising from the navigation of the river Medway,

and also in the profits of the business of carriers carried on by the defendants, and in other rents and profits of and incident to the defendants' undertaking; also certain freehold lands and premises, and rents and increment arising therefrom, which said lands are situate at Tonbridge and other places on the river Medway and elsewhere, in satisfaction of the sum of £2,585 13s. 7d. and costs, due under the judgment in this action; and the plaintiffs by their solicitors hereby undertaking to abide by any order the court or a judge may make as to damages in case the court or a judge should hereafter be of opinion that the defendants shall have sustained any by reason of this order which the plaintiffs ought to pay, it is ordered and directed that the said defendants, their agents and servants, and every of them be restrained, and an injunction is hereby granted restraining them and every of them, until after the hearing of the above application, from selling, charging, or otherwise dealing with said property."

JELF, J., refused the defendants' application that this injunction should be dissolved. The defendants appealed.

Upjohn, K.C., and *J. G. Wood* for the defendants.
Holman Gregory for the plaintiffs.

SIR RICHARD HENN COLLINS, M.R.—I think that this appeal must be allowed. Before the passing of the Judicature Act, 1873, the practice of granting equitable execution was, of course, unknown to the common law courts. At first after that Act was passed the judges of the Queen's Bench Division seem to have taken too wide a view of the powers given by the Act, and the present practice seems to have been introduced with the view of restricting the freedom with which orders were made for the appointment of receivers. Receivers were sometimes appointed on ex parte applications, but as the practice was found to be attended with difficulties and drawbacks it was changed, and provision was made for notice of the application for a receiver being given. That practice, of course, involves an interval between the notice of the application and the hearing of it, during which there may in some cases be a danger of the property to which the application relates being made away with by the judgment debtor. Against that danger provision has been made in the form which appears in the ANNUAL PRACTICE, App. K., No. 61 (a). That form is primâ facie applicable to all cases, and treats the injunction contained in it as ancillary to the summons to the debtor to attend at a later date upon the hearing of the application. In so far as it might be thought to involve that such an injunction is necessarily ancillary to the summons, it would appear to be a departure from the practice of the Court of Chancery. The Court of Chancery would not have granted such an injunction without having before it an averment, and some evidence, of a danger that the property might be subtracted from the jurisdiction of the court. The terms of Form No. 61 (a) do seem primâ facie to be contrary to that practice, and to substitute a hard-and-fast rule in the place of the exercise by the judge of an individual discretion as to the granting of an injunction. In the case before us there is no allegation of any intention on the part of the debtors to remove out of the jurisdiction the property in respect of which the appointment of a receiver is asked for. I therefore see no ground for granting an injunction, and I think that JELF, J., was wrong in refusing to dissolve the injunction that had been granted. The appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. Reliance has been placed on the terms of Form 61 (a) in App. K. in the ANNUAL PRACTICE. I do not think that it can possibly have been intended by that form that, on its being shown that there is property in respect of which the court has jurisdiction to appoint a receiver by way of equitable execution, it should in all cases necessarily follow, without more, that there must be an injunction such as is contained in the form. I do not think that there is any practice by which such an injunction must as a matter of course be granted in a case like the present where there is a total absence of anything to

show that there is any danger of the property being made away with by the judgment debtor, pending the appointment of a receiver.

COZENS-HARDY, L.J.—I agree. I should be sorry that there should be any doubt that in many cases Form 61 (a) is the proper form of order; or that, if property is in danger, in respect of which an application for the appointment of a receiver is pending, in a case where the court has jurisdiction to appoint a receiver, the court has power to protect it by granting an ex parte injunction until the hearing of the application. The same result might be obtained by the receiver being appointed ex parte, but that course might involve increased expense and delay. It is a very long step for them to say that, as a matter of course, and without any allegation, much less proof, of any danger of the property being made away with, a judgment creditor can get an injunction ex parte to restrain the judgment debtor from any dealing with his property. It appears to me that the judge in dealing with an application of this kind must have regard to the facts alleged and proved in the particular case, and must not proceed on the general idea that the injunction is a matter of course, upon the filing of such an affidavit as in the present case, without any allegation of any danger that the property will be made away with by the defendant.

Appeal allowed.

Solicitors: *Church, Adams & Prior: Tarry, Sherlock & King.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

FIELD *v.* METROPOLITAN POLICE RECEIVER

[KING'S BENCH DIVISION (Phillimore and Bray, JJ.), May 14, July 29, 1907]

[Reported [1907] 2 K.B. 853; 76 L.J.K.B. 1015; 97 L.T. 639; 71 J.P. 494; 23 T.L.R. 736; 51 Sol. Jo. 720; 5 L.G.R. 1121]

Riot—Elements of offence—Presence of three or more persons—Common purpose—Inception or execution of purpose—Intent to resist opposition—Alarm caused by force or violence—Damage to "building"—Wall.

To constitute a riot the following five elements must co-exist: (i) Presence of at least three persons; (ii) a common purpose; (iii) execution or inception of the common purpose; (iv) intent by the persons present to help one another, by force if necessary, against any person who may oppose them in the execution of their common purpose; (v) force or violence, not merely used in demolishing property, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.

A wall is a "building" within s. 2 (1) of the Riot (Damages) Act, 1886.

Notes. Approved: *R.* v. *Wong Chey, etc.* (1910), 6 Cr. App. Rep. 59. Considered: *Ford* v. *Metropolitan Police District Receiver*, [1921] All E.R.Rep. 493. Applied: *Munday* v. *Metropolitan Police District Receiver*, [1949] 1 All E.R. 337. Considered: *R.* v. *Sharp*, [1957] 1 All E.R. 577. Referred to: *Kaufman* v. *Liverpool Corpn.* (1916), 80 J.P. 223; *Motor Union Insurance* v. *Boggan*, [1923] All E.R.Rep. 331; *Compania Naviera Bachi* v. *Henry Hosegood & Son, Ltd.*, [1938] 2 All E.R. 189.

As to riot and similar offences, see 10 HALSBURY'S LAWS (3rd Edn.) 582 et seq.; and for cases see 15 DIGEST (Repl.) 785 et seq.

Cases referred to:

(1) *R.* v. *Soley* (1707), 11 Mod. Rep. 100, 115; 2 Salk. 594; 88 E.R. 935; sub nom. *Bewdly Corpn. Case*, Holt, K.B. 353; 15 Digest (Repl.) 791, *7426.*

(2) *R.* v. *Phillips* (1842), 2 Mood. C.C. 252; sub nom. *R.* v. *Langford*, Car. & M. 602; 7 J.P.Jo. 868; 15 Digest (Repl.) 792, *7436*.

(3) *Drake* v. *Footitt*, *Drake* v. *Hankin* (1881), 7 Q.B.D. 201; 50 L.J.M.C. 141; 45 L.T. 42; 45 J.P. 798, D.C.; 15 Digest (Repl.) 1218, *12,420*.

(4) *R.* v. *Graham and Burns* (1888), 4 T.L.R. 212; 16 Cox, C.C. 420; 15 Digest (Repl.) 788, *7388*.

Also referred to in argument:

Clifford v. *Brandon* (1809), 2 Camp. 358, N.P.; 15 Digest (Repl.) 792, *7435*.

Appeal from a decision of His Honour Judge Willis, sitting at Southwark County Court.

The action was brought by the plaintiffs under s. 2 (1) of the Riot (Damages) Act, 1886, to recover damages for injury done to a wall by a number of young men and boys. Section 2 (1) provides:

> "Where a house, shop, or building in any police district has been injured or destroyed or the property therein has been injured, stolen, or destroyed by any persons riotously and tumultuously assembled together, such compensation as hereinafter mentioned shall be paid out of the police rate of such district to any person who has sustained loss by such injury, stealing, or destruction."

The county court judge held that the plaintiffs were entitled to recover, and the defendant appealed.

Avory, *K.C.*, and *J. Roberts* for the defendant.

Clavell Salter, *K.C.*, and *Cecil Walsh* for the plaintiffs.

Cur. adv. vult.

July 29, 1907. **PHILLIMORE, J.,** read the following judgment of the court.— This is an appeal from the decision of His Honour Judge Willis, sitting in the county court at Southwark, giving judgment for the plaintiffs for damages done by the knocking down of a wall. The action was brought under the Riot (Damages) Act, 1886, s. 2, upon the footing that the wall was a "building" "destroyed" by "persons riotously and tumultuously assembled together." The learned judge has found that the wall was a "building," and there is no complaint of this finding. It was suggested to us that the learned judge thought that a building might be destroyed by "persons riotously assembled," without there being an actual riot. But we find nothing in his judgment to lead us so to suppose, and he has since told us that he did not intend so to decide. We have, therefore, to consider whether the evidence justifies his finding that there was a riot.

It appears that about 9 p.m. on Oct. 30, 1907, seven or eight youths of ages from fourteen to eighteen were upon the pavement in Martindale Road shouting and using rough language, some of them standing with their backs against the wall, others running against them or against the wall with their hands extended, and that after they had gone backwards and forwards in this way for about a quarter of an hour the wall fell with a "splash." It was a 9 in. wall toothed into a house, of considerable length, and inclosing a yard. About 12 ft. to 13 ft. fell. As soon as it fell the caretaker of the premises came out into the street and the youths cleared off in different directions. There was evidence that the neighbourhood is a rough one, and that doors, windows, shutters, and water and gas fittings have been at other times destroyed, and people frightened. It should be added that the youths were described as "congregated together" and as appearing to be acting together. These are all the facts; and upon them we have to determine whether the learned judge could properly find that there was a riot.

We have been referred to several authorities, and we have consulted them and some others. It is as well to enumerate those we have consulted: Brooke, La Graunde Abridgement, entitled Riots, Routs and Assemblies; Coke, Third Institute, Of Riots, Routs, Unlawful Assemblies, Forces, etc., p. 176; Blackstone's Commentaries (13th Edn.), vol. 4, p. 146; Hawkins' Pleas of the Crown

(8th Edn.), bk. 1, c. 28, heading 4, OF RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES, ss. 1 to 5; STEPHEN'S DIGEST OF THE CRIMINAL LAW (4th Edn.), arts. 70–72; *R.* v. *Soley* (1); *R.* v. *Langford* (2); *Drake* v. *Footitt* (3); *R.* v. *Graham and Burns* (4); and RUSSELL ON CRIMES, and later text-books. Riot is a crime, a misdemeanour at common law. The writer who appears to require the fewest elements to constitute this crime, and who, therefore, is the strongest authority in favour of the plaintiffs, is LORD COKE. He says that riot is where three or more do any unlawful act, as to beat any man, or to hunt in his park, or take possession of another man's land, or cut or destroy his corn, etc. This would seem to imply that any assault or malicious injury to property done by three or more is a riot. It is to be observed, however, that if this is LORD COKE's meaning, he stands alone; also that the whole chapter, which embraces four or five kinds of crime, is short and sketchy, and that his definition of riot is an illogical one, derived, as we see by reference to BROOKE from the reading of SERJEANT MARROW in the Inner Temple in the STATUTE OF PEACE, a reading very properly criticised by BROOKE. BLACKSTONE follows COKE in his definition of riot—a definition which has been since abandoned by text-writers; but he makes it plain that there must always be force or violence to constitute a riot.

HAWKINS requires that the rioters should have an intent mutually to assist one another against anyone who should oppose them in the execution of their enterprise, and should actually execute the same in a violent and turbulent manner to the terror of the people (s. 1). A riot ought to be accompanied, he says, by some manner of violence either to the person of a man or to his possessions, as by beating him or forcing him to quit possession of his land or goods, etc. (s. 4); and there must be at least some circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike terror into the people (s. 5). STEPHEN says that an unlawful assembly must be (i) with intent to commit a crime by open force or (ii) with intent to carry out any common purpose in such a manner as to give firm and courageous persons reasonable ground to apprehend a breach of the peace, and a riot is an unlawful assembly which has actually begun to execute its purpose by a breach of the peace, and to the terror of the public. In *R.* v. *Soley* (1), HOLT, C.J., says (11 Mod. Rep. at p. 102):

> "If I am writing a letter and three or more were hollooing and jogging me, is this a riot? No, it ought to be in terrorum populi."

In *R.* v. *Langford* (2), where five persons were indicted for riot for ejecting an old man out of a cottage which they claimed, and then demolishing it, the conviction was supported because such force was used as to terrify the old man. *Drake* v. *Footitt* (3) was the case of a violent election riot, where the only question was whether a felony had been committed. In *R.* v. *Graham and Burns* (4), CHARLES, J., largely relying upon the passages in HAWKINS, instructed the jury (16 Cox, C.C. at p. 427) **that**

> "a riot is a disturbance of the peace by three persons at the least who, with an intent to help one another against any person who opposes them in the execution of such enterprise or other, actually execute that enterprise in a violent and turbulent manner to the alarm of the people."

From these passages we deduce that there are five necessary elements of a riot—(i) number of persons, three at least; (ii) common purpose; (iii) execution or inception of the common purpose; (iv) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; (v) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. In this case element No. (i) was present. As to elements Nos. (ii) and (iii), there was evidence upon which the learned judge could have found their existence, though, as far as we can judge from the notes of the evidence and without seeing the witnesses, we think we should not have found the same way. But as to elements Nos. (iv) and (v) there is no evidence. The youths ran away as

soon as the single caretaker came forward; there is no reason to suppose that they would have resisted if he had come forward earlier and required them to desist. It is true that the caretaker's wife was frightened by the noise of the falling wall, but no one says that he was alarmed by the youths, though the witness may have been frightened by other youths on other occasions, nor was the conduct of the youths such as would be calculated to alarm persons of reasonable firmness and courage. We cannot hold that there was a riot. The appeal must be allowed, and judgment must be entered for the defendants.

Appeal allowed.

Solicitors: *Huntley & Son*; *Ellis & Ellis.*

[*Reported by* P. B. Durnford, Esq., *Barrister-at-Law.*]

LOGAN *v.* BANK OF SCOTLAND AND OTHERS

[Court of Appeal (Sir Richard Henn Collins, M.R., Romer, L.J., and Sir Gorell Barnes, P.), December 12, 21, 1905]

[Reported [1906] 1 K.B. 141; 75 L.J.K.B. 218; 94 L.T. 153; 54 W.R. 270; 22 T.L.R. 187]

Practice—Stay of proceedings—Vexatious action—Cause of action arising abroad —Forum conveniens.

The court will stay an action brought within their jurisdiction in respect of a cause of action which arose outside their jurisdiction whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the court in which the action is brought, and to which he would not be subjected if the action were brought in another accessible and competent court.

A person domiciled in Scotland brought an action in England claiming £50 damages in respect of alleged misrepresentations in the prospectus of a company issued in Scotland. There were four defendants to the action, the first three being domiciled in Scotland, but the fourth, who was an undischarged bankrupt, resided in London. The company in respect of which the prospectus was issued had gone into voluntary liquidation, and the books and documents of the company were, at the time of action brought, in the hands of the liquidator in Edinburgh. The witnesses which would have to be called in the action resided in Scotland. Two of the defendants made an application for a stay of all proceedings in the action upon the ground that the action was vexatious and oppressive and an abuse of the process of the court.

Held: as the inconvenience and difficulty placed upon the defendants in conducting the case in England would be so great and the expenses so heavy as to be out of proportion to the sum involved in the action, and as there was a proper and adequate tribunal in the place where most of the parties to the action resided or were domiciled, the bringing of the action in England was vexatious and oppressive to the defendants, and proceedings should be stayed.

Notes. Applied: *Egbert* v. *Short*, [1907] 2 Ch. 205. Considered: *Re Norton's Settlement, Norton* v. *Norton*, [1908] 1 Ch. 471. Referred to: *The Cap Blanco*, [1911–13] All E.R.Rep. 365; *Guarantee Trust Co. of New York* v. *Hannay*, [1914–15] All E.R.Rep. 24; *St. Pierre* v. *South American Stores (Gath and Chaves), Ltd.*, [1936] 1 K.B. 382; *Oppenheimer* v. *Louis Rosenthal & Co., A.G.*, [1937] 1 All E.R.

23; *Turk Gemi Kurtama* v. *Ithaka* (*Owners*), *The Ithaka*, [1939] 2 All E.R. 630; *Ocean Steamship Co.* v. *Queensland State Wheat Board*, [1941] 1 All E.R. 158.

As to staying of frivolous and vexatious actions, see 30 HALSBURY'S LAWS (3rd Edn.) 38–39; and for cases see 11 DIGEST (Repl.) 542 et seq., and DIGEST (Pleading) 82 et seq.

Cases referred to:

(1) *Collard* v. *Beach* (1903), 81 Hun. (App. Div.) N.Y. 582; 93 Hun. (App. Div.) N.Y. 339.

(2) *Longworth* v. *Hope* (1865), 3 Macph. (Ct. of Sess.) 1049.

(3) *Williamson* v. *North Eastern Rail. Co.* (1884), 11 R. (Ct. of Sess.) 596; 21 S.L.R. 421.

(4) *Ewing* v. *Orr Ewing* (1885), 10 App. Cas. 453; 53 L.T. 826; 1 T.L.R. 645, H.L.; 30 Digest (Repl.) 222, *665*.

(5) *McHenry* v. *Lewis* (1882), 22 Ch.D. 397; 52 L.J.Ch. 325; 47 L.T. 549; 31 W.R. 305, C.A.; 11 Digest (Repl.) 542, *1512*.

(6) *Hyman* v. *Helm* (1883), 24 Ch.D. 531; 49 L.T. 376; 32 W.R. 258, C.A.; 11 Digest (Repl.) 547, *1545*.

(7) *Peruvian Guano Co.* v. *Bockwoldt* (1883), 23 Ch.D. 225; 52 L.J.Ch. 714; 48 L.T. 7; 31 W.R. 851; 5 Asp.M.L.C. 29, C.A.; 11 Digest (Repl.) 545, *1530*.

Also referred to in argument:

Metropolitan Bank v. *Pooley* (1885), 10 App. Cas. 210; 54 L.J.Q.B. 449; 53 L.T. 163; 49 J.P. 756; 33 W.R. 709, H.L.; 1 Digest (Repl.) 81, *613*.

Haggard v. *Pélicier Frères*, [1892] A.C. 61; 61 L.J.P.C. 19; 65 L.T. 769; 8 T.L.R. 130, P.C.; 38 Digest (Repl.) 87, *618*.

Stein v. *Valkenhuysen* (1858), E.B. & E. 65; 27 L.J.Q.B. 236; 31 L.T.O.S. 80; 4 Jur.N.S. 411; 120 E.R. 431; sub nom. *Steyne* v. *Valkenhuyzen*, 6 W.R. 444; Digest (Practice) 315, *404*.

Stephenson v. *Garnett*, [1898] 1 Q.B. 677; 67 L.J.Q.B. 447; 78 L.T. 371; 46 W.R. 410, C.A.; Digest (Pleading) 89, *756*.

Lawrance v. *Lord Norreys* (1890), 15 App. Cas. 210; 59 L.J.Ch. 681; 62 L.T. 706; 38 W.R. 753; 54 J.P. 708; 6 T.L.R. 285, H.L.; Digest (Pleading) 22, *182*.

British South Africa Co. v. *Companhia de Moçambique*, [1893] A.C. 602; 63 L.J.Q.B. 70; 69 L.T. 604; 10 T.L.R. 7; 37 Sol. Jo. 756; 6 R. 1, H.L.; 11 Digest (Repl.) 371, *374*.

Cookney v. *Anderson* (1862), 31 Beav. 452; 1 New Rep. 77; 32 L.J.Ch. 305; 7 L.T. 491; 8 Jur.N.S. 1220; 54 E.R. 1214; on appeal (1863), 1 De G.J. & Sm. 365; 2 New Rep. 140; 32 L.J.Ch. 427; 8 L.T. 295; 9 Jur.N.S. 736; 11 W.R. 628; 46 E.R. 146, L.C.; 36 Digest (Repl.) 566, *1243*.

Drummond v. *Drummond* (1866), 2 Ch. App. 32; 36 L.J.Ch. 153; 15 L.T. 337; 15 W.R. 267, L.C. & L.JJ.; 16 Digest (Repl.) 121, *51*.

Thornton v. *Thornton* (1886), 11 P.D. 176; 55 L.J.P. 40; 54 L.T. 774; 34 W.R. 509, C.A.; 11 Digest (Repl.) 543, *1522*.

Appeal by the defendants from an order of PHILLIMORE, J., at chambers refusing to stay all proceedings in an action.

The action was brought by a schoolmaster residing in Scotland, claiming £50 damages for misrepresentations alleged to have been made in the prospectus of a company, called James Young & Co., on the faith of which he had applied for and had been allotted five preference shares of £10 each. The issue of the prospectus, the application for shares by the plaintiff, the allotment, and the registration of the company all took place in Scotland. There were four defendants—viz., the Bank of Scotland, whose name had appeared on the prospectus as bankers of the company, Sir George Anderson, who was treasurer of the bank; and Robert Young and James Scott, who were directors of the company. The last two named defendants were said to be undischarged bankrupts, and they had not entered appearance in the action. The head office of the Bank of Scotland was in Edinburgh, but

they had a branch office in London. Service of the writ of summons in the action was effected upon the manager of the bank's branch office in London, and an application by the bank to have the service set aside was dismissed: (*Logan* v. *Bank of Scotland*, [1904] 2 K.B. 295). The bank and Sir George Anderson then took out a summons asking that the action should be stayed as being vexatious and oppressive and an abuse of the process of the court. The master granted the application, but his decision was reversed by PHILLIMORE, J. The defendants, the Bank of Scotland and Sir George Anderson, appealed.

Rufus Isaacs, K.C. (*Bremner* and *A. C. Agnew* with him), for the defendants.
Colam (*Eric Dunbar* with him) for the plaintiff.

Cur. adv. vult.

Dec. 21, 1905. **SIR GORELL BARNES, P.,** read the following judgment.— This is an appeal from an order of PHILLIMORE, J., made on Nov. 6 last rescinding an order of MASTER MACDONELL made in this action on Oct. 31 last staying all proceedings in the action against the defendant bank and Sir George Anderson, on the ground that the same is vexatious and oppressive and an abuse of the process of the court. The action is brought against the defendant bank and Sir George Anderson as treasurer of the bank, and Robert Young and James Scott, in respect of certain alleged misrepresentations in a prospectus of a Scottish company, issued on Mar. 1, 1899, on which the name of the defendant bank appeared as the company's bankers. The bank and Sir George Anderson say that they took no part in the promotion of the said company and were not in any way concerned in the preparation or issue of the said prospectus except that the bank acted as the bankers of the company, and that they had no reason to believe, and did not, and do not now, believe that the prospectus contained any false or misleading statement.

The action is purely a Scottish action, and all the transactions which give rise to the alleged cause of action took place exclusively in Scotland; all the parties to the action are Scottish and reside in Scotland, with the exception of the defendant Scott, who appears to reside in London. The plaintiff is a schoolmaster, who resides at Inveraray, in Argyllshire, and is a domiciled Scotsman. The bank is a Scottish corporation incorporated under an Act of Parliament in Scotland in 1695, and they have their head office in Edinburgh and numerous branches at various places in Scotland. The only branch of the bank outside Scotland is in London, and the writ of summons in this action was served on the bank there. But the London branch appears to have taken no part and was not concerned in any of the matters in question in this action. Sir George Anderson resides in Scotland, and is a domiciled Scotsman. He states that he has appeared without objecting to the jurisdiction of the court because of his official connection with the bank. The defendant Young, who appears to reside in Scotland and to be a Scotsman, was made bankrupt in the Court of Session in Scotland about Aug. 11, 1899, but appears to have obtained his discharge in March, 1904, and to have been again made bankrupt in the said court about May 16, 1905, and is still undischarged. He has not entered an appearance in this action. The defendant Scott was adjudicated bankrupt in the London Bankruptcy Court on or about June 14, 1902. His discharge was subsequently suspended for two years from Nov. 19, 1902, and he is still undischarged, and it appears clear that he is not a substantial defendant in this action. He appears to have been appointed a director of James Young & Sons, Ltd., as representing the interests of a sister, who was the widow of James Young, a former partner in the firm of James Young & Sons; he was resident in Scotland, but he seems now to be a clerk in some office in the City. He has not appeared to the action.

The cause of action alleged in the statement of claim appears to arise out of the fact that the plaintiff, as he alleges, in March, 1899, applied for and was allotted five preference shares of £10 each in a company registered in Scotland, called James Young & Sons, Ltd. That application was made and was received in Scotland. It is clear from the affidavits in this case that all the circumstances upon

A which the plaintiff relies in the statement of claim took place in Scotland and not elsewhere, and that all the evidence with reference thereto will have to be obtained from Scotland. The company was registered in Scotland in the early part of 1899, having been formed to acquire, as it afterwards did, the business of a Scottish firm of contractors, Messrs. James Young & Sons, Edinburgh. The business of that firm was carried on exclusively in Scotland, and, as appears from the prospectus B of the company, the whole of the assets acquired from the said firm were situated in Scotland, and all contracts to be taken over by them were for works to be executed in Scotland. The firm had been for many years customers of the defendant bank, and the banking accounts of the firm, and afterwards of the company, were kept at the head office of the bank in Edinburgh. The company went into voluntary liquidation in September, 1899, and an order was made directing the C company to be wound-up under the supervision of the court on Oct. 25, 1899.

All the books and documents of the company are in the hands of the liquidator in Edinburgh. If this action be fought out, it is obvious that it will involve calling a large number of witnesses, all of whom reside in Scotland, and none in England, and the production of numerous books, documents, and papers relating to the matters in question in Scotland, about the production of which there might be D considerable difficulty having regard to what is stated in the affidavit of the defendant, Sir George Anderson, and also probably a consideration of Scottish law as affecting the rights and liabilities of the respective parties, and it is perfectly clear that a case of this kind ought, if possible, to be tried in Scotland, and that the inconvenience and difficulty placed upon the defendants in conducting the case in England would be so great as to put a great oppression upon them if they were E obliged to produce and keep their witnesses and documents, etc., in London during the time such a trial as that which would take place would last. In fact the inconvenience would be so great and the expenses so heavy as to be utterly out of proportion to the insignificant sum involved in this action.

The action appears to be brought by the plaintiff alone nearly five years after the winding-up order, and, although it is suggested in the affidavit of the plaintiff's F solicitor, that he is law agent for a large number of shareholders in James Young & Sons, Ltd., he does not venture to suggest that any one of those shareholders is assisting the plaintiff in this action or ready to be bound by its results, or that in any way the present is a test action brought on behalf of a number of shareholders. The defendants make this motion practically upon the grounds stated in Sir George Anderson's affidavit, where he urges that no legitimate advantage can accrue to the G plaintiff from prosecuting this action in England while there is an appropriate tribunal in Scotland, and that he believes that the plaintiff has not brought the action in England bona fide for the purpose of obtaining justice, but vexatiously and solely for the purpose of harassing the defendant bank under cover of asking justice, and in the hope that the bank, rather than incur the trouble and expense of trying the action in England, may be induced to pay something in order to get H rid of an unfounded claim. This suggestion is denied by the plaintiff, who, according to his affidavit, puts forward this suggestion, that the defendant Scott is in England, and that the plaintiff desires to have the matters in dispute settled in one action in England, where he can make Scott and the other defendants all parties, and that Scott is not a mere nominal defendant. With regard to this last point it is to be noticed that Scott is, as I have already observed, an undischarged bankI rupt and has not appeared, and has stated that he does not intend to deliver any defence in the action although the statement of claim has been delivered to him, and the bank say that Scott is not a substantial defendant at all.

First, with regard to the law applicable to the case, there seems, after the discussion of the case in court by counsel, to be substantially little dispute between them as to the state of the law in this country. An American and certain Scottish cases were cited which seem to carry the law further in those countries than can be found in any reported case in this country. In the first of those cases (*Collard* v. *Beach* (1)), where an action had been brought by a resident of the State of Con-

necticut against another resident of that State in the State of New York, the court declined to exercise its jurisdiction and to try the case unless there were special circumstances shown. The court appears principally to have decided the case upon the ground that the court would not allow its time to be taken up with the burden and expense of trying actions in that court which ought to be brought in other jurisdictions where the home courts of the litigants were open; in other words, they appear to have declined jurisdiction because of the inconvenience to an already overworked court which the case would cause. In the Scottish cases of *Longworth* v. *Hope* (2) and *Williamson* v. *North Eastern Rail. Co.* (3) it is stated that the courts in Scotland will allow the plea of forum non conveniens, and at first sight those cases seem to suggest that a mere question of inconvenience would be sufficient to cause the court in Scotland to decline to exercise its jurisdiction, but, having regard to the judgment of LORD DEAS in the first of those cases, it would seem that the inconvenience which the courts would consider would be an inconvenience which would give the party endeavouring to avail himself of the court's jurisdiction an unfair advantage over his opponent; for he says:

> "It is a valuable discretion which is vested in every court, not to exercise its jurisdiction if there are grounds for holding that, by an exercise of that jurisdiction, the defender, who objects to it, will be put to unfair disadvantage which he would not be subjected to in another accessible and competent court."

And I should gather that the Scottish courts would scarcely object to allow a case to be tried unless they felt satisfied that injustice would be done by allowing it to proceed in their own court. In some cases in England the doctrine of forum conveniens is to be met with, as in cases of administration of estates and trusts, of which an instance is to be found in *Ewing* v. *Orr Ewing* (4); but in that case I notice LORD SELBORNE stated (10 App. Cas. at p. 506):

> "It appears also that the doctrine of forum conveniens, which in England seldom comes into consideration when jurisdiction exists apart from the service of process abroad, unless there is an actual competition of suits, is in Scotland carried further, and may prevent the exercise of jurisdiction when the court is satisfied that the suit might have been brought and effectively prosecuted in a more convenient forum, although this may not actually have been done."

These remarks were made in a case which is of a class in which it may be necessary to invoke the above doctrine, but no case was cited to this court in which that doctrine has been held to apply to actions of a transitory character such as that in the present case. It may, however, be that there is not really any very substantial difference between the practice in Scotland and that of our courts as expressed by various judges—viz., that the court will interfere to prevent vexatious proceedings which would have the effect of preventing the due administration of justice; thus LORD BOWEN spoke of in *McHenry* v. *Lewis* (5) (22 Ch.D. at p. 408):

> "the general principle that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end."

For instance, in this country, where two actions are brought by the same person against the same person in different courts governed by the same procedure, and where the judgments are followed by the same remedies, it is primâ facie vexatious to bring two actions where one will lie; and, where two actions are brought, one in this country and one in a foreign country, by the same plaintiff against the same defendant, the bringing of such two actions may be vexatious, though not necessarily so, and other cases may be put, for which see the judgments in *McHenry* v. *Lewis* (5) and *Hyman* v. *Helm* (6).

In my opinion, however, the jurisdiction of the court to stay proceedings on the ground of vexation should be exercised with great care; indeed I find that COTTON, L.J., in *McHenry* v. *Lewis* (5) said (22 Ch.D. at p. 406):

A "In the first place, it is a jurisdiction which one ought to exercise with extreme caution. Stopping in the middle of a suit a plaintiff from going on when he has a right of action as against the defendant, is a jurisdiction which has to be exercised with very considerable caution."

The English courts are freely open to persons foreign to this country seeking to B enforce their rights against our corporations, companies, and citizens, in cases in which the courts can properly exercise jurisdiction, but, while I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused. The difficulties which arise in the exercise of this power of the court do not appear to be so much difficulties in stating the law as difficulties in administering or applying it. The court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other C hand, I think the court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the court in which the action is brought, and to which he would not be subjected if the action were brought in another accessible and competent court.

D There are various grounds on which an action may be vexatious. It may be so frivolous that it is obvious that it cannot succeed, and it will be stayed. The facts then show that it is only brought to annoy the defendant, and, in my view, this would not necessarily be answered by the plaintiff stating that he bona fide believed in his rights, because he might be possessed of a mind which held a distorted view about the matter such as no reasonable man ought to entertain. In other words, it does not appear to me that the question ought to be settled by a E mere consideration of what the plaintiff considers his intention, but the court is at liberty to treat him as intending what his acts show. Again, as SIR GEORGE JESSEL points out in *Peruvian Guano Co.* v. *Bockwoldt* (7) (23 Ch.D. at p. 230):

> "The plaintiff not intending to annoy or harass the defendant, but thinking that he would get some fanciful advantage, sues him in two courts at the F same time under the same jurisdiction. . . . That is vexatious, because whatever the intention of the plaintiff may be he cannot get any benefit . . . and the defendant is harassed by two suits."

The case may also be the same, though not necessarily so, where one suit is brought in one country and a second in another by the same plaintiff against the same defendant. There may also be other cases, but all the cases appear to be covered by G LORD BOWEN's language in the case last mentioned where he says (ibid. at p. 233):

> "Therefore, when that which he [the plaintiff] is asking for is frivolous, or sometimes when he is asking for it in a way which necessarily involves injustice, the courts have interfered."

It is true that the courts of this country have not gone so far as to express themH selves upon the question of convenience in terms similar to those used in the Scottish cases, though, as I have already noticed, it may be doubted whether there is any substantial difference between the two. Yet it seems to me clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious. This would probably not be so if the difference of trying in one country rather than in another I were merely measured by some extra expense; but where the difficulty for the defendant of trying in the country in which the action is brought is such that it is impracticable to properly try the case by reason of the difficulty of procuring the attendance of busy men as witnesses and keeping them during a long trial, and having to deal with masses of books, documents, and papers which are not in the country where the action is brought, and of dealing with law foreign to the tribunal, it appears to me that a case of vexation in some circumstances may be made out if the plaintiff chooses to sue in that country rather than in that where everybody is and where all the witnesses and material for the trial are. If, for instance, as

was put in argument, a dispute of a complicated character had arisen between two foreigners in a foreign country, and one of them were made defendant in an action in this country by serving him with a writ while he happened to be here for a few days' visit, I apprehend that, although there would be jurisdiction in the court to entertain the suit, it would have little hesitation in treating the action as vexatious and staying it. A

Suppose, again, for instance, that this action had been brought against all the present defendants except Scott, and the bank had been served in this country, which it can be, as it has been in the present case, because it had a branch here, could there be any reasonable doubt but that the plaintiff must be treated as intending to bring a vexatious action and that such action would be stayed? If that were not held, I see no reason why any one abroad might not sue and be allowed to proceed against a bank which had a branch in this country in respect of transactions all of which had taken place in some other country where the head office of the bank was—e.g., Australia or Brazil—and where the inconvenience of trying the case in this country would be so enormous as practically to work the most serious injustice upon the defendant. This matter is, in this respect, of general importance, because so many banks and other mercantile houses which are established in our colonies and in the United States and other foreign countries have branches here. To a business concern to allow actions to proceed in such circumstances where there is a proper and adequate tribunal in the place where both parties really are, and dealt with each other, and all the evidence is, would be intolerable. B C D

In the present case, apart from this question about Scott, it is difficult to conceive anything more harassing to the defendant bank than to have their officials dragged up to London for a lengthy trial, when the Court of Session is, so to speak, across the way in Edinburgh, and when together with their officials they would have to bring up here and keep away from their business numerous other witnesses with a mass of books, papers, and documents, if they can get them at all, which there seems to be some difficulty about without orders from the Court of Session as to some of them. All this to my mind is not measured by mere expense, and even on the question of expense it is to be pointed out that the cost of trying a case such as that indicated by the statement of claim, which refers to very complicated matters and attacks the character of the bank and Sir George Anderson, is utterly out of proportion to the trumpery amount in dispute; and if the defendants win, one would gather that they would have little prospect of recovering their costs from the plaintiff. E F G

The question then seems to me to resolve itself into this—viz., whether the fact that Scott has been made a defendant and has been served in England makes any difference in the view which the court should take of the case. To my mind it does not, having regard to the special circumstances of the case. Of course, it might do so if Scott were a real defendant and it had been necessary to bring one action to join him and the bank in this country; then the bank might have had to submit. But Sir George Anderson's affidavit describes Scott's position, and the affidavits of the plaintiff and his solicitor do not contain one word to show that Scott was not known to the plaintiff to be an uncertificated bankrupt. Scott is not defending, and could not apparently find any means for doing so. Was he then joined because the plaintiff wished to enforce his remedies against him? I feel it impossible to take this view, and, notwithstanding what the plaintiff and his solicitor say in their affidavits, I cannot bring myself to find that in fact the action is bona fide brought in this country. One other point; it is said by the plaintiff that a judgment against Scott might bar the plaintiff's remedy against the bank, but the bank's law agent says that this is not so in Scotland, and, although this is disputed by the plaintiff's solicitor, I prefer to accept the bank's law agent's view of the law. But if there be any doubt on the matter, the point is dealt with by the master's order under which the bank and Sir George Anderson are not to raise any point out of this. Moreover, there is no need for the plaintiff to sign judgment against Scott, H I

and it seems clear he will get nothing if he does. It is further said by the plaintiff that he wishes to get discovery against Scott; but as Scott is not defending, I fail to see how the plaintiff can expect to get any discovery against him which would in any way affect the case.

For these reasons I think that this appeal should be allowed with costs here and below, the master's order restored subject to a slight correction, and the plaintiff left to pursue his remedies against the bank and Sir George Anderson on the other side of the Tweed amid his own countrymen. This involves no hardship upon the plaintiff, but is really to his advantage if his claim is persisted in and fought out; for he can make it at less expense and trouble to himself in Scotland than in England. I think the restored order of the master should be slightly varied by the stay being of the proceedings against the defendant bank and the defendant Sir George Anderson.

SIR RICHARD HENN COLLINS, M.R.—ROMER, L.J., and I have read the judgment that has just been delivered, and we agree with it.

Appeal allowed.

Solicitors: *D. W. Drummond*; *Ashurst, Morris, Crisp & Co.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

GRIMOND *v.* GRIMOND

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord James of Hereford and Lord Robertson), March 6, 1905]

[Reported [1905] A.C. 124; 74 L.J.P.C. 35; 92 L.T. 477; 21 T.L.R. 323]

Charity—Uncertainty—Bequest to "charitable or religious institutions and societies."

A testator by his will directed his trustees, in the events which happened, to divide a third part of the residue of his estate "to and among such charitable or religious institutions and societies as my trustees or the survivors or survivor of them may select and in such proportion to each or any as they may fix."

Held: the testator's language was too vague and the bequest was void for uncertainty.

Notes. Considered: *Re Allen, Hargreaves* v. *Taylor*, [1905] 2 Ch. 400. Distinguished: *Re Pardon, McLaughlin* v. *A.-G.*, [1906] 2 Ch. 184. Followed: *Re Da Costa, Clarke* v. *Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337. Considered: *Houston* v. *Burns*, [1918–19] All E.R.Rep. 817. Referred to: *Verge* v. *Somerville*, [1924] All E.R.Rep. 121; *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson*, [1944] 2 All E.R. 60.

As to charitable purposes generally, see 4 HALSBURY'S LAWS (3rd Edn.) 213 et seq.; and for cases see 8 DIGEST (Repl.) 394 et seq.

Cases referred to in argument:

Blair v. *Duncan*, [1902] A.C. 37; 71 L.J.P.C. 22; 86 L.T. 157; 50 W.R. 369; 18 T.L.R. 194, H.L.; 8 Digest (Repl.) 394, *865*.

Crichton v. *Grierson* (1828), 3 Wils. & S. 329; 8 Digest (Repl.) 409, **347*.

Income Tax Special Purposes Comrs. v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1*.

Cocks v. *Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 325, *88*.

Re White, White v. *White*, [1893] 2 Ch. 41; 62 L.J.Ch. 342; 68 L.T. 187; 41 W.R. 683; 37 Sol. Jo. 380, C.A.; 8 Digest (Repl.) 334, *150.*

Re Macduff, Macduff v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879.*

Lord Advocate v. *Stewart*, [1902] A.C. 344; 71 L.J.P.C. 66; 86 L.T. 603; 50 W.R. 673; 18 T.L.R. 618, H.L.; 21 Digest 47, *301.*

Hill v. *Burns* (1826), 2 Wils. & S. 80; 8 Digest (Repl.) 399, **304.*

Andrews v. *M'Guffog* (1886), 11 App. Cas. 313, H.L.; 8 Digest (Repl.) 474, *1766.*

Playfair's Trustees v. *Playfair* (1900), 2 F. (Ct. of Sess.) 686; 37 S.L.R. 543; 7 S.L.T. 444.

Cobb v. *Cobb's Trustees* (1894), 21 R. 638; 31 S.L.R. 506; 1 S.L.T. 578.

Robbie's Judicial Factor v. *Macrae* (1893), 20 R. 358; 30 S.L.R. 411.

Appeal from a decision of the Second Division of the Court of Session in Scotland consisting of the Lord Justice Clerk (Lord Kingsburgh), Lord Young and Lord Trayner (Lord Moncreiff dissenting), who had affirmed a judgment of the Lord Ordinary (Lord Low).

The appellants, Mrs. Margaret Isabella Grimond (or Macintyre) and Mrs. Amy Affleck Grimond (or Webber) were nieces of the testator, Alexander Dick Grimond, of Glenericht, merchant, and manufacturer in Dundee, and two of his next-of-kin. They and their husbands were pursuers in the action, which was brought against the respondents, Joseph Bowman Grimond and Louis Grimond Macintyre, as trustees and executors of the testator, Alexander Dick Grimond, and against Joseph Bowman Grimond as an individual, in respect of his interest as heir-at-law. The testator died on Jan. 29, 1903.

The direction which the pursuers sought to set aside was contained in the third purpose of the testator's trust-disposition and settlement. By that purpose the testator directed his trustees to hold, dispose of, and apply the residue of his whole estate and effects, both heritable and movable, in the manner following, viz.: That they should divide such residue into three equal parts or shares, and with regard to one of such parts they should divide, pay, and convey the same to and among such charitable or religious institutions and societies as he might direct, and in such proportions to each or any as he might fix by any writing, whether holograph or tested, or under his hand, and failing thereof in whole or in part then, as regards such whole or such part not disposed of by him, to and among such charitable or religious institutions and societies as his trustees or the survivors or survivor of them, might select, and in such proportions to each or any as they might fix. The remaining two-thirds of residue the testator directed his trustees to divide among his nephews and nieces in certain proportions, and under certain conditions and limitations. The testator left no directions as to the particular charitable or religious institutions and societies amongst which such one-third part should be divided, nor did he fix by any writing, whether holograph or tested, or under his hand, the proportions in which such institutions and societies should benefit from his said bequest. The trustees claimed a right to retain in their hands the one-third share of residue, amounting to £100,000 or thereby, for distribution among such charitable or religious institutions and societies as they might select. The Lord Ordinary held that the bequest of the one-third share of residue was not void for uncertainty; and to this judgment the Second Division of the Court adhered on appeal, Lord Moncreiff dissenting as above-mentioned.

The Lord Advocate (*Scott-Dickson, K.C.*), *J. Wilson, K.C.*, and *J. Duncan Miller* (all of the Scottish Bar) for the appellants.

W. Campbell, K.C. and *W. J. Cullen* (both of the Scottish Bar) for the respondents.

A **THE EARL OF HALSBURY, L.C.**—I do not think it necessary to go through the whole course of the authorities which have been cited at the Bar upon the construction of other wills. I think that this case can be decided upon a simple proposition. It is sufficient to say that the testator has not given his property to a class from the members of which the trustees were to be at liberty to select individuals as the objects of his bounty. On the contrary, he has used language B so vague that he may be said, in effect, not to have made a will himself, but to have given to someone else the power of making a will for him, which I conceive to be the objection always raised where the direction is extremely vague, and you cannot say what the intention of the testator is. He has not made a will himself; he has empowered someone else to make a will for him after his death, and that the law will not allow. I have not been able to entertain any doubt C that this is the effect of the will, and that the gift of one-third of the residue is invalid on the ground of vagueness and uncertainty. I am encouraged in the expression of my opinion by finding some variety of opinion among the learned judges themselves in the Court of Session, who have nevertheless adhered to the judgment of the Lord Ordinary. The Lord Ordinary has said that the bequest is to be confined to religious institutions and societies in the sense of those insti- D tutions and societies that are Christian; but I do not think that this limitation was adopted by any of the judges of the Court of Appeal, and what the particular limit which has been imposed is, in the selection which is to be made by the trustees, I am afraid that I have not been able to discover. But it seems to me that the judgment delivered by LORD MONCREIFF really disposes of the question quite satisfactorily, and I do not wish to add anything to what his Lordship has E said, which has satisfactorily dealt with the whole of the arguments now presented on behalf of the respondents. As a result, I move that the judgment be reversed, and that the interlocutor be remitted for the purpose of giving effect to the judgment craved by the pursuers.

LORD MACNAGHTEN, LORD JAMES OF HEREFORD, and **LORD ROBERT-** F **SON** concurred.

Appeal allowed.

Solicitors: *A. & W. Beveridge*, for *Duncan & Black*, Edinburgh; *John Kennedy*, for *W. & J. Cook*, Edinburgh.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

Re PRICE. PRICE *v.* NEWTON

[CHANCERY DIVISION (Farwell, J.), March 31, April 1, 1905]

[Reported [1905] 2 Ch. 55; 74 L.J.Ch. 437; 93 L.T. 44; 53 W.R. 600]

B

Will—"Pecuniary investment"—Money placed on deposit at bank subsequent to will.

A testator by his will gave to beneficiaries all his "mortgages, debentures, and other securities for money, shares, stocks, and pecuniary investments" on certain trusts. After making his will he placed on deposit at a bank sums of money for the withdrawal of which ten days notice was required.

C

Held: although the money on deposit at the bank was earning interest it was money awaiting investment and was not a "pecuniary investment" within the terms of the will.

Per FARWELL, J.: I get no assistance from the usual extrinsic circumstances or from putting myself in the testator's armchair, because the subject-matter of the dispute was not in existence at the time the will was made. Nor is there any assistance to be derived from the inclination of the court to avoid intestacy, because it is not a case between testacy and intestacy, but between two gifts in the same will. Nor is there any assistance to be derived from the man's natural desire to provide for his wife and children, because it is a case between his brother and his brother's children.

D

Notes. Considered: *Re Collings, Jones* v. *Collings*, [1933] All E.R.Rep. 745. Distinguished: *Re Lewis's Will Trusts, O'Sullivan* v. *Robbins*, [1937] All E.R. 227. Referred to: *Re Derbyshire, Webb* v. *Derbyshire*, [1906] 1 Ch. 135.

E

As to the construction of "investments" in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 250; and for cases see 44 DIGEST 729 et seq.

Cases referred to:

(1) *Wilks* v. *Groom* (1856), 3 Drew. 584; 25 L.J.Ch. 724; 27 L.T.O.S. 270; 2 Jur.N.S. 681; 4 W.R. 697; 61 E.R. 1026; 23 Digest (Repl.) 329, *3969*.

F

(2) *Perpetual Executors and Trustees Association of Australia, Ltd.* v. *Swan*, [1898] A.C. 763; 67 L.J.P.C. 141; 79 L.T. 148; 14 T.L.R. 557, P.C.

Also referred to in argument:

Re Wheeler, Hankinson v. *Hayter*, [1904] 2 Ch. 66; 73 L.J.Ch. 576; 91 L.T. 227; 52 W.R. 586; 48 Sol. Jo. 493; 44 Digest 729, *5830*.

G

Mayne v. *Mayne*, [1897] 1 I.R. 324; 35 I.L.T. 35; 44 Digest 729, *l*.

Re Rayner, Rayner v. *Rayner*, [1904] 1 Ch. 176; 73 L.J.Ch. 111; 89 L.T. 681; 52 W.R. 273; 48 Sol. Jo. 178, C.A.; 44 Digest 705, *5484*.

Hopkins v. *Abbot* (1875), L.R. 19 Eq. 222; 44 L.J.Ch. 316; 31 L.T. 820; 23 W.R. 227; 44 Digest 708, *5514*.

H

Adjourned Summons to determine whether money on deposit at a bank was a "pecuniary investment" within the terms of a will.

William Evan Price, a solicitor practising at Torrington, in North Devon, by his will, dated June 30, 1888, gave his brother Rees Charles Price his policies, ready money, and book debts, and directed the payment thereout of his debts, funeral and testamentary expenses, and legacies. He then gave all his

I

"mortgages, debentures, and other securities for money, shares, stocks, and pecuniary investments"

to his trustees therein named for his brother and brother's sons on trusts therein mentioned. The testator's brother having predeceased him, he added a codicil to his will whereby he altered the trusts for his brother in favour of his brother's children. Subsequent to the making of the will, sums of money to the amount of £5,750 were placed to the testator's credit at the Torrington branch of the National Provincial Bank, being sums received in respect of his book debts

A by a nephew who held his power of attorney. The testator died on Dec. 16, 1904, and shortly after his decease a summons was taken out to determine whether the sum on deposit was a "pecuniary investment" within the terms of the will.

Upjohn, K.C., and *Metcalfe* for the plaintiffs.
Jenkins, K.C., and *Howard Wright* for the defendants.
Simon for another defendant.

B

FARWELL, J.—This is a short point which, however, involves a considerable sum of money; and, in coming to a conclusion myself, I do not dogmatise, for I think that anybody might claim to come to a different conclusion. The testator was a solicitor, and he was a very old man when he made his will in 1888. I get no assistance from the usual extrinsic circumstances or from putting myself C in his armchair, because, unfortunately, the subject-matter of this particular dispute was not in existence at the time that he made his will. Nor is there any assistance to be derived from the inclination of the court to avoid intestacy, because it is not a case between testacy and intestacy, but between two gifts in the same will. Nor is there any assistance to be derived from the man's natural desire to provide for his wife and children, because it is a case between his brother D and the children of his brother—the daughters and the sons. Therefore I simply have the codicil as it stands. He gives his brother his "policies, ready money, and book debts," and he makes that the primary fund for the payment of his debts, funeral expenses, and legacies. He then goes on to give to trustees for his brother and his brother's sons the particular funds in question in the following words:

E

> "All my mortgages, debentures, and other securities for money, shares, stock, and pecuniary investments, subject to the payment of the rest of my debts and legacies as the secondary fund for that purpose, on trust to continue the same in their present state of investment or to convert the same and invest the proceeds in any manner whatever,"

F and to hold upon trusts for his brother and his brother's children; and this gift is altered by the codicil in favour of all the brother's children—the sons or daughters. Then he gives the residue of his real and personal estate to his brother, and, in the case of his brother's death in his lifetime (which happened), to the three sons of the brother absolutely. In 1896 the testator, having a large sum on current account, placed some of it on deposit at his bank, the amount at his death being G £5,750. The question is: Is that a pecuniary investment within the meaning of this gift, so that it passes under the specific gift, or is not to be so described, and does it fall into residue?

In my opinion it is not a pecuniary investment, and falls into residue. I think that no one, in ordinary parlance, speaking of money which he puts on deposit account at his bankers at a short call like this—ten days—taking the usual H bankers' interest, which is 1 per cent. below bank rate, would treat himself as making an investment, or as investing in a mode which could be treated by him as an investment to be continued by his trustees "in its present state of investment" within the meaning of those words. It is a little difficult to dogmatise about matters of this sort, and I quite feel the force of the observation that people do use the words "invest" and "investment" nowadays in very odd collocations. I But, first of all, to take the Rules of Court, they certainly distinguish between money on deposit and money invested; and certainly KINDERSLEY, V.C., in *Wilks* v. *Groom* (1), when he was speaking of the cases in which a trustee is not liable for not investing moneys in his hands, mentions cases which he distinguishes one from another. The one is investing as required, the other is depositing the money with bankers so that it is not mixed up with other moneys. Those are things which he contrasts. In the same way in *Perpetual Executors and Trustees Association of Australia, Ltd.* v. *Swan* (2), LORD MACNAGHTEN, dealing with a

colonial statute authorising in certain instances money belonging to a trustee company to be placed with bankers on deposit, says ([1898] A.C. at pp. 767, 768):

"The framers of the Act knew perfectly well the difference between depositing moneys with a bank and investing moneys on security."

The distinction, to my mind, is really well established. The money which is deposited with your banker awaits investment, it is not in fact invested. It produces interest by being put on deposit, but that is immaterial. I think there is great force in the observation made by counsel for the plaintiffs that the fact that the sum deposited earns interest cannot make it an investment, because it is quite within recent times—there may be some banks which do it even now—that banks have allowed interest on a current account if exceeding a certain amount. The result is that in my opinion this sum falls into residue.

Solicitors: *Kendal, Price, & Francis*; *Harwood & Pusey*, for *E. B. Titley*, Bath.

[*Reported by* J. A. Price, Esq., *Barrister-at-Law.*]

Re BATES. HODGSON *v.* BATES

[Chancery Division (Kekewich, J.), October 31, 1906]

[Reported [1907] 1 Ch. 22; 76 L.J.Ch. 29; 95 L.T. 753; 23 T.L.R. 15; 51 Sol. Jo. 27]

Trust—Investment—Retention of investments—Hazardous securities—Power to trustees to retain—Right of tenant for life to whole income.

A testator bequeathed all his personal estate to his wife for life, with remainders over. The will contained no trust for conversion and no investment clause. By a codicil the testator declared that his trustees might retain any investments belonging to him for such period as they might think proper without being responsible for any loss occasioned thereby. Fully-paid shares in a coal company, together with some household furniture, constituted the whole of the testator's personal estate.

Held: the testator, by giving his trustees power to retain investments, made the shares authorised securities and directed the whole income therefrom to be paid to the tenant for life for so long as the trustees deemed it proper to retain the shares unconverted.

Rule in *Howe* v. *Earl of Dartmouth* (1) (1802), 7 Ves. 137, not applied.

Re Thomas, Wood v. *Thomas* (2), [1891] 3 Ch. 482, considered.

Notes. Followed: *Re Wilson, Moore* v. *Wilson*, [1907] 1 Ch. 394. Considered: *Re Nicholson, Eade* v. *Nicholson*, [1908–10] All E.R.Rep. 669.

As to the rule in *Howe* v. *Dartmouth*, see 16 Halsbury's Laws (3rd Edn.) 381, 382, and for cases see 44 Digest 197 et seq.

Cases referred to:

(1) *Howe* v. *Earl of Dartmouth, Howe* v. *Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 44 Digest 197, *265*.

(2) *Re Thomas, Wood* v. *Thomas*, [1891] 3 Ch. 482; 60 L.J.Ch. 781; 65 L.T. 142; 40 W.R. 75; 44 Digest 208, *366*.

(3) *Macdonald* v. *Irvine* (1878), 8 Ch.D. 101; 47 L.J.Ch. 494; 38 L.T. 155; 26 W.R. 381, C.A.; 44 Digest 198, *274*.

(4) *Re Sheldon, Nixon* v. *Sheldon* (1888), 39 Ch.D. 50; 58 L.J.Ch. 25; 59 L.T. 133; 37 W.R. 26; 44 Digest 208, *364*.

(5) *Porter* v. *Baddeley* (1877), 5 Ch.D. 542; 44 Digest 207, *361*.

Also referred to in argument:

Gray v. *Siggers* (1880), 15 Ch.D. 74; 49 L.J.Ch. 819; 29 W.R. 13; 44 Digest 207, *362*.

Green v. *Britten* (1863), 1 De G.J. & Sm. 649; 46 E.R. 257, L.JJ.; 44 Digest 339, *1687*.

Re Pitcairn, Brandreth v. *Colvin*, [1896] 2 Ch. 199; 65 L.J.Ch. 120; 73 L.T. 430; 44 W.R. 200; 44 Digest 208, *368*.

Re Bentham, Pearce v. *Bentham* (1906), 94 L.T. 307; 44 Digest 210, *381*.

Re Chaytor, Chaytor v. *Horn*, ante p. 230; [1905] 1 Ch. 233; 74 L.J.Ch. 106; 92 L.T. 290; 53 W.R. 251; 43 Digest 618, *586*.

Originating Summons to determine whether the tenant for life was entitled to the whole income of shares given under a will.

Cadwallader John Bates, who died on March 18, 1902, by his will dated Dec. 6, 1899, devised all his real estate to his wife, Josephine Bates, during her life without impeachment of waste, and after her death to such uses in favour of any descendant of the testator's grandfather, John Moore Bates, as his said wife should by will appoint, such descendant to take the same real estate in tail male, and so far as any such appointment should not extend to the use of the testator's brother, Charles Loftus Bates, during his life, and on his death to his eldest son in tail male. The testator bequeathed all his personal estate to the trustees of the will upon such trusts as would correspond as nearly as the rules of law and equity would permit with the uses thereinbefore declared in respect of his real estate. There was no trust for conversion and no investment clause. By a codicil to his will dated Oct. 4, 1900, the testator, after giving his trustees full power and authority to carry on the business of a colliery owner as then carried on by himself, declared as follows:

> "My trustees may retain any investments belonging to me at the time of my death for such period as to them, him, or her may seem proper without being responsible for any loss occasioned thereby."

Three hundred and thirty-six fully-paid shares of £50 each in the Bedlington Coal Co., Ltd., together with certain household furniture and effects, constituted the whole of the testator's personal estate. This company had a capital of £224,000, divided into 4,480 shares of £50 each. There were no debentures or mortgages, but debts amounting to £23,000. It worked four leasehold collieries, whose coal seams had an estimated life of some 200 years. It had a reserve fund of about £56,000 invested in trust securities and owned freehold property and other property in addition to its collieries amounting to about £100,000. By its memorandum of association the company was established to acquire, work, and sell collieries and any other mines, minerals, and quarries and manufactories of mineral products, and also railways, tramways, and other ways and wharfs. Also to cultivate and manage farms and lands and to carry on ancillary businesses. The trustees of the will issued this summons asking (inter alia) that it might be determined whether Josephine Bates, the tenant for life, became upon the testator's death entitled to the whole of the dividends on the shares in the Bedlington Coal Co., or whether such dividends ought to be apportioned as between capital and income under the rule in *Howe* v. *Earl of Dartmouth* (1).

Austen-Cartmell for the trustees.

P. O. Lawrence, K.C., and *F. Cassell, K.C.*, for Josephine Bates, the tenant for life.

Stewart Smith, K.C., and *Cozens-Hardy* for persons entitled in remainder.

KEKEWICH, J., decided that the testator had given his wife a life interest in his residuary personalty, with remainders over corresponding to the uses declared of his realty, and continued: I will now consider the main question in this case, which is very neatly raised for the first time in this sense, that, although there are many authorities upon the application of the rule in *Howe* v. *Earl of*

Dartmouth (1), in all of them there is something more than a mere power to retain investments, so that this is the first time that the exact question whether a mere power to retain standing alone takes the case out of the rule. A

Here we have a gift of personal estate to trustees upon trust for the wife for her life, and after her death for the persons mentioned in the will. If it were not for the codicil the rule in *Howe* v. *Earl of Dartmouth* (1) would apply without doubt. As to the effect of the rule in *Howe* v. *Earl of Dartmouth* (1), I venture B to say there is no clearer definition of it than that by BAGGALLAY, L.J., in *Macdonald* v. *Irvine* (3) where he says that the rule amounts to this (8 Ch.D. at p. 112):

> "Where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a court of equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only C means of giving effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognised character, and are consequently deemed to be more or less hazardous."

The question then is one of intention, and the rule is founded upon what is D presumed to be the intentions of the testator, and where he gives an estate for life and then to other persons, he must be presumed to have intended equality between them, so that the property bequeathed should not be swallowed up by the tenant for life. That intention is one presumed by law, but being only an intention presumed by law it must give way to any expressed intention on the part of the testator, and once you find an express intention by the testator that E the property is to be enjoyed in specie then effect must be given to it notwithstanding the rule in *Howe* v. *Earl of Dartmouth* (1). We must then examine this will and codicil to ascertain the testator's intention. In the codicil he uses words which show his intention with respect to the enjoyment of his estate. He says:

> "My trustees may retain any investments belonging to me at the time of F my death for such period as to them, him, or her may seem proper without being responsible for any loss occasioned thereby."

I will leave out the last words of the clause, which show the motive of the testator that the trustees are not to suffer if any loss is occasioned, but which does not affect the force of the direction itself.

The rule in *Howe* v. *Earl of Dartmouth* (1) says that the trustees must, as soon G as conveniently may be, realise all wasting and hazardous investments and pay the income of the permanent investments of a recognised character to the tenant for life, and pending conversion they can only allow the tenant for life 3 or 4 per cent. The power to retain investments is inconsistent with the rule. The trustees may retain for such time as they think fit—that is, they can retain for any time— H so that the testator by giving them this direction has clearly said that they are not bound to convert under the obligation imposed on them by the rule with which the power to retain is inconsistent. So here we have an expression of the testator's intention which is different from the intention presumed by the law. What is the effect of this power to retain? I am aware that in what I am about to say I am going beyond the language I used in *Re Thomas, Wood* v. *Thomas* (2), and which I has been favourably considered by other judges, but I think on further consideration that there are some faulty expressions with respect to this power to retain in *Re Thomas, Wood* v. *Thomas* (2), and I must have greater regard to what was said by NORTH, J., in *Re Sheldon, Nixon* v. *Sheldon* (4) where he says (39 Ch.D. at p. 53):

> "I do not see how I can direct the retainer of the existing investments, and at the same time hold that the tenants for life are not entitled to receive the whole of the income produced by those investments."

A It seems to me that the direction to retain investments adds them all to the list of authorised securities, so that the investments retained by the trustees are by the express sanction of the testator to be included in his estate, and the whole income of them to be paid to the tenant for life.

Then comes the question whether these shares are wasting or hazardous securities, for a distinction has been drawn between them by NORTH, J., in *Re* B *Sheldon, Nixon* v. *Sheldon* (4) and by many other judges with respect to the operation of the rule in *Howe* v. *Earl of Dartmouth* (1), and with regard to this distinction I speak with some hesitation. Of course there is a great distinction in one way. With regard to wasting securities the definition is difficult. They may be described as securities which decrease in value from day to day. Lease- holds and long annuities are examples, although the former may in some cases C increase in value owing to local circumstances, but their intrinsic character is a decrease in value day by day. There is a strong presumption that a testator does not intend that the tenant for life should swallow up the fruit-bearing tree; he only means him to have the yearly fruit thereof; therefore the reason of the rule in *Howe* v. *Earl of Dartmouth* (1) applies with more force to wasting securities than to hazardous securities, but it applies equally to both, for the same result D is arrived at—viz., that all the beneficiaries should be equal. But why should that operate upon the receipt of the income if once the testator has authorised his trustees to retain investments, and so has added them to the list of authorised securities? If you arrive at that, why should you hesitate to say that the tenant for life is to have the whole of the income derived from them, and in fact enjoy what the testator himself enjoyed? If a testator says that his trustees may retain E an investment, say of a leasehold house, he can do so, and if he does, why should you impute to him the intention that he does not intend the tenant for life to have the whole income therefrom? But as regards wasting securities, other judges have thought differently, as in *Porter* v. *Baddeley* (5), where it was decided that the rule applied in the case of wasting securities, although there was power to retain investments, and NORTH, J., in *Re Sheldon, Nixon* v. *Sheldon* (4) says F (39 Ch.D. at p. 52):

> "In *Porter* v. *Baddeley* (5) the unauthorised securities were of a wasting nature. The principle does not seem to me to apply to securities which are of a permanent nature, though they may be hazardous."

If it were necessary for me to decide in this case whether the trustees could G retain wasting securities and pay the whole income thereof to the tenant for life, I should say that they could, but I should have to consider the question more carefully because, if I held that, I should be going in the face of the decisions of some other judges, and I might think it preferable to leave it to the Court of Appeal. As regards that point there I simply record my impression. I do not decide it, because in this case I am dealing with hazardous and not with wasting H securities. They are shares in a coal mining company, but I find that the company is one which works not only one particular colliery but several collieries, and that it also has a large business in mines and railway transport, and is in fact a large trading company. It cannot be said that the shares of a trading company are of a wasting nature unless perhaps in such a case as that of a single ship company. I am of opinion then that these shares are hazardous only, and without going I into the other cases cited I hold that the testator, by giving his trustees a power to retain, has shown an express intention that they may hold these shares, and that the tenant for life is to have the whole income derived therefrom, and there must be a declaration that the tenant for life is entitled to the full income from the shares so long as the trustees deem it proper to retain them unconverted.

Solicitors: *Flux, Leadbitter & Harvey*, Newcastle-on-Tyne; *Crossman, Prichard & Co.*, for *Stanton, Atkinson & Hudson*, Newcastle-on-Tyne.

[*Reported by* C. F. DUNCAN, ESQ., *Barrister-at-Law.*]

A

GIBBON *v.* PEASE

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), March 24, 1905]

[Reported [1905] 1 K.B. 810; 74 L.J.K.B. 502; 92 L.T. 433; 69 J.P. 209; 53 W.R. 417; 21 T.L.R. 365; 49 Sol. Jo. 382; 3 L.G.R. 461] B

Architect—Plans and specifications—Right of employer to plans after work completed—Custom of profession.

Custom—Usage—Architect—Plans and specifications—Right of employer to plans after completion of work. C

A building owner employed an architect to carry out work and paid him a percentage on the contract price. The architect refused to give the building owner the plans and specifications prepared by him for the purpose of carrying out the work, alleging a custom of the profession that he was entitled to keep them after the completion of the work.

Held: the building owner paid the architect for making the plans, and, D therefore, they came into existence as the owner's property; any alleged custom to the contrary would be unreasonable, and the court would not give effect to it.

Ebdy v. *M'Gowan* (1) (1870), Hudson's B.C. (8th Edn.), 101, approved and followed.

Notes. As to usages of professions and occupations, see 11 HALSBURY'S LAWS E (3rd Edn.) 207 et seq.; and for cases see 7 DIGEST (Repl.) 458, 459.

Cases referred to:

(1) *Ebdy* v. *M'Gowan* (1870), Hudson's B.C. (8th Edn.), 101; 7 Digest (Repl.) 458, *471.*

(2) *Ex parte Horsfall* (1827), 7 B. & C. 528; 108 E.R. 820; sub nom., *Re Horsfall*, F 1 Man. & Ry.K.B. 306; 6 L.J.O.S.K.B. 48; 42 Digest 326, *3664.*

Appeal by the defendant from a decision of RIDLEY, J., at the trial of the action without a jury.

The plaintiff brought this action to recover from the defendant certain plans and specifications. The plaintiff was the owner of certain houses in Queen's Road, Bayswater, and he desired to have the upper parts of those houses converted into G residential flats. In September, 1902, he employed the defendant, an architect, to carry out the work upon the terms that the defendant should be paid 5 per cent. on the contract price of the work as his remuneration. The defendant prepared the necessary plans and specifications, and superintended the execution of the work, which was completed in June, 1903. The plaintiff paid the defendant his agreed remuneration, and then claimed to have the plans and specifications handed over H to him. The defendant refused to give up the plans and specifications, alleging that they were his property, and that he was entitled to retain them. Thereupon the plaintiff brought this action, which was tried before RIDLEY, J., without a jury. The learned judge held, on the authority of *Ebdy* v. *M'Gowan* (1) that the plaintiff was entitled to the plans and specifications, and he refused to admit any evidence of an alleged custom of the profession that the plans and specifications I remained the property of the architect, who was entitled to keep them after completion of the work. Judgment was accordingly given in favour of the plaintiff. The defendant appealed.

Montague Shearman, K.C., H. T. Kemp, K.C., and *Morle* for the defendant.
Danckwerts, K.C., and *Hugh Gatehouse* for the plaintiff.

SIR RICHARD HENN COLLINS, M.R.—It seems to me that this case is clearly governed by the decision in *Ebdy* v. *M'Gowan* (1). The defendant, an

A architect, was employed by the plaintiff to do all that was necessary to be done by an architect for designing and carrying out certain building operations at a remuneration of 5 per cent. on the contract price. It is not disputed that the employment involved the preparation of plans, and that the plans came into existence and use for the purpose of carrying out the building operations. The building operations were finished, and the plaintiff paid the defendant his re-
B muneration. The plaintiff then claimed the plans, but the defendant said that he was entitled by the custom of the profession to keep the plans, and he refused to give them to his employer. The case came on for trial before RIDLEY, J., who referred to *Ebdy* v. *M'Gowan* (1). Counsel on behalf of the defendant then contended that there was a custom of the profession which entitled the architect to keep the plans after the work was finished, and tendered evidence to prove
C the existence of that custom. In my opinion, that was not such a custom as would bind a party who had not assented to it. RIDLEY, J., decided that, if the alleged custom existed, it was unreasonable. I think also that the learned judge thought that it was not evidence of a custom, but of the opinion of architects as to what the contract ought to be. I will assume, however, that the learned judge accepted the statement that such a custom existed; but then he held, upon
D the authority of *Ebdy* v. *M'Gowan* (1) that it was so unreasonable that the court would not give effect to it.

It is said that that case is distinguishable from the present case. The principle upon which the argument in favour of the right of the architect to keep the plans has been based, was that his contract was not a contract for the sale of a chattel, but for work and labour in preparing plans and superintending the work, and that
E there was not the passing of any property in a chattel, and that the architect had performed his contract when he had superintended the work to completion. Was that the principle involved in the case of *Ebdy* v. *M'Gowan* (1)? It seems to me that that case was just the same as the present case. In that case the plaintiff was an architect who had been employed by the defendant to prepare plans and get tenders for a vicarage. The terms were that the payment to the architect
F was to be 5 per cent. on the money expended if the vicarage was completed, if tenders were obtained and work not commenced 3 per cent. on the estimated cost, if no invitations for tenders issued 2½ per cent. The plans were prepared, and then the building owner declined to proceed with the work and wrote to the architect offering to pay him his agreed remuneration and asking for the plans. He was ready and willing to pay the architect, but the architect refused to give up the plans. The archi-
G tect refused to give up the plans on the same ground as that upon which the architect has refused in the present case, that he had been employed to do, and had done, work and labour only and that there was no passing of property in any chattel; and he sought to support that contention by proving a custom of the profession for architects to retain their plans if the work was not proceeded with. That is practically the same
H custom as the custom which it is sought to set up in the present case. It was held by the Court of Exchequer that the custom, even if proved, would be unreasonable, and that the building owner was not bound to pay for the plans unless he got them. It seems to me that, if the alleged custom was bad in the one case, it is equally bad in the other in point of principle. It has been argued that the custom was held to be bad in *Ebdy* v. *M'Gowan* (1) because the building owner would there
I have got nothing at all unless he was entitled to the plans, and that that distinguishes that case from the present case. But in that case it was the choice of the building owner himself not to proceed with the work. It seems to me, therefore, that in the present case the architect is in even a worse position than in *Ebdy* v. *M'Gowan* (1), because the whole of the work has been carried out and he has earned and has been paid the full 5 per cent. remuneration.

In my opinion, the plans come into existence as the property of the building owner who pays the architect, and not as the property of the architect who is paid for making them. It seems to me that the true effect of the contract is

that the property in the plans passes to the building owner. I cannot see any difference between this case and the case of an artist who is employed to paint a picture or to design a coat of arms, where the property in the picture or coat of arms passes to the employer, I think that RIDLEY, J., was right, and that *Ebdy* v. *M'Gowan* (1) decided in 1870 and never since questioned, governs the present case. This appeal, therefore, fails and must be dismissed.

MATHEW, L.J.—I am of the same opinion, and I agree with all the reasons which have been given by the Master of the Rolls.

COZENS-HARDY, L.J.—I am of the same opinion. It seems to me that in principle the present case is not distinguishable from that of the solicitor, to which I referred during the argument—*Ex parte Horsfall* (2). There, as in the present case, the contract was for work and for the making of certain things which were absolutely necessary for carrying out the work. But it was held, in 1827, that, although it may be convenient for the solicitor to retain drafts and copies of deeds or other documents, yet those documents are the property of the client. There, as in the present case, the solicitor claimed the right to retain the documents after he had been paid. It seems to me that in this case, as in that case, the claim to retain cannot be maintained. What is the position of the building owner after the completion of the work? Without the plans how can he tell where various things are? Must he go and make a new contract with another architect to ascertain where the drains are placed? It was suggested that there is an implied contract by the architect to permit inspection of the plans by the building owner after the work has been completed. There is not, however, any foundation for that suggestion. In my opinion the question in this case was really decided in *Ebdy* v. *M'Gowan* (1) and this case is governed by that decision. I think, therefore, that the judgment of RIDLEY, J., must be affirmed.

Appeal dismissed.

Solicitors: *Charles Robinson & Co.*; *Gibbon & Moore.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

A

SEWELL *v.* NATIONAL TELEPHONE CO., LTD.

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Cozens-Hardy and Fletcher Moulton, L.JJ.), January 11, 1907]

[Reported [1907] 1 K.B. 557; 76 L.J.K.B. 196; 96 L.T. 483; 23 T.L.R. 226; 51 Sol. Jo. 207]

B

False Imprisonment—Evidence of imprisonment—Signing of charge-sheet containing charge against plaintiff—Plaintiff under arrest on criminal charge.

The fact that, while the plaintiff was in the custody of the police, the defendant signed at the police-station the charge-sheet containing the charge against him is not evidence sufficient to support an action of false imprisonment by the plaintiff against the defendant, for the defendant did not commit a trespass against the plaintiff, but merely set in motion the machinery of the law.

C

Notes. As to false imprisonment, see 33 HALSBURY'S LAWS (2nd Edn.) 37 et seq.; and for cases see 43 DIGEST 443 et seq.

Cases referred to:

D

(1) *Austin* v. *Dowling* (1870), L.R. 5 C.P. 534; 39 L.J.C.P. 260; 22 L.T. 721; 18 W.R. 1003; 33 Digest 467, *12*.

(2) *Grinham* v. *Willey* (1859), 4 H. & N. 496; 28 L.J.Ex. 242; 33 L.T.O.S. 110; 23 J.P. 280; 5 Jur.N.S. 444; 7 W.R. 463; 43 Digest 447, *755*.

Also referred to in argument:

E

Harris v. *Dignum* (1859), 1 F. & F. 688; 29 L.J.Ex. 23; 1 L.T. 169; 43 Digest 447, *756*.

Application by the plaintiff for judgment or for a new trial on appeal from the verdict and judgment at the trial before RIDLEY, J., with a jury.

The plaintiff brought this action to recover from the defendants damages for false imprisonment. The plaintiff, in his statement of claim, alleged that the

F

defendants, on or about July 21, 1904, gave the plaintiff into the custody of a police officer upon a false charge of felony and caused the plaintiff to be imprisoned for one night at a police-station. The defendants, in their defence, denied that they caused the plaintiff to be imprisoned. The only witness called at the trial was the plaintiff, who proved that he was in the employment of the defendants when he was arrested by two police constables at about 5 p.m. on July 21, 1904, and taken

G

to the police-station and charged with stealing a piece of metal; that he did not see Lowe, the defendants' manager, there, and that he did not see who signed the charge-sheet; that he was detained in custody and brought before the magistrate on the next day; and that he was committed for trial at the quarter sessions and was acquitted. On behalf of the plaintiff two interrogatories, administered by the plaintiff to the defendants, and the answers thereto, were put in evidence. They

H

were as follows:

"(3) Did not you, or some person or persons by your authority, on or about the dates mentioned in the statement of claim, prosecute the plaintiff upon the said charge? If you say no, did not you, or some person or persons by your authority, on one or more of the said dates, prosecute the plaintiff as aforesaid? If you say yes, say on which of the said occasions you so prosecuted?—Answer: In answer to the third interrogatory, I say that Mr. J. Harvey Lowe, on behalf

I

of the defendants, signed the charge-sheet on July 21, 1904, and from that date the defendants were responsible for the prosecution of the plaintiff. (5) Did not one J. Harvey Lowe sign the charge-sheet at the police-station on July 21, 1904? Was not the said J. Harvey Lowe your district manager? Did he not sign the charge-sheet by your authority?—Answer: In answer to the fifth interrogatory, I say yes."

There was no evidence that the defendants authorised the police constables to arrest the plaintiff, and it was admitted that the defendants were not responsible for the

detention of the plaintiff before Lowe signed the charge-sheet. The action was tried before RIDLEY, J., with a jury, and the learned judge held that the mere fact that the defendants' manager, with their authority, signed the charge-sheet was no evidence that he authorised the imprisonment of the plaintiff. The learned judge therefore directed the verdict and judgment to be entered for the defendants. The plaintiff appealed, asking for judgment or for a new trial.

Lord Coleridge, K.C., and *H. J. Turrell* for the plaintiff.

Montague Shearman, K.C., and *Chetham-Strode*, for the defendants, were not called on to argue.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal from the decision of RIDLEY, J., at the trial of an action for damages for false imprisonment. The action was tried with a jury and the learned judge held that there was no evidence to go to the jury in support of the plaintiff's claim, and directed the verdict and judgment to be entered for the defendants.

Although this case is very near the line, I am of opinion that the decision of the learned judge was right. The distinction between false imprisonment and malicious prosecution is now well settled, and when that distinction is once grasped this case becomes fairly clear. That distinction was well stated by WILLES, J., in *Austin* v. *Dowling* (1), where he said (L.R. 5 C.P. at p. 534):

> "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer. It is fallacious to inquire whether or not the one is severable from the other, until you find some inseparable connection between them. It may very well happen in the superior courts, which have jurisdiction over both descriptions of action, where the plaintiff, having been at once taken before a magistrate, may be content to bring his action for false imprisonment only. In such a case, which must be within the memory of all of us, the judge would tell the jury to give damages for the false imprisonment only, and not for what came under the cognisance of the magistrate. What did the judge do here? He ruled that, although there was evidence in support of a case of false imprisonment, yet that he ought not, having regard to the particulars of demand, and as the jury had heard all the evidence, and as the imprisonment before and the imprisonment after the charge-sheet was signed were substantially parts of the same continuous transaction, to sever the evidence which supported a case of false imprisonment from the evidence which supported a case of malicious prosecution. The former part of the ruling is quite right; the latter part is wrong in two particulars: in the first place, the judge seems to have thought that there was an inception of the malicious prosecution at the time the charge-sheet was signed; and, in the second place, that the false imprisonment merged in that. But, for the reasons already assigned, it was false imprisonment all through, so long as the matter remained in the hands of the ministerial officer."

Bearing that distinction in mind, I think that the present case does not fall within false imprisonment. That judgment of WILLES, J., makes it clear that, if a person only desires to obtain a judicial decision, and for that purpose merely makes a statement before the proper officer, who then intervenes and acts upon the statement, that person does not commit a trespass; he merely sets in motion the machinery of the law, and by doing that does not commit any trespass. In the

present case the defendants seem to have had nothing to do with the initial charge against the plaintiff. There is no evidence as to what person, if any, made a charge against the plaintiff, and why the constables arrested him. It was not until the plaintiff was in custody at the police-station that the defendants' manager appeared and signed the charge-sheet. The only evidence as to what the defendants did is contained in the answers to the third and fifth interrogatories, which simply amounted to an admission that they took a step which was essential to the carrying on of the prosecution. There is no evidence as to the circumstances under which the defendants' manager signed the charge-sheet. As I have pointed out, that is not of itself an act of trespass; it is merely a step in the prosecution of the charge, and does not go beyond asking for a judicial decision. More must be proved to establish a false imprisonment. If the facts proved are equally consistent with the inference that the defendant was merely invoking the assistance of the proper tribunal as with the inference that he was taking the matter into his own hands, there can be no primâ facie presumption either way. I do not wish to weaken the arm of a judge at the trial who, in a proper case, assumes the responsibility of withdrawing the case from the jury upon the ground that there is no evidence for them. In the present case I think that there was no evidence for the jury, and that the decision of the learned judge was right. This appeal, therefore, fails, and must be dismissed.

COZENS-HARDY, L.J.—I am of the same opinion. I think that the passage in the judgment of MARTIN, B., in *Grinham* v. *Willey* (2), is sufficient to decide this case. The learned Baron there said (4 H. & N. at p. 499):

> "The mere writing of the defendant's name on the charge-sheet does not make the defendant a trespasser."

I would also refer to the passage in the judgment of POLLOCK, C.B., in the same case, where he said (ibid. at pp. 498, 499):

> "We ought to take care that people are not put in peril for making complaint when a crime has been committed. If a charge be made mala fide, there are ample means of redress. But in the absence of mala fides we ought not to be too critical in our examination of the facts, to see if something is not done without which the charge against the suspected person could not have been proceeded with. A person ought not to be responsible in trespass, unless he directly and immediately causes the imprisonment."

Here the only evidence is that the defendants' manager signed the charge-sheet on July 21, 1904, and that from that date the defendants were responsible for the prosecution of the plaintiff. That is not sufficient evidence of false imprisonment; it is only a step towards the prosecution of the charge. I think, therefore, that the decision of the learned judge was right, and that this appeal must be dismissed.

FLETCHER MOULTON, L.J.—I am of the same opinion, and have nothing to add.

Appeal dismissed.

Solicitors: *H. S. Bridge*; *W. E. L. Gaine*.

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law*.]

RUBEN AND LADENBURG *v.* GREAT FINGALL CONSOLIDATED

[House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Robertson and Lord Atkinson), June 14, 15, 18, July 19, 1906]

[Reported [1906] A.C. 439; 75 L.J.K.B. 843; 95 L.T. 214; 22 T.L.R. 712; 13 Mans. 248]

Company—Estoppel—Shares—Certificate—Certificate forged by secretary of company for own purposes—Right of company to deny genuineness of certificate.

Estoppel—Estoppel by representation—Company—Share certificate forged by secretary of company—Right of company to deny genuineness of certificate.

Where the secretary of a company, acting fraudulently for his own illegal purposes, forges a certificate of shares in that company, the company is not estopped from denying the genuineness of that certificate, which is a nullity, and no representation on the part of the secretary relating to the matter will bind the company.

Shaw v. *Port Philip Gold Mining Co.* (1) (1884), 13 Q.B.D. 103, doubted.

Per Lord Loreburn, L.C.: It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.

Notes. Explained: *Lloyd* v. *Grace, Smith & Co.*, [1911–13] All E.R.Rep. 51. Considered: *Rand* v. *Craig*, [1919] 1 Ch. 1. Applied: *Kreditbank Cassel G.M.B.H.* v. *Schenkers, Ltd.*, [1927] All E.R.Rep. 421. Followed: *South London Greyhound Racecourses, Ltd.* v. *Wake*, [1930] All E.R.Rep. 496. Considered: *Slingsby* v. *District Bank, Ltd.*, [1931] All E.R.Rep. 143; *Algemeene Bankvereeniging* v. *Langton* (1935), 40 Com. Cas. 247; *Uxbridge Permanent Benefit Building Society* v. *Pickard*, [1939] 2 All E.R. 344.

As to agency and contracts of a company, see 6 Halsbury's Laws (3rd Edn.) 420 et seq.; and for cases see 9 Digest (Repl.) 297 et seq.

Cases referred to:

(1) *Shaw* v. *Port Philip Gold Mining Co.* (1884), 13 Q.B.D. 103; 53 L.J.Q.B. 369; 50 L.T. 685; 32 W.R. 771, D.C.; 9 Digest (Repl.) 298, *1880*.

(2) *Bank of Ireland* v. *Evans' Charities Trustees* (1855), 5 H.L.Cas. 389; 25 L.T.O.S. 272; 3 W.R. 573; 3 C.L.R. 1066; 10 E.R. 950, H.L.; 13 Digest (Repl.) 198, *181*.

(3) *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 1 Digest (Repl.) 681, *2425*.

(4) *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A.C. 396; 63 L.J.Q.B. 134; 69 L.T. 598; 42 W.R. 204; 9 T.L.R. 597; 37 Sol. Jo. 729; 1 R. 178, H.L.; 9 Digest (Repl.) 297, *1873*.

(5) *Sheffield Corpn.* v. *Barclay*, [1905] A.C. 392; 74 L.J.K.B. 747; 93 L.T. 83; 69 J.P. 385; 54 W.R. 49; 21 T.L.R. 642; 49 Sol. Jo. 617; 10 Com. Cas. 287; 3 L.G.R. 992; 12 Mans. 248, H.L.; 1 Digest (Repl.) 763, *2989*.

Also referred to in argument:

Re Bahia and San Francisco Rail. Co. (1868), L.R. 3 Q.B. 584; 9 B. & S. 844; 37 L.J.Q.B. 176; 18 L.T. 467; 16 W.R. 862; 9 Digest (Repl.) 404, *2590*.

Duck v. *Tower Galvanizing Co.*, [1901] 2 K.B. 314; 70 L.J.K.B. 625; 84 L.T. 847, D.C.; 10 Digest (Repl.) 759, *4933*.

British Mutual Bank Co., Ltd. v. *Charnwood Forest Rail. Co.* (1887), 18 Q.B.D. 714; 56 L.J.Q.B. 449; 57 L.T. 883; 52 J.P. 150; 35 W.R. 590; sub nom.

Mutual Banking Co. v. *Charwood Forest Rail. Co.*, 3 T.L.R. 498, C.A.; 1 Digest (Repl.) 686, *2449*.

Houldsworth v. *City of Glasgow Bank* (1880), 5 App. Cas. 317; 42 L.T. 194; 28 W.R. 677, H.L.; 9 Digest (Repl.) 256, *1631*.

Limpus v. *London General Omnibus Co., Ltd.* (1862), 1 H. & C. 526; 32 L.J.Ex. 34; 7 L.T. 641; 27 J.P. 147; 9 Jur.N.S. 333; 11 W.R. 149; 158 E.R. 993, Ex. Ch.; 1 Digest (Repl.) 690, *2469*.

Mackay v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; 43 L.J.P.C. 31; 30 L.T. 180; 38 J.P. 296; 22 W.R. 473, P.C.; 1 Digest (Repl.) 682, *2428*.

Thorne v. *Heard and Marsh*, [1894] 1 Ch. 599; 63 L.J.Ch. 356; 70 L.T. 541; 42 W.R. 274; 10 T.L.R. 216; 7 R. 100, C.A.; affirmed, [1895] A.C. 495; 64 L.J.Ch. 652; 73 L.T. 291; 44 W.R. 155; 11 T.L.R. 464; 11 R. 254, H.L.; 1 Digest (Repl.) 685, *2443*.

George Whitechurch, Ltd. v. *Cavanagh*, [1902] A.C. 117; 71 L.J.K.B. 400; 85 L.T. 349; 50 W.R. 218; 17 T.L.R. 746; 9 Mans. 351, H.L.; 9 Digest (Repl.) 570, *3762*.

Hambro v. *Burnand*, [1903] 2 K.B. 399; 72 L.J.K.B. 662; 89 L.T. 180; 51 W.R. 652; 19 T.L.R. 584; 8 Com. Cas. 252; reversed, [1904] 2 K.B. 10; 73 L.J.K.B. 669; 90 L.T. 803; 52 W.R. 583; 20 T.L.R. 398; 48 Sol. Jo. 369; 9 Com. Cas. 251, C.A.; 1 Digest (Repl.) 662, *2316*.

Dyer v. *Munday*, [1895] 1 Q.B. 742; 64 L.J.Q.B. 448; 72 L.T. 448; 59 J.P. 276; 43 W.R. 440; 11 T.L.R. 282; 14 R. 306, C.A.; 1 Digest (Repl.) 701, *2524*.

Starkey v. *Bank of England*, [1903] A.C. 114; 72 L.J.Ch. 402; 88 L.T. 244; 51 W.R. 513; 19 T.L.R. 312; 8 Com. Cas. 142, H.L.; 1 Digest (Repl.) 763, *2988*.

Staple of England v. *Bank of England* (1887), 21 Q.B.D. 160; 57 L.J.Q.B. 418; 56 L.T. 665; 52 J.P. 580; 36 W.R. 880; 4 T.L.R. 46, C.A.; 3 Digest (Repl.) 132, *27*.

Mahony v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; 33 L.T. 383, H.L.; 9 Digest (Repl.) 687, *4529*.

County of Gloucester Bank v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629; 64 L.J.Ch. 451; 72 L.T. 375; 43 W.R. 486; 39 Sol. Jo. 331; 2 Mans. 223; 12 R. 183, C.A.; 9 Digest (Repl.) 674, *4454*.

Knights v. *Wiffen* (1870), L.R. 5 Q.B. 660; 40 L.J.Q.B. 51; 23 L.T. 610; 19 W.R. 244; 3 Digest (Repl.) 109, *316*.

Appeal from a decision of the Court of Appeal (SIR RICHARD HENN COLLINS, M.R., STIRLING and MATHEW, L.JJ.), reported [1905] 2 K.B. 712, reversing a decision of KENNEDY, J., reported [1904] 1 K.B. 650, at the trial of the action before him without a jury.

Rufus Isaacs, K.C., *Danckwerts, K.C.*, and *J. D. Crawford* for the appellants.

Sir R. Finlay, K.C., *Eldon Bankes, K.C.*, and *Bremner* for the respondent company.

Their Lordships took time for consideration.

July 19, 1906. **LORD LOREBURN, L.C.**—In this case KENNEDY, J., gave judgment in favour of the plaintiffs, the present appellants, but stated that his decision was governed entirely by the authority of a previous case and that his own opinion was in favour of the defendants, the present respondents. The Court of Appeal gave judgment in favour of the present respondents, and, in my opinion, they arrived at a right conclusion.

The question is raised by the fraud and forgery of a man named Rowe. Rowe was secretary of the respondent company. He applied to the appellants, who are stockbrokers, to procure for him a loan of £20,000 in order to enable him to purchase 5,000 shares in the respondent company. Accordingly the appellants arranged with a firm of bankers to advance the money upon a transfer of the shares

to their names. Rowe forged a transfer in the name of one Storey as transferor. The transfer was duly executed by the bankers as transferees, and then the appellants delivered it to Rowe in exchange for a certificate. The certificate purported to state that the bankers were the registered proprietors of 5,000 shares; it purported to be signed by two directors, the seal was affixed to it, and it was countersigned by Rowe himself as secretary. In fact, the names of the two directors were forged by Rowe, and the company's seal was affixed by Rowe fraudulently, and not for or on behalf of or for the benefit of the respondent company, but solely for himself and for his own private purposes and advantage. Upon this the bankers advanced £20,000. When the fraud was discovered the appellants were obliged to repay to the bank the sum of £20,000, and brought this action against the respondent company on the ground that they were liable for the fraud of Rowe. The only other circumstance needing notice is that Rowe was admittedly a proper person to deliver certificates on behalf of the company.

I cannot see upon what principle your Lordships can hold that the respondent company is liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.

Another ground was pressed upon us—namely, that this certificate was delivered by Rowe in the course of his employment, and that delivery imported a representation or warranty that the certificate was genuine. He had not nor was held out as having authority to make any such representation or give any such warranty. And certainly no such authority is given by the simple fact that he held the office of secretary and was a proper person to deliver certificates. Nor am I able to see how the respondent company is estopped from disputing the genuineness of this certificate. That, indeed, is only another way of stating the same contention. From beginning to end the company itself and its officers with the exception of the secretary had nothing to do either with the preparation or issue of the document. No precedent has been quoted in support of the appellants' contention except *Shaw* v. *Port Philip Gold Mining Co.* (1). I agree with STIRLING, L.J., in regarding that decision as one that may possibly be upheld upon the supposition that the secretary there was in fact held out as having authority to warrant the genuineness of a certificate. If that be not so, then, in my opinion, the decision cannot be sustained. For these reasons the judgment of the Court of Appeal ought to be affirmed.

LORD MACNAGHTEN.—This case was argued at some length and with much ingenuity by the learned counsel for the appellants. In my opinion there is nothing in it. Ruben and Ladenburg are the victims of a wicked fraud. No fault has been found with their conduct. But their claim against the respondent company is, I think, simply absurd. The thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company's seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit and no better than a forgery. The signatures of the two directors which purport to authenticate the sealing are forgeries pure and simple, and every statement in the document is a lie. The only thing real about it is the signature of the secretary of the company, who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right or bind or affect the company in any way. It is not the company's deed, and there is nothing to prevent the company from saying so. Then, how can the company be bound or affected by it? The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation there can be no estoppel. The fact that this fraudulent certificate was concocted in the company's office, and was

A uttered and sent forth by its author from the place of its origin cannot give it an efficacy which it does not intrinsically possess. The secretary of the company, who is a mere servant, may be the proper hand to deliver out certificates which the company issues in due course, but he can have no authority to guarantee the genuineness or validity of a document which is not the deed of the company.

I could have understood a claim on the part of the appellants if it were incumbent B on the company to lock up their seal and guard it as if it were a dangerous beast, and as if it were culpable carelessness on the part of the directors to commit the care of the seal to their secretary or any other official. That is a view which once commended itself to a jury, but it has been disposed of for good and all by *Bank of Ireland* v. *Evans' Charities Trustees* (2) in this House. Of all the numerous cases that were cited in the opening, none, I think, is to the point but *Shaw* v. C *Port Philip Gold Mining Co.* (1), and that, as it seems to me, cannot be supported unless a forced and unreasonable construction is to be placed on the admissions which were made by the parties in that action. I think that the appeal must be dismissed with costs.

LORD DAVEY. To use the language of a distinguished judge of the last generation, the appellants' case seems to me as full of holes as a colander. There is not D a step in their title which is not tainted with fraud going to the root of it. Storey, whose name was used as transferor, had not 5,000 shares to transfer, and his name was forged to the transfer. There were, therefore, no shares, and there was no transfer. The seal on the certificate was, indeed, a genuine impression of the company's seal, but it was placed there without any authority, and (as concisely stated by LORD LINDLEY in his work on COMPANIES (6th Edn.) p. 246), "A document E of that kind, if there is any intent to defraud, is a forged instrument." The signatures of the two directors who purported to countersign were also forgeries. The appellants have, no doubt, been grossly defrauded, but the question is whether they can shift the loss on to the shoulders of the innocent. The company has done literally nothing in the transaction, and could do nothing, because in no stage of the transaction did it come before the board of directors, which alone was entitled to F speak and act for it.

It is admitted that Rowe was the proper person to deliver certificates to those entitled to them. From this harmless proposition the appellants slide into another and a very different one, that it was the secretary's duty to warrant on behalf of the company the genuineness of the documents which he delivered. There is no evidence that any such duty or power was, in fact, intrusted to Rowe, and it G is too great a strain on my powers to ask me to imply it from the mere fact of his being the secretary or the proper person to deliver documents. But even if I could make the implication that the appellants desire I do not think that it would assist them, for I agree with the learned judges in the Court of Appeal, that every part of the legal proposition stated by WILLES, J., in his well-known judgment in *Barwick* v. *English Joint Stock Bank* (3) is of the essence of it. WILLES, J.'s words H are these (L.R. 2 Exch. at p. 265):

> "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit."

Where, therefore (as in the present case), the secretary is acting fraudulently for I his own illegal purposes, no representation by him relating to the matter will bind his employers. And in my opinion it would be a matter of reproach if the law were otherwise. The reason for the qualification, I suppose, is that a representation made under such circumstances, whether express or implied, is also part of the same fraud, and cannot rightly be considered to be made by the servant as agent or on behalf of his master.

Finally, it is, in my opinion, open to serious doubt whether, on the facts of the present case, the parties relied on Rowe's representation at all. The evidence indicates that they refused to do so because they declined to part with their money

on Rowe's certifying the transfer (as it is called), and if they acted in reliance on the certificate apart from any representation, their case, of course, fails, for nobody can pretend that the certificate itself created any estoppel against the company. I guard myself from expressing any opinion whether, even if the certificate had been genuine, but issued under some innocent mistake, it would have been an estoppel in favour of the present appellants. It will be remembered that the appellants themselves propounded the forged transfer to the company for registration of the supposed transferees' names. I share the doubt expressed by my noble and learned friend LORD MACNAGHTEN in *Balkis Consolidated Co.* v. *Tomkinson* (4) ([1893] A.C. at p. 411):

> "whether under such circumstances a person ought to be permitted to rely upon a representation innocently made to which he has in a sense and to a certain extent contributed."

The recent decision of this House in *Sheffield Corpn.* v. *Barclay* (5) may be found to have some bearing upon this point. It is, however, unnecessary to express any opinion upon it on the present occasion. I am of opinion that the appeal should be dismissed.

LORD JAMES OF HEREFORD.—Concurring as I do in the judgments which have been delivered, I do not propose to add to them except by making one observation. This is one of the cases in which it is said that one of two innocent persons must suffer. I cannot help observing that the decision now about to be given may cause those who receive certificates in commercial life to be anxious, and to be shaken in their confidence in the validity of those certificates. But in this case a transferee has a safeguard which a company has not. A company cannot protect itself against the fraud of its secretary, and, if the company has to bear the burden of this loss, of course the loss placed upon companies will be very great, and they must guard against it. But—certainly theoretically, I do not know if it is quite the case practically—the transferee has a safeguard. He can always apply to the two directors whose names appear upon the certificate, and inquire from them whether those signatures are valid and genuine signatures or not. If the answer is that they are genuine, the certificate, of course, is valid; if the answer is "No, I have not signed that certificate," then he is aware that it is invalid. I do not know whether in commercial life transferees will take the trouble to inquire of directors whose signatures appear on certificates whether those signatures are genuine or not, but at any rate there is that power if they choose to exercise it.

LORD ROBERTSON and **LORD ATKINSON** concurred.

Appeal dismissed.

Solicitors: *Gilbert Samuel & Co.*; *Ashurst, Morris, Crisp & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

HALKETT *v.* EARL OF DUDLEY

[CHANCERY DIVISION (Parker, J.), February 14, 21, 22, 1907]

[Reported [1907] 1 Ch. 590; 76 L.J.Ch. 330; 96 L.T. 539;
B 51 Sol. Jo. 290]

Sale of Land—Repudiation of contract by purchaser—Defect of title—Right to repudiate to be exercised as soon as defect ascertained—Waiver by treating contract as subsisting—Defect discovered after decree of specific performance granted to vendor—Need to apply to court for rescission—Motion by purchaser to be discharged from contract—Perfection of title by vendor.

C *Specific performance—Sale of land—Repudiation of contract—Bar to granting of decree.*

Before the pronouncement of a decree of specific performance a purchaser who becomes aware of a defect in the vendor's title which cannot be removed without the concurrence of a third party whose concurrence the vendor has no power to require may (except possibly in the case of trifling matters which the
D court would at the vendor's instance treat as matters of compensation or abatement of purchase money) repudiate his contract, and such repudiation will be a bar to any relief being subsequently given by way of specific performance at the vendor's instance, even though the defect has been removed before trial. This right is no more than an equitable right affecting the equitable remedy by way of specific performance. If a vendor contracts that he will at
E a future date convey to a purchaser land which does not at the date of the contract belong to him, but to which he acquires title before the day on which, according to the contract, the purchase is to be completed, in principle he should be able to recover damages for breach of contract if the purchaser fails to complete at the date fixed for completion. If that be so, the right of repudiation in question must be distinguished from the common law right of
F rescission and arises out of that want of mutuality which, unless waived, is generally fatal to relief by way of specific performance.

This right of repudiation, whatever may be its nature, must be exercised, if it be exercised at all, as soon as the defect is ascertained. If, after ascertaining the defect, the purchaser still treats the contract as subsisting he does not
G retain the right to repudiate at any subsequent moment which he may choose. He precludes himself from exercising a right of repudiation at a subsequent time before giving the vendor a reasonable time to cure the defect, and thereafter his only safe course is to limit the time within which the defect must be removed and a title made out if the contract is to go through.

After a decree of specific performance a defendant purchaser cannot repudiate
H the title or the contract without the leave of the court. Even if repudiation is treated as a rescission of the contract a court of equity will not grant rescission without application to itself for leave so to do. The proper course for the purchaser, on discovery of a defect of title such as might, but for the decree, give rise to a right of repudiation, is to move to be discharged from the contract. Even if he does so move, he will not be entitled to be discharged as a
I matter of course. A decree for specific performance enures for the benefit of both parties, and on the reference to title a vendor is not confined to showing such title as he had at the date of the decree, much less to such title as he had at the date of the contract, but may perfect his title at any time before certificate. On the other hand, the purchaser is not confined to objections taken by him before or at the hearing. Even if the certificate be adverse to the title an application by the purchaser to be relieved may be refused if, at the hearing of the application, the vendor has perfected his title, and the same rule applies to the further hearing of the action on the certificate.

Sale of Land—Title—Proof—Document—Impossibility of production—Need for vendor to give evidence of contents—Nature of evidence which must be supplied.

There is no obligation on a vendor either to produce, or procure a covenant for the production of, a document of record, or any document which it is impossible to produce, but he is bound to furnish sufficient evidence of its contents. A vendor is not in every case bound to supply evidence which would be admissible in an action for ejectment.

Evidence—Document—Secondary evidence as to effect—Document of record—Foreign document—Production illegal by foreign law.

When a party proves that he is not in a position to adduce primary evidence of the contents of a document by the production of the document, e.g., because the document in question is lost or cannot be found, or that it is of record in a foreign country the laws of which do not admit of its production, he is at liberty to give secondary evidence of its contents.

Notes. Distinguished: *Banfield* v. *Picard* (1911), 55 Sol. Jo. 649. Considered: *Procter* v. *Pugh*, [1921] 2 Ch. 256. Applied: *Berners* v. *Fleming*, [1925] All E.R.Rep. 557. Considered: *Cleadon Trust, Ltd.* v. *Davis*, [1940] 3 All E.R. 648; *Simpson* v. *Connolly*, [1953] 2 All E.R. 474; *Manning* v. *Turner*, [1956] 3 All E.R. 641. Referred to: *Elliott* v. *Pierson*, [1948] 1 All E.R. 939.

As to the repudiation by the purchaser of a contract for the sale of land, see 34 Halsbury's Laws (3rd Edn.) 324–328. As to the effect of repudiation on a claim for specific performance, see ibid., vol. 36, pp. 319–322. As to secondary evidence of a document, see ibid., vol. 15, pp. 264–266. For cases see 40 Digest (Repl.) 262 et seq., 42 Digest 521–523, 22 Digest (Repl.) 203 et seq.

Cases referred to:

(1) *Bellamy* v. *Debenham*, [1891] 1 Ch. 412; 60 L.J.Ch. 166; 64 L.T. 478; 39 W.R. 257; 7 T.L.R. 199, C.A.; 40 Digest (Repl.) 151, *1155*.

(2) *Salisbury* v. *Hatcher* (1842), 2 Y. & C.Ch. Cas. 54; 12 L.J.Ch. 68; 6 Jur. 1051; 63 E.R. 24; 40 Digest (Repl.) 268, *2239*.

(3) *Hoggart* v. *Scott* (1830), 1 Russ. & M. 293; Taml. 500; 9 L.J.O.S.Ch. 54; 39 E.R. 113; 40 Digest (Repl.) 268, *2238*.

(4) *Eyston* v. *Simonds* (1842), 1 Y. & C.Ch. Cas. 608; 11 L.J.Ch. 376; 6 Jur. 817; 62 E.R. 1038; 42 Digest 501, *673*.

(5) *Murrell* v. *Goodyear* (1860), 1 De G.F. & J. 432; 29 L.J.Ch. 425; 2 L.T. 268; 6 Jur.N.S. 356; 8 W.R. 398; 45 E.R. 426, L.JJ.; 40 Digest (Repl.) 263, *2209*.

(6) *Esdaile* v. *Stephenson* (1822), 6 Madd. 366; further consideration, 1 Sim. & St. 122; 57 E.R. 49; 40 Digest (Repl.) 215, *1754*.

(7) *Coffin* v. *Cooper* (1807), 14 Ves. 205; 33 E.R. 499, L.C.; 40 Digest (Repl.) 268, *2241*.

(8) *Whittaker* v. *Whittaker* (1792), 4 Bro.C.C. 31; 29 E.R. 762; 20 Digest (Repl.) 376, *986*.

(9) *Jenkins* v. *Hiles* (1802), 6 Ves. 646; 31 E.R. 1238, L.C.; 42 Digest 551, *1123*.

(10) *Wynn* v. *Morgan* (1802), 7 Ves. 202; 32 E.R. 82; 42 Digest 500, *661*.

(11) *Stevens* v. *Theatres, Ltd.*, [1903] 1 Ch. 857; 72 L.J.Ch. 764; 88 L.T. 458; 51 W.R. 585; 19 T.L.R. 334; 35 Digest 494, *2249*.

Also referred to in argument:

Cato v. *Thompson* (1882), 9 Q.B.D. 616; 47 L.T. 491, C.A.; 40 Digest (Repl.) 251, *2107*.

Jacobs v. *Revell*, [1900] 2 Ch. 858; 69 L.J.Ch. 879; 83 L.T. 629; 49 W.R. 109; 40 Digest (Repl.) 113, *872*.

Re Arnold, Arnold v. *Arnold* (1880), 14 Ch.D. 270; 42 L.T. 705; 28 W.R. 635, C.A.; 40 Digest (Repl.) 47, *291*.

Rudd v. *Lascelles*, [1900] 1 Ch. 815; 69 L.J.Ch. 396; 82 L.T. 256; 48 W.R. 586; 16 T.L.R. 278; 42 Digest 577, *1426*.

Green v. *Sevin* (1879), 13 Ch.D. 589; 49 L.J.Ch. 166; 41 L.T. 724; 44 J.P. 282; 40 Digest (Repl.) 120, *941.*

Lysaght v. *Edwards* (1876), 2 Ch.D. 499; 45 L.J.Ch. 554; 34 L.T. 787; 24 W.R. 778; 40 Digest (Repl.) 195, *1579.*

Garnett v. *Acton* (1860), 28 Beav. 333; 54 E.R. 394; 40 Digest (Repl.) 221, *1792.*

Fain v. *Ayers* (1826), 2 Sim. & St. 533; 57 E.R. 450; sub nom. *Fair* v. *Ayres*, 4 L.J.O.S.Ch. 166; 40 Digest (Repl.) 311, *2560.*

Enraght v. *Fitzgerald* (1839), 2 I.Eq.R. 87; 40 Digest (Repl.) 216, **937.*

Binks v. *Lord Rokeby* (1818), 2 Swan. 222; 36 E.R. 600, L.C.; 40 Digest (Repl.) 214, *1743.*

Dakin v. *Cope* (1827), 2 Russ. 170; 38 E.R. 299; 40 Digest (Repl.) 208, *1696.*

Phillipson v. *Gibbon* (1871), 6 Ch. App. 428; 40 L.J.Ch. 406; 24 L.T. 602; 35 J.P. 676; 19 W.R. 661, L.JJ.; 42 Digest 501, *674.*

Croome v. *Lediard* (1834), 2 My. & K. 251; 3 L.J.Ch. 98; 39 E.R. 940, L.C.; 42 Digest 506, *722.*

Monro v. *Taylor* (1852), 3 Mac. & G. 713; 21 L.J.Ch. 525; 19 L.T.O.S. 97; 42 E.R. 434, L.C.; 42 Digest 456, *259.*

Burnaby v. *Equitable Reversionary Interest Society* (1885), 28 Ch.D. 416; 54 L.J.Ch. 466; 52 L.T. 350; 33 W.R. 639; 42 Digest 502, *683.*

Further Consideration of action for specific performance and adjourned summonses.

In August, 1902, the plaintiff, Margaret Halkett, agreed to sell, and the defendant, the Earl of Dudley, agreed to buy a residential property known as Great Fosters, at Egham, Surrey. About a fortnight after the contract was made, the defendant suggested that completion should be postponed, and thereupon negotiations took place extending for two years as to the terms on which the defendant might be relieved of his contract. These negotiations failed, and on July 13, 1904, the plaintiff instituted this action for specific performance. On Jan. 14, 1905, the court, on the admission by the defendant that there was a binding agreement between him and the plaintiff which ought to be specifically performed and carried into execution in case a good title could be made to the premises, made an order accordingly, and ordered that an inquiry should be made whether a good title could be made to the land in question, and in case it should appear that a good title could be made, a further inquiry when it was first shown that such good title could be made. The judgment was made without prejudice to any question as to damages, as to the plaintiff being charged with occupation rent, and as to any claim regarding the plaintiff's right to enforce specific performance with an abatement. The contract of which specific performance was decreed was an open contract, and no abstract of title had been delivered prior to the decree. The plaintiff, having delivered her abstract of title in February or March, 1905, the defendant, on April 5 following, made certain objections to the plaintiff's title, two of which were as follows:

(i) A piece of land coloured green on the plan was subject to restrictive covenants, which entirely precluded building without the licence of third parties. The plaintiff contended that this piece of land was very material to the enjoyment of the property as a whole, as it had a frontage of nearly 400 ft. to the only main road bounding the property, and alleged that the restriction on building on that piece precluded the proper development of the land in the rear of it. The plaintiff on June 7, 1905, replied that she offered to make compensation in respect of this matter if it were held that it was not too late for her to show a title to it, and alleged that the property was residential and not a building estate. The defendant on Nov. 18, 1905, alleged that it was now too late for the plaintiff to obtain a release of the restrictive covenants, that there was no evidence to show that she could obtain any such release, and that the contract was repudiated by the objection of April 5 as mentioned above, and subsequently before the master on July 11, 1905. The plaintiff replied on Dec. 8, 1905, that she had obtained a release, and

denied that the contract had ever been repudiated, or at all events, that no attempt to repudiate was made until after the plaintiff had obtained an agreement for a release.

(ii) The defendant's second objection was to the effect that the trust disposition and settlement in Scottish form of one Richard Kerr, who died in 1872 entitled to three mortgages amounting in all to £6,000 over part of the land in question had not been, nor had any sufficient evidence thereof been produced, and that this document was material to the title of the mortgaged premises and was in the custody of a Scottish court, but the defendant was entitled to have the original produced to him in England. The plaintiff, on June 7, 1905, answered, as was the fact, that she had produced certified copies, the original official copy of the trust disposition from the proper custody, and the official confirmation of the appointment of executors, that the latter document had been re-sealed in England, that the original of the trust disposition was registered in Edinburgh, and that the plaintiff had offered to bear all reasonable expenses of obtaining production at the places where the originals were to any agent of the defendant. On Dec. 6, 1905, the restrictive covenants in question were contracted to be released, and were actually released on Jan. 4, 1906. On Dec. 22, 1905, the defendant repudiated the contract before the master in chambers, on the ground of want of title on the part of the plaintiff.

By summons dated April 9, 1906, the defendant applied to be discharged from his purchase on the ground that at the date of the contract and also at the date of the decree for specific performance, and also subsequently when he insisted on the defects in the plaintiff's title, the plaintiff was without a good title to the hereditaments, had no power to convey them free from incumbrances, and had no power to compel a conveyance from any other person. Buckley, J., ordered that this summons should stand over until after the certificate had been made, and should be heard at the further consideration. By his certificate dated Nov. 14, 1906, the master certified that a good title could be made to the land in question, and that it was first shown that a good title could be made on Dec. 8, 1905. On Nov. 29, 1906, the defendant took out a summons to vary the master's certificate, dated Nov. 14, 1906, by discharging the finding that a good title could be made to the hereditaments, and by finding in lieu thereof that a good title could not be made to them for, among other reasons, that a trust disposition and settlement of one Richard Kerr, who died on Oct. 29, 1872, entitled to three mortgages on the hereditaments, was not, nor was any sufficient evidence thereof, produced.

By s. 7 of the Evidence Act, 1851:

> "All proclamations, treaties, and other acts of State of any foreign State or of any British colony, and all judgments, orders, and other judicial proceedings of any court of justice in any foreign State or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court may be proved in any court of justice . . . either by examined copies or by copies authenticated as hereinafter mentioned."

By s. 18: "This Act shall not extend to Scotland."

The further consideration and two summonses mentioned above came on for hearing together.

Buckmaster, K.C., and *T. T. Methold*, for the defendant, the purchaser.
Upjohn, K.C., and *MacSwinney*, for the plaintiff, the vendor.

PARKER, J., stated the facts and continued: The purchaser puts his case in this way. He says, first, that a purchaser discovering a fatal defect in the vendor's title has a right to repudiate the contract; he says, secondly, that this right is unaffected by the decree for specific performance; he says, thirdly, that he did repudiate the contract on July 11, 1905, or, at any rate, on Dec. 22, 1905, before the objection as to the restrictive covenant had been removed. He says, further, his objection to the non-production of the Scottish will, or sufficient evidence

thereof is still a good objection to the title. I think it is reasonably clear on the authorities quoted to me that, before decree, a purchaser who becomes aware of a defect in the vendor's title, which defect cannot be removed without the concurrence of a third party whose concurrence the vendor has no power to require, may (except possibly in the case of trifling matters which the court would at the vendor's instance treat as matters of compensation or abatement of purchase money) repudiate his contract, and that such repudiation will be a bar to any relief being subsequently given by way of specific performance at the vendor's instance, even though the defect has been removed before trial. I do not think that this right is more than an equitable right affecting the equitable remedy by way of specific performance. If a vendor contracts that he will, at a future date, convey to a purchaser land which does not at the date of the contract belong to him, but to which he acquires title before the day upon which, according to the contract, the purchase is to be completed, I do not see why, in principle, he should not be able to recover damages for breach of contract if the purchaser fail to complete at the date fixed for completion. If this be so, the right of repudiation in question must be distinguished from the common law right of rescission, and arises out of that want of mutuality which, unless waived, is generally fatal to relief by way of specific performance.

The point is touched on, though it is left open, in *Bellamy* v. *Debenham* (1); and *Salisbury* v. *Hatcher* (2), to which I will refer presently, is further material on the point, but it is, in my opinion, equally clear that this right of repudiation, whatever may be its nature, must be exercised, if it be exercised at all, as soon as the defect is ascertained. If, after ascertaining the defect, the purchaser still treats the contract as subsisting he does not retain the right to repudiate at any subsequent moment he may choose. That is, I think, the effect of *Hoggart* v. *Scott* (3), *Eyston* v. *Simonds* (4), *Salisbury* v. *Hatcher* (2), and *Murrell* v. *Goodyear* (5). In *Hoggart* v. *Scott* (3) the headnote (which I think sufficiently shows the nature of the case) is this (1 Russ. & M. at p. 293):

> "The plaintiff in a bill for the specific performance of a contract is entitled to a decree, if, at the hearing, he can show a good title, although he had not such title at the time of the contract; but the defendant might, if he had thought fit, have retired from the contract, as soon as the want of title was discovered, and was not bound to wait till the plaintiff could acquire a good title."

I think that the headnote sufficiently states the principle which was laid down in the judgment, and in almost the same words, so I need not further refer to the case. The next case is *Eyston* v. *Simonds* (4). In that case a person contracted to sell an estate, being at the time of the contract not entitled either to a legal or equitable title to it by reason of the alienage of a party through whom he claimed. The purchaser by his own inquiries ascertained a defect of title, but did not, until after some months of negotiation with the vendor, repudiate the contract. The vendor then filed his bill for specific performance, and, pending the investigation of the title in the master's office, obtained a grant of the estate from the Crown, and it was held that he was entitled to a decree. In that case KNIGHT BRUCE, V.-C., makes use of the following observation (1 Y. & C.Ch. Cas. at p. 613):

> "Now it appears to me to be very possible, though it is not necessary to decide, that if, at that moment [i.e., the moment the defect was discovered] the purchaser had held his hand, and had said, A material fact has been concealed and withheld from me, and, therefore, I refuse to complete the purchase—it is possible, under such circumstances, that he could not have been compelled to complete it. I, however, do not decide that point."

It had been decided already, I think in *Hoggart* v. *Scott* (3). Then he goes on to say (ibid.):

> "Instead of so acting the parties continue in negotiation, in the course which a further opinion is taken on the title; and it is not till the end of the year

1840, this having occurred in 1839, that the matter is broken off. Having regard to what took place in the interval between April, 1839, and October, 1840, having regard to the frame of the answer, to say nothing as to the order which has been obtained, I am of opinion that the point is not now effectually open to the purchaser, but that the decree must be made in favour of the vendor, subject to the payment to the purchaser of all costs up to the report and the confirmation of it, inclusive, and that subsequently to the confirmation no costs should be given on either side."

The third case to which I have referred is *Salisbury* v. *Hatcher* (2). In that case the headnote is as follows (2 Y. & C.Ch. Cas. at p. 54):

"Specific performance of a contract for sale of an estate in fee simple decreed in favour of a vendor who at the time of the contract was tenant for life only; the purchaser not having rejected the purchase as soon as he ascertained the real interest of the vendor, and the vendor being able by means of the consent of the parties interested in remainder to make a good primâ facie title to the fee simple at the hearing."

In that case the Vice-Chancellor commences his judgment in the following manner (ibid. at pp. 63, 64):

"In cases of specific performance the want of mutuality is a consideration generally material, but it is contrary to principle and authority to say that perfect mutuality is requisite in order to call a court of equity into action. There are cases in which plaintiffs have had a decree for specific performance against defendants, who, when the bill was filed, were not in a condition to enforce specific performance in their own favour. Where no legal invalidity affects the contract, the enforcement of it in this court is matter of judicial discretion. In this case it has not been contended that there is any legal invalidity. Suppose Mrs. Salisbury to have obtained a legal conveyance of the fee before the time fixed for completion of the contract, and to have done and tendered all other things requisite to be done and tendered. If this were done in sufficient time, she would, I apprehend, have been entitled to recover, at law, on the contract. The contrary, indeed, has not been argued, and I do not understand that on that point the counsel for the defendant desire a Case for the opinion of a court of law. If so, this becomes a case for the judicial discretion of the court of equity to which application for specific performance is made."

I read that passage primarily because it appears to me to be relevant on the point as to what is the nature of this right of repudiation on which the purchaser in the present case relies, and it really points to the fact that it has nothing to do with the legal right of rescission. It is merely an equitable right arising out of want of mutuality, and which may possibly form the ground of a defence to the peculiar relief given by courts of equity—namely, the relief by way of specific performance. The Vice-Chancellor then goes on to explain the various circumstances of the case, and later on in his judgment he says this (ibid. at p. 66):

"In this state of things I am asked, on the ground of want of mutuality, to say that the plaintiff is not entitled to any relief. I should be trampling on all principle and authority, if I were to accede to such an argument. Even if the rule of mutuality, as it has been called, could be carried so far as it has been attempted to be carried in a case of this description, which I do not say, still the conduct of the purchaser has been amply sufficient to exclude him from the benefit of any such argument. With full notice of the state of the title, he pursues the investigation of it, and obtains the fulfilment of a requisition made by himself, and founded on the very state of the title. In my opinion, therefore, to relieve him from the contract would, as I have already said, be contrary to all principle and authority, and discreditable to a court of justice."

A It will be seen that the decision in the case, or rather the principle of the decision, rests really upon a waiver of the want of mutuality in the contract. I do not know that I need refer to the last case I have quoted which is to the same effect—namely, *Murrell* v. *Goodyear* (5).

Assuming here that the defect of title due to the existence of the restrictive covenant was such a defect as to give rise to the right of repudiation which I have B been describing, was such right exercised or did the purchaser still continue to treat the contract as in operation? I am of opinion that no such prompt repudiation as required on the part of the purchaser has been proved, but that, on the contrary, the purchaser continued after notice of the defect to treat the contract as subsisting, to make requisitions and objections with a view to an inquiry as to the vendor's title which was proceeding in chambers, an inquiry which would, of C course, have been wholly useless if the contract had been effectually repudiated. It was suggested that the purchaser repudiated the contract as early as July 11, 1905, at an interview or appointment before the master; but even as late as Nov. 8, 1905, we find him delivering observations on replies to the requisitions, and such observations are not expressed to be made without prejudice to some alleged prior repudiation. The first real attempt to repudiate the contract was, I think, made D before the master on Dec. 22, 1905, when the plaintiff was in a position to compel release of the restrictive covenant, and after that the defendant takes no step to give effect to the repudiation until the very end of March, 1906, long before which the covenant had been released. It is not necessary for me to go as far as to hold that, by not repudiating promptly, the purchaser loses his right of repudiation altogether; but it seems to me that, by treating the contract as subsisting after the E discovery of the defect, he does preclude himself from exercising a right of repudiation at a subsequent time before giving the vendor a reasonable time to cure the defect, and that thereafter his only safe course is to limit the time within which the defect must be removed and a title made out if the contract is to go through. There is no trace of any such course having been attempted in the present case. As I have said before, as late as Nov. 8, the objection is insisted upon without repudiation, F and the defect is in effect cured before the attempted repudiation on Dec. 22 in the same year.

Hitherto, I have assumed that the decree for specific performance does not affect the purchaser's right of repudiation; but I have come to the conclusion that, after decree of specific performance, a defendant purchaser cannot repudiate the title or the contract without the leave of the court. Repudiation as a defence to specific G performance, arising as I think it does out of the doctrine of mutuality, is, strictly speaking, out of the question after a decree for specific performance has been made, and even if you treat repudiation as a rescission of the contract founded on some doctrine of law, I do not think that a court of equity would grant rescission without application to itself for leave so to do. The proper course for the purchaser, on discovery of a defect of title such as might, but for the decree, give rise to a right H of repudiation, is to move to be discharged from the contract. Even if he does so move, I do not think he would be entitled to be discharged as a matter of course. A decree for specific performance enures for the benefit of both parties, and on the reference as to title a vendor is not confined to showing such title as he had at the date of the decree, much less to such title as he had at the date of the contract, but may perfect his title at any time before certificate. On the other I hand, the purchaser is not confined to objections taken by him before or at the hearing. Even if the certificate be adverse to the title an application by the purchaser to be relieved may be refused if, at the hearing of the application, the vendor has perfected his title; and the same rule applies to the further hearing of the action upon the certificate. In each case it seems to me that the court will consider the circumstances, and grant the relief or refuse relief, as may appear to be equitable.

What I have stated to be the principle of the court is, I think, shown to be such by the cases which were quoted before me during the arguments. I may refer

in particular to *Esdaile* v. *Stephenson* (6). That states shortly the difference between a matter of title and a matter of conveyance, and points out, where the vendor cannot control the person whose consent or concurrence in the conveyance is necessary, it is a question of title and not of conveyance, though it might be otherwise if the vendor has a power to control and compel the concurrence or consent. In the case to which I have just referred, the Vice-Chancellor says (6 Madd. at p. 367):

> "That if the master should report against the title, and at the hearing, upon further directions, the vendor had cured the defect, the court would then compel the purchaser to take the title, although it would not suspend the contract with a view to a future proceeding to perfect the title; that if the fact, whether the vendor could at the hearing cure the defect were in question, it must be then sent back to the master to review his report with the additional circumstances."

There was also *Coffin* v. *Cooper* (7), the headnote of which is this (14 Ves. at p. 205):

> "Purchaser cannot insist on being discharged upon a report of defective title, if capable of being made good within a reasonable time, as to which the vendor will be put upon terms."

In that case it was argued that there was a rule that, if the vendor cannot make a title at the date of the report, the purchaser has a right to be discharged, and the Lord Chancellor said (ibid.):

> "There is no such rule as is suggested. Where the master's report is that the vendor, getting in a term or getting administration, etc., will have a title, the court will put him under terms to procure that speedily. In *Whittaker* v. *Whittaker* (8) Sir Robert Mackreth wished very much to be discharged from the contract; and LORD KENYON would not hold that the vendor was to be bound during six years, while all Mr. Wilkinson's affairs were winding-up."

In that particular case it appears that the title had been made good after report by an Act of Parliament, and it is the case, I think, on which the editors of DART ON VENDORS AND PURCHASERS (6th Edn.), p. 1243, found the following observation:

> "So if, the certificate being against the title, and there being no application to discharge or vary it, the purchaser moves that he may be discharged from the contract, the vendor may show that the title has been perfected by some certificate—for example, by a private Act of Parliament."

Then there is *Jenkins* v. *Hiles* (9), where I think the same principle is recognised, but the greater part of the case has to do with other matters. LORD ELDON in that case says (6 Ves. at p. 655):

> "It is impossible to deny, that upon the old authorities a specific performance might be obtained if the title could be made good before the report. The court would execute the contract then, regard being had to the justice due to particular cases."

He treats that as the rule founded upon the earlier authorities. There was a case also—*Wynn* v. *Morgan* (10) which, though not precisely in point, is yet, I think, worth referring to. The headnote is this (7 Ves. at p. 202):

> "Where the time at which the contract was to be executed is not material, and there is no unreasonable delay, the vendor, though not having a good title at the time the contract was to be executed, nor when the bill was filed, but being able to make a title at the hearing, is entitled to a specific performance."

That makes the same principle applicable up to the hearing, where no plea, at any rate, of want of mutuality could be taken advantage of, or was, in fact, raised by the answer.

It seems to me that these cases are inconsistent with the principle for which the defendant contends, and, indeed, in a case of an action for specific performance, it seems to me that there are reasons against the possibility of repudiation or rescission without the leave of the court, equally strong as those which, in a foreclosure action, prevail against the right of the mortgagee to sell without the leave of the court as to which I may refer to *Stevens* v. *Theatres Ltd.* (11). I think, therefore, as far as the restrictive covenant is concerned, the applicant's case fails.

With regard to the Scottish will, it is proved that such a will is in Scotland matter of record, and that production of the record in this country is quite impossible. I do not think that there is any obligation on a vendor either to produce, or procure a covenant for the production of, a document of record, or indeed of any document which it is, in fact, impossible to produce; he is, however, bound to furnish sufficient evidence of its contents. It is said that the Evidence Act, 1851, has no reference to a Scottish will, and, therefore, no sufficient evidence can be produced. It does appear that this Act has no application to a Scottish will, but long before it was passed foreign and colonial records could be proved by appropriate secondary evidence, and I do not think that the Act (which was intended to simplify the proof of such records in certain cases) can be said inferentially to abrogate the common law in cases to which it does not apply. I take the common law principle to be that when a party proves that he is not in a position to adduce the primary evidence, for example, that the document in question is lost or cannot be found, or that it is of record in a foreign country the laws of which do not admit of its production, he is at liberty to give secondary evidence of its contents. I do not entirely assent to the proposition that a vendor is in every case bound to supply evidence which would be admissible in an action for ejectment. The vendor in the present case has produced the official extract which, in Scotland, answers to an English probate; he has also produced and handed over a certified copy of the original, and, having done so, he has, in my opinion, done all that could be reasonably required of him. In my judgment, therefore, the defendant is also wrong on the second question that has been argued. With regard to the date when a title was first shown, I think that, after Dec. 6, 1905, when the plaintiff obtained an agreement for the release of the covenant, the matter ceased to be a question of title, and became a question of conveyance only, and that, therefore, the master's certificate is right. It follows that both applications before me fail, and with the usual result.

With respect to the interest payable on the purchase money, occupation rent, and the costs of the action, I think that in this case the object of the inquiry was to ascertain, among other things at any rate, upon what date the interest ought to run on the purchase money. It is quite true that in one case which counsel for the vendor has quoted the inquiry was of a somewhat different nature, but I do not think I ought to say that the ordinary inquiry for that purpose, which has been well known in specific performance decrees for, I might say, generations, is wrong in form, and, instead of being an inquiry as to when the title is first shown, ought to be an inquiry as to when title could be first shown in respect of which possession might be taken. I think that really they are the same thing, and that, therefore, interest at 4 per cent. ought to run from the date when the master has certified that title was first shown. With regard to the occupation rent, I think there ought to be an occupation rent so far, at any rate, as the vendor continued in possession after the date fixed by the master's certificate as the date when title was first shown, in the same way as she did before. I do not say that necessarily, if she had left the property, and put in a caretaker, she ought to pay occupation rent. Therefore, I think the best plan will be to direct an inquiry whether after Dec. 8, 1905 (the date from which interest begins to run), she ought to be charged with any, and what, occupation rent, and for what period. With regard to the costs, the usual rule is clear, that in an ordinary case the vendor pays the costs up to the date when title was shown, but I have no doubt myself that the reason for the original action for specific performance in this case was

that there was a most unwilling purchaser, and I think under the circumstances justice would be done between the parties by making the purchaser pay the costs of the action up to and including the order made on the trial, and by making the vendor in the usual way pay the costs of the proceedings in chambers down to Dec. 8, 1905, and by giving no subsequent costs. There will be one order on the two summonses and one further consideration and a set-off of the costs.

Solicitors: *May, How & Chilver*; *Burgess, Taylor & Tryon.*

[*Reported by* R. C. Carter, Esq., *Barrister-at-Law.*]

Re THOMPSON. LANGHAM *v.* THOMPSON

[Chancery Division (Kekewich, J.), October 25, 1904]

[Reported 91 L.T. 680]

Marriage—Presumption of marriage—Cohabitation—Cohabitation for ten years—Parties regarded as married by friends and neighbours—Recognition of children by relative.

From 1856 to 1866 a man and a woman lived together as man and wife and had five children. There was evidence that they had been treated as a married couple by friends and neighbours, and that their children had been recognised by the head of the father's family. In 1866 the woman left the man, who in 1874, while she was still alive, married another woman. In 1904 the question of the legitimacy of the children was raised in connection with their right to share in a bequest given by a will.

Held: although no marriage certificate had been produced, on the evidence it must be presumed that a marriage had taken place and that the children were legitimate and entitled to benefit under the will.

Notes. As to presumption of marriage, see 19 Halsbury's Laws (3rd Edn.), 812, 813; and for cases see 27 Digest (Repl.) 69–77.

Case referred to:

(1) *Lyle* v. *Ellwood* (1874), L.R. 19 Eq. 98; 44 L.J.Ch. 164; 23 W.R. 157; 27 Digest (Repl.) 74, *551.*

Also referred to in argument:

Sastry Velaider Aronegary v. *Sembecutty Vaigalie* (1881), 6 App. Cas. 364; 44 L.T. 895; sub nom. *Sastry Velaider Arone Gary and Semba Cutty Sinne Pullei* v. *Kassanader Sambonade*, 50 L.J.P.C. 28, P.C.; 27 Digest (Repl.) 69, *476.*

Re Shephard, George v. *Thyer*, ante, p. 186; [1904] 1 Ch. 456; 73 L.J.Ch. 401; 90 L.T. 249; 27 Digest (Repl.) 71, *490.*

Adjourned Summons taken out to determine a question of legitimacy.

By his will, dated Nov. 11, 1902, James Thompson, after making certain bequests, directed all his property, both real and personal, to be realised and divided equally between all his nephews and nieces who should survive him and the children of those who might predecease him, such children to take between them per stirpes their parent's share. The testator died on Aug. 9, 1903. Nathaniel Thompson, one of his nephews, had predeceased him.

Nathaniel Thompson had lived with one Patience Buckland from 1856 to 1866 in the city of Bath, during which time Patience became the mother of five children, of which Nathaniel was the father. There was no evidence of their

marriage, but it was alleged that during that time Patience was known as the wife of Nathaniel by all neighbours, relatives, and friends, and that the children were recognised by the testator as the children of his brother Nathaniel. In a Testament which had belonged to Nathaniel were entered, in his handwriting, the names and dates of birth of all the five children, the eldest being entered as having been born on Mar. 29, 1856. The birth of all the children except the eldest was registered. Each certificate stated the child to be the child of "Nathaniel Thompson and Patience Thompson, formerly Buckland," the informant in three cases being "the mark × of Patience Buckland," and in the fourth case "Nathaniel Thompson, father." In 1866 Patience, owing to quarrels, left Nathaniel. In 1874 Nathaniel married Eliza Brown at Walcot Church, Bath. In the marriage certificate Nathaniel was described as a bachelor. At this time Patience was still living.

The five children of Nathaniel claimed to share in the testator's estate, but a question was raised as to their legitimacy and capacity as beneficiaries.

C. A. Montague Barlow for the trustee and executor of the testator's estate.
Eustace Smith for the five claimants.
R. Rowlands for grand-nephews of the testator.

KEKEWICH, J.—The facts in this case are not particularly complicated. In 1874 Nathaniel Thompson, who was supposed to have been married before, did undeniably marry Eliza Brown. The fact that he is described in the marriage certificate as a bachelor is not really of any great importance; but at that time Patience was still alive, and, if she was then his lawful wife, it follows that Nathaniel must have committed bigamy. The question is, Did Nathaniel marry Patience? It is clear that he had by Patience five children, whose names are entered in his own handwriting in his Testament. Their births, too, were registered, and we have the certificates of birth of all of them except the eldest; but it is conceded that, if the other four are held to be legitimate, the eldest must also be included in the class. The question, then, is whether I can apply the principle which has been laid down in many cases, and particularly in *Lyle* v. *Ellwood* (1), where HALL, V.-C., says (L.R. 19 Eq. at p. 107):

> "Where a man and woman have long lived together as man and wife, and have been so treated by their friends and neighbours, there is a primâ facie presumption that they really are, and have been, what they profess to be."

It is true that Nathaniel and Patience only lived together about ten years, but still their cohabitation took place a very long time ago, and, although the evidence is that the cohabitation was only for about ten years, yet, not having been challenged for such a long time, I must treat it as though it had been longer. Then there is the important fact that this testator recognised, and upon the evidence must be taken to have known, these children as the children of his brother Nathaniel. It is not suggested that the testator meant in his will to recognise illegitimate children as legitimate; it is admitted he referred only to legitimate children; but the fact that the testator recognised these children as legitimate is most valuable to them. It appears, then, that during the time Nathaniel and Patience were living together their marriage was never challenged, and that the testator, the head of the family, recognised the children as the legitimate children of his brother Nathaniel. It is true there is no certificate of the marriage of Nathaniel and Patience, and that she left him in 1866 owing to quarrels; but upon the evidence it must be presumed that a marriage took place, and that these children are, therefore, legitimate.

Solicitors: *Langham, Son & Douglas*; *Wrentmore & Sons*, for *Walter Morgan, Bruce & Nicholas*, Pontypridd.

[*Reported by* C. F. DUNCAN, ESQ., *Barrister-at-Law.*]

A

Re GOOD. HARINGTON *v.* WATTS

[Chancery Division (Farwell, J.), April 14, 15, 1905]

[Reported [1905] 2 Ch. 60; 74 L.J.Ch. 512; 92 L.T. 796; 53 W.R. 476; 21 T.L.R. 450; 49 Sol. Jo. 445]

B

Charity—Benefit to community—Army—Bequest to regiment of library—Residuary estate for maintenance.

A testator gave his books and bookcases to the officers' mess of a certain regiment, and directed his residuary estate to be held in trust for the mess and the income thereof to be applied for the maintenance and renewal of the library, any surplus to be expended in the purchase of plate for the mess.

C

Held: this was a good charitable bequest on the ground that it promoted the efficiency of the army, a body in which the public had an interest.

Perpetuities—Gift—Gift of two houses to regiment—Intestacy.

The same testator gave two houses for the use of former officers of the regiment at a small rent for their lives.

D

Held: the gift failed as a perpetuity, and there was an intestacy as to these houses.

Notes. Followed: *Re Donald, Moore* v. *Somerset*, [1909] 2 Ch. 410; *Re Gray, Todd* v. *Taylor*, [1926] All E.R.Rep. 250. Considered: *Wernher's Charitable Trust (Trustees)* v. *I.R.Comrs.*, [1937] 2 All E.R. 488. Applied: *Re Driffill*, [1949] 2 All E.R. 933; *Re Meyers*, [1951] 1 All E.R. 538. Considered: *I.R.Comrs.* v. *City of Glasgow Police Athletic Association*, [1953] 1 All E.R. 747. Referred to: *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund, Ryan* v. *Forrest*, [1945] 2 All E.R. 711. *Lord Nuffield* v. *I.R.Comrs.*, *Goodenough* v. *I.R.Comrs.* (1946), 175 L.T. 465; *Baddeley* v. *I.R.Comrs.*, [1953] 2 All E.R. 233.

E

As to charitable purposes, see 4 Halsbury's Laws (3rd Edn.) 213 et seq.; and for cases see 8 Digest (Repl.) 346–348.

F

Cases referred to:

(1) *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879*.

(2) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1*.

G

Also referred to in argument:

Re Stephens, Giles v. *Stephens* (1892), 8 T.L.R. 792; 36 Sol. Jo. 713; 8 Digest (Repl.) 350, *300*.

Re Stratheden and Lord Campbell, Alt v. *Stratheden and Lord Campbell*, [1894] 3 Ch. 265; 63 L.J.Ch. 872; 71 L.T. 225; 42 W.R. 647; 10 T.L.R. 574; 38 Sol. Jo. 602; 8 R. 515; 8 Digest (Repl.) 346, *277*.

H

Hancock v. *Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321, H.L.; 43 Digest 644, *792*.

Carne v. *Long* (1860), 2 De G.F. & J. 75; 29 L.J.Ch. 503; 2 L.T. 552; 24 J.P. 676; 6 Jur.N.S. 639; 8 W.R. 570; 45 E.R. 550, L.C.; 8 Digest (Repl.) 437, *1278*.

I

Re Dutton, Ex parte Peake (1878), 4 Ex.D. 54; 48 L.J.Q.B. 350; 40 L.T. 430; 27 W.R. 398; sub nom. *Re Dutton, Ex Parte Tunstall Athenæum Trustees*, 43 J.P. 6; 8 Digest (Repl.) 437, *1281*.

Newland v. *A.-G.* (1809), 3 Mer. 684; 36 E.R. 262, L.C.; 8 Digest (Repl.) 504, *2253*.

Nightingale v. *Gouldbourn* (1847), 5 Hare 484; 16 L.J.Ch. 270; 11 Jur. 383; affirmed (1848), 2 Ph. 594; 17 L.J.Ch. 296; 11 L.T.O.S. 169; 12 Jur. 317; 41 E.R. 1072 L.C.; 8 Digest (Repl.) 315, *8*.

Adjourned Summons to determine validity of a bequest.

Thomas Good was formerly a sergeant in the 14th Regiment of Foot, later the 2nd Battalion of H.M. West Yorkshire Regiment. Although an illiterate man, he had formed a large collection of books, which were, however, of no great value. He also owned two renewable leasehold houses at Ryde, Isle of Wight, and the gross value of his estate was £7,000. On May 31, 1900, Good made his will, whereby, after giving certain annuities and legacies, he proceeded in the following way:

"I give to the officers' mess 2nd Battn. 14th Regt., now called the 2nd W.Y.P. of Wales O. Regt., all my books and bookcases whatsoever and wheresoever for the use of the aforesaid mess only. And subject to the aforesaid trust I ask my trustee to hold the whole of my residuary estate and the investments and income thereof in trust for the aforesaid officers' mess absolutely, and I give them the same accordingly to be envisted and the divident and annual incom only arising therefrom be paid to the aforesaid officers' mess to maintain the aforesaid library and renual of books for ever. Should there be an overbalance at any time the col. and any two officers of the aforesaid regt. serving at any time may spend the same in the purchas of plate for the use of the aforesaid officers' mess only; should the officers consider the library a burthen it may leftd at the depot for use. But the giver hopes it will always be in the mess or ante room of the 2nd Battn. 14th Regiment of Foot, his old happey home. The first payment of the annuities to be paid first week of the seventh month after my death and half yearly afterwards as being from the first day of the seventh month after my death. And I revoke all former wills by me heretofore made; I appoint Col. F. W. Harington, late of the 14th Regiment, executor of this my will and allso trustee for carrying into effect the trusts hereof, and I bequeath him the sum of fifteen pounds fifteen shillings per annum so long as he acts as my trustee. All annuities to be paid free of tax and from the dividents of my present envestments only. My two houses at Ryde for the use of old officers of the regt. at a small rent during their life."

Good died on Sept. 12, 1904, and his will was proved in the principal registry on Dec. 6, 1904, by Colonel Harington. A summons was taken out to determine whether the bequest of the residuary estate to the officers' mess of the 2nd Battalion of the 2nd West Yorkshire Regiment was a good charitable trust or otherwise a valid and effectual gift, or whether it was void for perpetuity. It was also asked whether the testator's directions in reference to the two houses at Ryde constituted a valid and effectual gift of the houses, or whether the gift was bad for remoteness.

The testator had no known relations, and his heir-at-law and next-of-kin were represented by the Official Solicitor. An affidavit was made on behalf of the Attorney-General by Colonel Browne, Assistant Adjutant-General, to the effect that this officers' mess of the 2nd Battalion of the West Yorkshire Regiment was like all other officers' messes in the army; that it was not in the nature of a club; nor could the officers thereof, by a unanimous resolution or otherwise, dispose of the mess property. This mess was constituted under the King's Regulations for the Army. Rule 931 of the regulations provided that every officer of the corps was to be a member of the regimental mess. The Assistant Adjutant-General further stated the mess was a regimental institution as indissoluble as the regiment itself, and its plate and other property were in no sense the property of its members, but belonged to its members on trust for the institution for the time being. Part of the mess equipments in certain regiments consisted of a library, and it had been considered by the authorities whether a library should not be made a part of the necessary equipment of every officers' mess, on the ground that access to books, and particularly to books dealing with military matters, was conducive to military efficiency.

Crossman for the executor.

Upjohn, K.C., and *Manning* for Colonel Harington.

R. J. Parker for the Attorney-General.

Jenkins, K.C., and *Method* for the Official Solicitor as representing the next-of-kin of the testator.

FARWELL, J.—It is plain from the affidavit of the Assistant Adjutant-General that an officers' mess is an integral part of a regiment and not a club, and the gift is one to the members of the mess for the time being. The question that arises is whether a gift of this kind is a charitable gift within the statute of Elizabeth. Everyone would agree with the remarks of LORD LINDLEY in *Re Macduff, Macduff* v. *Macduff* (1), in commenting on LORD MACNAGHTEN'S judgment in *Income Tax Special Purposes Comrs.* v. *Pemsel* (2) that LORD MACNAGHTEN did not mean to say that every object of public utility is a good charity, though many objects are charitable because they are of public utility; but all objects of public utility are not charitable, and the question is whether within the purview of the statute of Elizabeth a particular object is or is not a charity. Now, counsel for the Attorney-General has put his argument on two grounds: First, he says that this is a charitable gift, because it tends to increase the efficiency of the army, a body in the efficiency of which the public has an interest. Secondly, he says that the gift would come within the last clause of the preamble to the statute of Queen Elizabeth,

> "the aide and ease of any poor inhabitants concerning payment of fifteenths and setting out of soldiers, and other taxes."

The difficulty of applying this last argument in the case before me is that there is no provision made in the government regulations for any payment by the government in aid of a library for a mess, though allowances are made to the mess in respect of other things, such as hardware and furniture. I have, however, come to the conclusion that this is a charitable gift, because it is a direct public benefit, tending to increase the efficiency of the army, a body in which the public is interested, not only on financial grounds, but also for the safety and protection of the country. I may say also that I think that the gift might be supported on the statement in the affidavit of the Assistant Adjutant-General that the mess equipment of some regiments consists of a library, and that it has been considered by the military authorities whether a library should not be made part of the necessary equipment of every officers' mess, on the ground that access to books, and particularly to books dealing with military matters, is conductive to military efficiency. I prefer, however, to put it on the first of counsel for the Attorney-General's grounds, on the view that it comes within the principle on which the court has acted in this difficult matter of applying the statute of Elizabeth. I do not say that the officers are objects of the charity. It is the public and not the officers who gain the benefit through the means put in the officers' way to make them more efficient for the defence of their country. I may say that KEKEWICH, J., has held that a prize for shooting is a good charitable gift, and that ROMER, J., has upheld as a charity a gift to a volunteer corps. I think that any gift to increase the efficiency of a regiment in a particular way would be a good charity. This does make the army more efficient, as it assists the officers to get good literature. It has been said that such literature as might be bought might by no means contribute to the army's welfare. I must assume, however, that the books bought will be books of merit. They need not all be confined to military matters. An officer's efficiency might be increased in other ways, as, for instance, by a knowledge of foreign languages. I should be sorry to say, indeed, that any gift which increased an officer's educational equipment was not charitable. I hold that this is a good charitable gift, and, as a scheme will be necessary, there will be liberty to apply.

The question as to the validity of the gift of the houses at Ryde was then briefly argued.

FARWELL, J.—I hold that this gift fails. If on the true construction the gift is only to apply the part of the residue falling in that way to the use of the old officers it fails, as the testator has meant it to be a perpetual endowment. If the houses are not disposed of as part of this trust they are not disposed of at all. I think that a separate trust was intended, and that it fails for perpetuity, so as to these houses there is an intestacy.

Solicitors: *C. E. Beal* for *J. Robinson*, Ryde, Isle of Wight; *The Treasury Solicitor*; *The Official Solicitor.*

[*Reported by* J. ARTHUR PRICE, ESQ., *Barrister-at-Law.*]

Re GARNETT. RICHARDSON *v.* GREENEP

[CHANCERY DIVISION (Kekewich, J.), June 28, 1905]

[Reported 74 L.J.Ch. 570; 93 L.T. 117]

Settlement—Marriage settlement—Covenant to pay if marriage "solemnised"—Ceremony of marriage performed—Subsequent decree of nullity on ground of impotence.

By an ante-nuptial settlement dated July 13, 1891, the father of the wife covenanted to pay a sum of money, to be held upon the trusts of the settlement, if the marriage were "solemnised." A legal marriage ceremony was gone through on the following day. In 1894 the settlor died without having paid the money to the trustees of the settlement, and in 1896 the wife obtained a decree nullifying the marriage on the ground of the husband's impotency.

Held: as a result of the decree the marriage was void ab initio, and, therefore, it had never been "solemnised" within the meaning of the settlement and the settlor never came under an obligation to pay the sum specified in the settlement.

Notes. Followed: *Re Wombwell's Settlement, Clerke* v. *Menzies*, [1922] All E.R.Rep. 115. Considered: *Re Ames' Settlement, Dinwiddy* v. *Ames*, [1946] 1 All E.R. 689; *Re Dewhirst, Flower* v. *Dewhirst*, [1948] 1 All E.R. 147.

As to consideration in settlements, see 34 HALSBURY'S LAWS (3rd Edn.) 458–461; and for cases see 40 DIGEST (Repl.) 566 et seq.

Cases referred to:

(1) *Dormer* (*otherwise Ward*) v. *Ward*, [1901] P. 20; 69 L.J.P. 144; 83 L.T. 556; 49 W.R. 149; 17 T.L.R. 12, C.A.; 27 Digest (Repl.) 648, *6110.*

(2) *Attwood* (*otherwise Pomeroy*) v. *Attwood*, [1903] P. 7; 71 L.J.P. 129; 87 L.T. 750; 18 T.L.R. 833; 27 Digest (Repl.) 658, *6199.*

(3) *A.* v. *M.* (1884), 10 P.D. 178; 54 L.J.P. 31; sub nom. *Addington* (*falsely called Mellor*) v. *Mellor*, 33 W.R. 232; 27 Digest (Repl.) 658, *6197.*

(4) *Chapman* v. *Bradley* (1863), 4 De G.J. & Sm. 71; 3 New Rep. 182; 9 L.T. 495; 10 Jur.N.S. 5; 12 W.R. 140; 46 E.R. 842, L.JJ.; 40 Digest (Repl.) 571, *769.*

Also referred to in argument:

Thomson v. *Thomson and Rodschinka*, [1896] P. 263; 65 L.J.P. 80; 74 L.T. 801; 45 W.R. 134; 12 T.L.R. 464; 40 Sol. Jo. 583, C.A.; 27 Digest (Repl.) 643, *6058.*

Cartwright v. *Cartwright*, [1903] 2 Ch. 306; sub nom. *Re Cartwright, Cartwright* v. *Cartwright*, 72 L.J.Ch. 622; 88 L.T. 854; 51 W.R. 606; 47 Sol. Jo. 618; 20 Digest 478, *2032.*

Summons for a declaration that a covenant in a marriage settlement was avoided by a declaration of nullity of the marriage. A

By an ante-nuptial settlement, dated July 13, 1891, made between Joseph Richardson the father of the intended wife, Beatrice Mary Richardson the intended wife, Captain H. P. Garnett the intended husband, and the trustees of the settlement, it was witnessed that, in contemplation of the said intended marriage, Joseph Richardson covenanted with the trustees of the settlement that "if the B said marriage be solemnised" his executors or administrators should within twelve months after his decease pay to the trustees of the settlement the sum of £25,000, together with interest at 4 per cent. from the date of the marriage, with a proviso that he might pay the said sum or any part thereof in his lifetime. And it was agreed that the trustees should upon receipt of the principal sum, with the consent in writing of Beatrice Mary, or after her decease at their discretion, C invest the same and pay the income to Beatrice Mary during her life for her separate use without power of anticipation during "any" coverture, and after her decease should pay out of the income a sum of £500 per annum to "any" husband who might survive her during his life, and subject thereto upon trust to hold the trust premises for the children of Beatrice Mary by Captain H. P. Garnett or "any future husband," as therein set forth, and if there should be no children D upon trust for Joseph Richardson, his executors, administrators, and assigns. On July 14 Beatrice Mary Richardson went through the ceremony of marriage with Captain H. P. Garnett at the Oratory, Kensington. Joseph Richardson died on Oct. 18, 1894, having by his will and codicil, dated June 21, 1891, and April 11, 1893, devised and bequeathed his residuary real and personal estate to trustees upon trust for conversion and subject to the payment of certain annuities upon E trust to pay the income to his daughter Mary Beatrice for her life for her own use without power of anticipation, and after her decease to hold the trust fund for her children as therein set out, and in default of children in trust for the

> "person or persons who under the statutes for the distribution of the estates of intestates would on the decease of Mary Beatrice have been entitled to the same if she had died intestate and without having been married." F

The testator's will was administered under the direction of the court, and by an order dated Dec. 15, 1896, £25,000 was certified as a debt due to the trustees of the marriage settlement, and was paid by the testator's executors to them. On June 4, 1896, Mrs. Mary Beatrice Garnett obtained a decree nisi of nullity of marriage against her husband Captain H. P. Garnett upon the ground of G impotency. The decree was made absolute on Dec. 14, 1896. Mrs. Mary Beatrice Garnett did not remarry. She died on Dec. 12, 1904. This was a summons taken out by a grandson of the testator asking (inter alia) for a declaration that the covenant by Joseph Richardson, the testator, in the marriage settlement to pay to the trustees thereof the sum of £25,000 was avoided by reason of the marriage having been declared null by decree of the Divorce Court, and that such sum H and the investments representing the same were never in fact subject to the trusts of the marriage settlement, but belonged to the testator's estate.

Ingpen, K.C., and *Austen Cartmell* for the summons.

P. O. Lawrence, K.C., and *J. G. Fawcus* for some of the next-of-kin of the father and the daughter.

A. J. Peterson and *J. Tanner* for other next-of-kin of the testator. I

G. Borthwick for the trustees of the settlement.

Stewart Smith, K.C., and *J. M. Parikh* for the legal personal representative of the daughter.

KEKEWICH, J.—There is no occasion now to consider whether a settlement made upon a marriage necessarily fails altogether by reason of that marriage not taking effect, either by there having been no legal marriage ceremony or by reason of the marriage having been annulled by decree of the Divorce Court. It

would be going much too far to say that a marriage settlement necessarily fails by reason of the non-solemnisation of the marriage, or by reason of the marriage having been solemnised and then being dissolved. It would be, no doubt, quite possible so to draw a settlement that it would be effectual even if the marriage contemplated turned out to be no marriage at all. I do not think VAUGHAN WILLIAMS, L.J., meant to say anything to the contrary where he says in *Dormer* v. *Ward* (1) ([1901] P. at p. 35):

> "Inasmuch as all marriage settlements are subject to the condition of marriage."

GORELL BARNES, J., avoided the question in *Attwood* v. *Attwood* (2), where he says ([1903] P. at p. 11):

> "It is not, I think, necessary for me to decide whether or not the settlement has come to an end on the pronouncing of the decree absolute annulling the marriage";

and counsel for the legal personal representative of the daughter gave me good reason for holding that a marriage settlement might well stand even if no marriage had been solemnised at all, and, of course, the settlement does stand, notwithstanding the annulment of the marriage for the purposes of s. 5 of the Matrimonial Causes Act, 1859 [see now s. 25 of the Matrimonial Causes Act, 1950], under which the court has jurisdiction to vary the settlement in case of nullity of marriage. *Dormer* v. *Ward* (1) is a distinct decision to that effect, that the settlement does stand for some purposes, even if it be ineffective by reason of no marriage having taken place.

I, however, have not to decide that question, nor am I in any way concerned to criticise the application of s. 5 of the Matrimonial Causes Act, 1859, as amended by s. 3 of the Matrimonial Causes Act, 1878, to a settlement where there has been a decree of nullity. It has been decided that, notwithstanding a decree of nullity, the power of the court to vary the settlement under s. 5 remains, and the court exercises its power upon the consideration of each case, whether the trusts may be of funds brought into settlement by a husband or by a wife, or directed to be held upon trust for a husband or for a wife; whatever the trust may be, the settlement is equally open to the application of the statutory power of the trust. The court can vary one settlement as well as another, but as to how it varies it, that depends upon the particular case. I gather, then, from the reports that the Court of Probate and Divorce has such trusts within its jurisdiction, and can vary them, and, that being so, it is not for me to say whether the form in *Addington* v. *Mellor* (3) may be the better form or not, or whether there may be some other which is superior. Certainly that form seems perfectly suitable for that case.

I must decide this case upon the particular meaning of this settlement—a settlement made upon the marriage of Mary Beatrice Richardson, in which the father covenants, "in contemplation of the said intended marriage," his executors shall pay £25,000 to the trustees of the settlement. He bound himself to pay if the marriage was "solemnised," and not otherwise. The question is the same whether the sum was payable in his lifetime or after his decease. Counsel for the legal personal representative of the daughter says that all that that means is that the ceremony of marriage should be gone through. He seems to be somewhat embarrassed by *Chapman* v. *Bradley* (4), but he says that there the marriage ceremony was never gone through in this sense, that the ceremony gone through was itself futile and invalid, but he says to this case a different rule should be applied, for here the marriage solemnised was of itself valid, and that the marriage remained valid until it was declared invalid, and he says that it would be monstrous to say that this marriage has not been "solemnised" when the parties went through a ceremony of marriage in itself valid, and believed that they were man and wife. All that turns on the word "solemnised." I agree that we are dealing with facts which are different from those in *Chapman* v. *Bradley* (4). There, though the

parties believed they were legally married, the law did not recognise the marriage as valid, and again that case was different from this in that then there was an initial trust for the settlor until the intended marriage should be solemnised, and from and after the solemnisation thereof upon trusts for the settlor, his wife, and his children. But the question turned upon the meaning of the word "solemnised," and it is immaterial whether a covenant is to be performed or a trust is to be carried out upon that condition. As KNIGHT BRUCE, L.J., says (4 De G.J. & Sm. at p. 76):

> "The first question is, what is the meaning to be ascribed to the word 'solemnised' as used in that instrument? As used in that instrument it must, in my judgment, mean validly and effectually solemnised. The ceremony of marriage was indeed gone through afterwards, but the lady and gentleman were domiciled in England, and their domicil had not been changed; and the lady was the gentleman's deceased wife's niece. Therefore the marriage ceremony, although it took place at Neufchatel, was as ineffectual as if there had never been any such ceremony at all."

and TURNER, L.J., says (ibid. at p. 77):

> "The word marriage must be taken to mean a valid and effectual marriage."

What difference is there between this case and cases where a marriage is not effectual by reason of the incapacity of the parties to marry on account of their relationship to one another, or where the marriage ceremony has been performed by an unauthorised person or by some person improperly attempting to perform the functions of a clergyman, or by some registrar not lawfully competent. There are many ways in which a marriage may fail to be "solemnised." No year passes without the government bringing in a Bill to sanction a marriage ceremony, which has been gone through in form, but which is not valid by some misadventure, and if the legislature had not intervened no marriage would have been "solemnised" at all. The decree of the Divorce Court says that

> "the marriage in fact had and solemnised on July 14, 1891, at the Oratory, in the district of Kensington, between Mary Beatrice Richardson, otherwise Mary Beatrice Garnett, the petitioner, and Henry Percy Garnett the respondent, be pronounced and declared to have been and to be absolutely null and void to all intents and purpose in the law whatsoever by reason of the impotence of the said respondent and the said petitioner be pronounced to have been and to be free from all bond of marriage with the said respondent."

Therefore, according to the decree of the court there never was a marriage, and although the parties lived together the marriage itself was null and void ab initio. The parties according to the decree not only are not but never were married, and, if so, in TURNER, L.J.'s words in *Chapman* v. *Bradley* (4) "there has never been any valid marriage," and therefore the father never came under any obligation to pay, for he covenanted to pay only if the marriage was "solemnised," and it never was "solemnised." My conclusion is then that there is no subject-matter to which the trusts in the settlement can apply, the trusts may be good enough, but there is nothing to which they can apply because there is no money payable under the covenant to which they can be applied. The father died without paying the money in his lifetime, and after his death his executors admitted the claim against his estate although they had an unanswerable answer to it, but it never occurred to anyone to raise it, and the claim was admitted and the money was paid over to the trustees of the marriage settlement, and they still hold it. But the money was paid under a mistake of fact, and the trustees still hold it, and it is the obvious duty of the court to see that justice is done as between the parties seeing that assent was given to the claim in ignorance of the real state of things.

Declaration that the father's covenant never became operative, and that the trustees of the settlement must repay the £25,000 to the executors of the father's will.

Solicitors: *Waples Canwarden*; *Merriman, White & Thomson*; *J. Hall Smith*; *W. J. Payne*; *T. Russel Kent.*

[*Reported by* C. F. DUNCAN, ESQ., *Barrister-at-Law.*]

EDWARDS *v.* HOOD-BARRS

[CHANCERY DIVISION (Kekewich, J.), November 26, December 2, 1904]

[Reported [1905] 1 Ch. 20; 74 L.J.Ch. 167; 91 L.T. 766; 21 T.L.R. 89]

Trustee—Breach of trust—Liability—Liability of several trustees joint and several.

In an action against trustees for a breach of trust the executors of a deceased trustee admitted that his insolvent estate was liable and the claims against two other trustees were compromised by the payment by the trustees of agreed sums.

Held: the liability of trustees in respect of a breach of trust being joint and several, the cestuis que trustent were allowed to prove against the estate of the deceased trustee for the full amount found by the certificate to be due, without deducting the amounts paid by the other trustees.

Notes. Distinguished: *Re Houlder, Ex parte Rabbidge (Trustee)* v. *Eagle Star and Dominions Insurance Co.*, [1928] All E.R.Rep. 366.

As to breach of trust and persons liable, see 38 HALSBURY'S LAWS (3rd Edn.) 1040–1044; and for cases see 43 DIGEST, 962–983.

Cases referred to:

(1) *Bagnall* v. *Carlton* (1877), 6 Ch.D. 371; 47 L.J.Ch. 30; 36 L.T. 653; 26 W.R. 243; on appeal 6 Ch.D. 392; 47 L.J.Ch. 42; 37 L.T. 481, C.A.; 24 Digest (Repl.) 679, *6662*.

(2) *Commercial Bank of Australia* v. *Official Assignee of John Wilson & Co.'s Estate*, [1893] A.C. 181; 62 L.J.P.C. 61; 68 L.T. 540; 41 W.R. 603; 9 T.L.R. 307; 1 R. 331, P.C.; 12 Digest (Repl.) 522, *3935*.

Also referred to in argument:

Dyke v. *Mercer* (1684), 2 Show. 394; 89 E.R. 1002; 7 Digest (Repl.) 242, *795*.

Adjourned Summons for a declaration that the liability of trustees in respect of a breach of trust was joint and several.

This was in effect the further consideration of an action commenced against Henry Hollier Hood-Barrs, John William Barrs, and Hugh Montgomery Drake, trustees, and one William Edward Barling, a former trustee, of a marriage settlement dated May 2, 1882, claiming the replacement of specific amounts misappropriated from the trust funds by the defendants. By order made on motion on July 18, 1902, after stating that the present defendants, Harriet Hood-Barrs and Thomas Teesdale Hall, as executors of Henry H. H. Barrs (who had died since the institution of the action) by their counsel, admitting that his estate was liable, and the defendants John W. Barrs and Hugh M. Drake, by their counsel, admitting that they were jointly and severally liable to make good to the trust

estate £4,830 and £4,500 respectively, the court ordered an account to be taken of what was due from the estate of Henry H. H. Barrs, and from the defendants John W. Barrs and Hugh M. Drake, on the footing of the foregoing admissions. By an order made on Nov. 11, 1902, on the application of the plaintiffs, cestuis que trustent, it was ordered that £1,900, paid by the defendant John W. Barrs to them, be accepted in full settlement and discharge of his liability to the plaintiffs. By an order made on Mar. 23, 1903, on the like application the court approved of the compromise of the action with the defendant William E. Barling on the terms of his paying to them the sum of £700 in full settlement and discharge of his liability to the plaintiffs in respect of the claim against him in the action, the action on payment of such sum to stand dismissed as against William E. Barling. By the master's certificate, in pursuance of the order of July 18, 1902, dated Aug. 4, 1904, there was found a balance remaining due from the estate of Henry H. H. Barrs and from the defendant Hugh M. Drake of £10,004 7s. The estate of Henry H. H. Barrs was admittedly insolvent. By this summons the plaintiffs applied for an order that they might prove against the estate of Henry H. H. Barrs for the sum of £10,004 7s., the sum mentioned in the certificate, as being due to the trust estate of the settlement of May 2, 1882. The defendants proposed that the sums of £1,900 and £700, paid by John W. Barrs and William E. Barling respectively, should be deducted from the sum certified to be due from the estate of Henry H. H. Barrs and the defendant Hugh M. Drake, and they asked for a declaration that their estates were jointly and severally liable to make good to the trust such sum less such deductions, and that the plaintiffs should prove for the balance less the deductions.

P. Ogden Lawrence, K.C., and *Edward Ford* for the summons.
D. Stewart-Smith, K.C., and *Theodore Ribton* for the defendants.

Cur. adv. vult.

Dec. 2, 1905. **KEKEWICH, J.,** read the following judgment.—In this case judgment was reserved on one point which arises in this manner. The action is one to enforce liability against trustees for breaches of trust, and by an order of July 18, 1902, the executors of Henry Hollier Hood Barrs, one of the trustees, admitted that his estate was liable, and the two other trustees, John William Barrs and Hugh Montgomery Drake, admitted that they were jointly and severally liable to make good to the trust estate two sums of £4,830 and £4,500. By the same order an account was directed of what was due from the estate of Henry H. Hood Barrs and from the other two trustees on the footing of the foregoing admissions. The inquiry was answered by the master's certificate, dated Aug. 4, 1904, which finds a balance of £10,004 7s. due from the estate of the deceased trustee and from the other two trustees. In the meantime, by two orders of Nov. 11, 1902, and Mar. 23, 1903, two compromises were sanctioned by the court. The first of these was with the defendant John W. Barrs, from whom was accepted £1,900 in full settlement and discharge of his liability to the plaintiffs in the action. The second compromise was with William Edward Barling, a former trustee, who was charged in common with Hugh M. Drake of having received and not having accounted for a sum of £1,500. There was accepted from him £700 in full settlement and discharge of his liability, and he was dismissed from the action. Nothing has been done as regards Hugh M. Drake, who remains liable for the £1,500 as well as for the sum mentioned in the certificate. On the hearing of the summons now before me, which really is the further consideration of the action, the plaintiffs claimed to prove against Henry H. Hood Barrs' estate, admittedly insolvent, for the full amount certified to be due as above mentioned, and it is contended by the executors on behalf of that estate that the proof ought not to be allowed for the full amount, but that a deduction ought to be made of the sums paid by others in reduction of the amount certified, and that the proof should only stand for the balance.

It escaped notice on the hearing of the summons that the payment made by William E. Barling was in respect of a separate claim for £1,500 with which Henry H. Hood Barrs' estate was not concerned. That fact disposes of the argument as regards the £700, but it remains to be considered as regards the £1,900 paid by John W. Barrs. Two cases were cited. In *Bagnall* v. *Carlton* (1) it was endeavoured on behalf of defendants held liable to the plaintiffs to deduct from the amount claimed a sum of £31,000 satisfied by other defendants, and the Court of Appeal held that such sum of £31,000 was paid in respect of a claim entirely different from that sought to be enforced, and that therefore no deduction was possible. The decision of the court proceeding on that ground has really no bearing on the present case. In *Commercial Bank of Australia* v. *Official Assignee of J. Wilson & Co.'s Estate* (2) the only question was whether certain sums provided by two sureties had been paid or not. It was admitted that, if they had been in fact paid, these sums must be deducted from the amount recoverable from another of the co-sureties, but it was held that no payment had been made, and that therefore there could be no deduction. This case, therefore, also has no bearing on the present. I have searched in vain for any other authority to which reference could usefully be made, and the point must be disposed of on principle. Here there is no contract of suretyship or question as between co-sureties. We are concerned only with the liability of the trustees, which is joint and several, and it seems to me that until the plaintiffs have received 20s. in the pound they are entitled to claim the whole debt from any one trustee, notwithstanding that another trustee has made a payment in respect of his several liability, and whether in or towards satisfaction of that liability. Therefore, the plaintiffs are, in my opinion, entitled to prove against the estate of Henry H. Hood Barrs for the full amount found due by the certificate, and to receive dividends on such proof until by means thereof, and payment by the other trustees, that amount has been wholly satisfied. The order must be framed on that footing.

Solicitors: *Beyfus & Beyfus*; *Rutter, Veitch & Bond.*

[*Reported by* W. P. PAIN, ESQ., *Barrister-at-Law.*]

A

Re HOUGHTON. HAWLEY *v.* BLAKE

[Chancery Division (Kekewich, J.), February 19, 23, 1904]

[Reported [1904] 1 Ch. 622; 73 L.J.Ch. 317; 90 L.T. 252; 52 W.R. 505; 20 T.L.R. 276; 48 Sol. Jo. 312]

B

Administration of Estates—Claim on estate—Compromise by executor of co-executor's claim—Parties acting honestly and reasonably—Trustee Act, 1893 (56 *& 57 Vict., c.* 53), *s.* 21—*Judicial Trustees Act*, 1896 (59 *& 60 Vict., c.* 35), *s.* 3.

An executor, acting honestly and reasonably and to avoid the expense of litigation, allowed, after inquiry, a claim by the testator's widow, who was co-executrix of the will, to a sum of money which, she alleged, belonged to her, but was represented by securities apparently belonging to the testator.

C

Held: it was competent for an executor in a proper case to compromise a claim by his co-executor against the estate, and, therefore, the transaction was valid and binding on residuary legatees.

D

Notes. The Trustee Act, 1893, s. 21, has been repealed; see now the Trustee Act, 1925, s. 15 (26 Halsbury's Statutes (2nd Edn.) 73). The Judicial Trustees Act, 1896, s. 3, has been repealed; see now the Trustee Act, 1925, s. 61, 26 Halsbury's Statutes (2nd Edn.) 141.

As to the power of a personal representative to compromise claims, see 16 Halsbury's Laws (3rd Edn.) 369, 370; and for cases see 24 Digest (Repl.) 641, 642.

E

Case referred to:

(1) *Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534; sub nom. *Re New's Settlement, Langham* v. *Langham, Re Leavers, Leavers* v. *Hall, Re Morley, Fraser* v. *Leavers*, 70 L.J.Ch. 710; 85 L.T. 174; 50 W.R. 17; 45 Sol. Jo. 706, C.A.; 43 Digest 840, *2866*.

F

Also referred to in argument:

De Cordova v. *De Cordova* (1879), 4 App. Cas. 692; 41 L.T. 43; 28 W.R. 105, P.C.; 24 Digest (Repl.) 641, *6324*.

Originating Summons for a declaration that it was competent for an executor to compromise a claim by his co-executor against the estate.

G

The testator, C. Houghton, who died on April 1, 1894, by a will dated Feb. 23, 1889, gave a life interest in his property to his wife Esther, and directed that, after her death, it should be realised and the net proceeds divided between his nephews and nieces therein specified, two of whom were the plaintiffs, and appointed the defendants John S. Blake and Ferdinand Houghton, with his wife, executors. His will was proved on May 1, 1894, by John S. Blake and his widow alone, leave being reserved to the defendant F. Houghton to prove, which power he had not exercised. Esther Houghton, the widow of the testator, died on June 7, 1902, leaving a will dated July 25, 1901, under which her nephew, the defendant J. S. Blake, was sole executor. In May, 1903, the executors of the will of the testator, represented by the defendant J. S. Blake, delivered an account to the residuary legatees, including the plaintiffs, from which the plaintiffs alleged that they first learned that Esther Houghton, claiming to be a creditor of the testator for £1,180, had, shortly after his death, appropriated, with the concurrence of her co-executor, the defendant J. S. Blake, certain securities standing in the name of the testator and also a portion of a debt due to his estate. At an interview between J. S. Blake and Esther Houghton shortly after testator's death, E. Houghton, as he alleged, took a number of securities from a safe and stated to him that they did not all belong to her husband, but that a great deal of the money they represented was hers, and came partly from her father and partly from her mother, amounting in all to the sum of £1,180, and she also showed him a memorandum of four items making up such sum. J. S. Blake consulted as to the matter a solicitor who had since

H

I

died. He also spoke to his father, who was the personal representative of the relatives of Esther Houghton, from whom the amounts mentioned in the memorandum were derived, with reference to the statements made by his aunt, and he confirmed those statements, and showed the defendant Blake the receipts in his possession as such personal representative for the several sums. Particulars as to the dates on which the items composing the £1,180 were advanced to the testator had been supplied to the Inland Revenue authorities by the solicitor to his estate in June, 1894, together with a statement that the money in question was Mrs. E. Houghton's share of her father's estate, and other evidence was given which rendered it probable that Esther Houghton might have been so entitled to the amounts in question, and as to £820 thereof for her separate use. Under these circumstances J. S. Blake, as one of the executors of C. Houghton, did not object to her claim against the testator's estate being admitted, and to her being allowed to retain the securities mentioned in the account delivered to the residuary legatees. The summons taken out by the plaintiffs asked for an inquiry and a consequent direction thereupon that all moneys, shares, and property retained by Esther Houghton, deceased, out of the estate of the testator in alleged discharge of moneys alleged to be owing to her from him might be paid or transferred by the defendant, J. S. Blake, as executor of E. Houghton, deceased, into the names of himself and the defendant F. Houghton, to be applied as part of the residuary estate of the testator.

Christopher James for the plaintiffs.
Warrington, K.C., and *Theodore Ribton* for the defendants.

KEKEWICH, J.—This is a claim by beneficiaries under the will of Charles Houghton to a sum of £1,180 received by the widow, Esther Houghton, and for which, if that be so, the estate of Esther Houghton became accountable, and the summons asks, if necessary, for administration of her estate for that purpose. As regards £820 receipts have been produced which clear the matter up entirely. There is no doubt that £820 really belonged to Esther Houghton. The story is a curious one. Esther Houghton was the widow of Charles Houghton. John S. Blake was with her executor of Charles Houghton, and on Charles Houghton's death Esther Houghton, the widow, produced a number of securities, but said that they did not all belong to her husband's estate, but some belonged to her amounting altogether to £1,180. Blake went into the matter more or less, but eventually he did not object to her claim, but allowed her to retain the securities. It is said he did wrong, and that therefore the money is now recoverable from him as executor of Esther Houghton, which he also happens to be. The real question is whether Blake, as one of the executors of Charles Houghton's will, could compromise the claim with Esther Houghton by allowing it in full. I use the word "compromise" advisedly. In one sense there was no compromise, because, the whole claim being allowed, there was no give and take about it. Esther Houghton had all she claimed, and in that sense there was no compromise. But the widow had possession of the securities, and they could not have been got from her without discussion and possibly litigation. It was entirely for those representing the estate to say whether the delay and expenses of litigation should be incurred or whether the claim should be acceded to. I therefore think what happened was properly called a compromise. Very little was given up, and there was reason when once you get the possibility of litigation and its consequences. There being no question about the honesty of the parties, was it competent for Blake, as one of the two executors, to admit the claim of his co-executor, particularly when the co-executor was the widow of the testator? In my opinion, the fact that the co-executor was the testator's widow made no difference. It is not disputed that one of two executors can compromise with a stranger. This power of compromise is a common law power. There is also statutory authority for it, but the statute really adds nothing to the common law powers, which have been recently recognised in *Re New's Settlement, Langham* v.

Langham (1) in the Court of Appeal. Executors are seised of their office per mie et per tout, each of them representing the estate for all purposes. In my opinion it would be an infringement of the rule to say that an executor cannot compromise a claim of his co-executor. But the position is a delicate one, and I think that an executor in that position would do well to come to the court for its sanction before entering into a compromise of this kind. As regards the Judicial Trustee Act, 1896, s. 3, I have no doubt that he acted honestly, and I have no doubt that he acted reasonably. Therefore, whether I take the case on his executorial power, or whether I take only the last statute to which I have referred, it seems to me that I must uphold the executor as having done what is right. There will be a declaration that £1,180 was properly allowed to Esther Houghton out of the testator's estate. Costs of all parties to be paid out of the estate; those of the defendant Blake to be taxed as between solicitor and client.

Solicitors: *Clarke, Rawlins & Co.*, for *Percival & Son*, Peterborough; *Field, Roscoe & Co.*, for *Senior & Furbank*, Richmond, Surrey.

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

Re LONGBOTHAM & SONS

[Court of Appeal (Vaughan Williams, Romer and Cozens-Hardy, L.JJ.), May 31, June 1, 1904]

[Reported [1904] 2 Ch. 152; 73 L.J.Ch. 681; 90 L.T. 801; 52 W.R. 660; 48 Sol. Jo. 546]

Solicitor—Mortgage—Rights of mortgagor on taxation of bill of mortgagee's solicitor—Limitation to costs of mortgagee strictly in that capacity.

A mortgagor is entitled to have taxation of the bill of costs of the solicitor acting for the mortgagee limited to the items of costs incurred by the mortgagee strictly in that capacity and not in his personal capacity.

Notes. The Solicitors Act, 1843, s. 38, has been replaced by the Solicitors Act, 1957, s. 70(1) (37 Halsbury's Statutes (2nd Edn.), 1113)

Considered: *Re Lewis* (1904), 49 Sol. Jo. 54. Applied: *Re Cohen and Cohen*, [1905] 2 Ch. 137. Considered: *Re Hirst and Capes*, [1908] 1 K.B. 982.

As to costs in mortgage transactions, see 27 Halsbury's Laws (3rd Edn.) 440–449; and for cases, see 35 Digest 694–696.

Cases referred to:

(1) *Re Gray*, [1901] 1 Ch. 239; 70 L.J.Ch. 133; 84 L.T. 24; 49 W.R. 298; 45 Sol. Jo. 139; 42 Digest 169, *1753*.

(2) *Re Negus*, [1895] 1 Ch. 73; 64 L.J.Ch. 79; 71 L.T. 716; 43 W.R. 68; 39 Sol. Jo. 29; 13 R. 85; 42 Digest 169, *1752*.

(3) *Re Brown* (1867), L.R. 4 Eq. 464; 36 L.J.Ch. 842; 16 L.T. 729; 15 W.R. 1030; 42 Digest 169, *1745*.

(4) *Re Abbott* (1861), 4 L.T. 576; 42 Digest 143, *1413*.

(5) *Re Morecroft* (1885), 1 T.L.R. 484; 29 Sol. Jo. 471, C.A.; 42 Digest 169, *1748*.

(6) *Re Dickson* (1856), 8 De G.M. & G. 655; 26 L.J.Ch. 89; 28 L.T.O.S. 153; 3 Jur.N.S. 29; 5 W.R. 108; 44 E.R. 542, L.JJ.; 42 Digest 173, *1804*.

(7) *Re Massey* (1865), 34 Beav. 463; 6 New Rep. 195; 34 L.J.Ch. 492; 12 L.T. 519; 11 Jur.N.S. 594; 13 W.R. 797; 55 E.R. 714; 42 Digest 168, *1742*.

Also referred to in argument:

Re Holliday and Godlee (1888), 58 L.T. 301; 42 Digest 168, *1744*.

Re Newman (1867), 2 Ch.App. 707; 36 L.J.Ch. 843; 17 L.T. 128; 15 W.R. 1189, L.J.; 42 Digest 173, *1797*.

Re Bignold (1845), 9 Beav. 269; 50 E.R. 347; 42 Digest 171, *1783*.

Re Baker (1863), 32 Beav. 526; 2 New Rep. 151; 8 L.T. 566; 11 W.R. 792; 55 E.R. 207; 42 Digest 171, *1779*.

Re Barrow (1853), 17 Beav. 547; 24 L.J.Ch. 126; 22 L.T.O.S. 217; 18 Jur. 181; 2 W.R. 109; 51 E.R. 1146; 42 Digest 171, *1776*.

Re Jones (1845), 8 Beav. 479; 50 E.R. 188; 42 Digest 171, *1774*.

Re Wells (1845), 8 Beav. 416; 14 L.J.Ch. 215; 5 L.T.O.S. 19; 9 Jur. 820; 50 E.R. 163; 42 Digest 157, *1577*.

Re Fyson (1846), 9 Beav. 117; 50 E.R. 287; sub. nom. *Re Fyson* v. *Curling*, 1 New Pract. Cas. 455; 8 L.T.O.S. 49; 42 Digest 191, *2066*.

Re Taylor (1854), 18 Beav. 165; 23 L.J.Ch. 857; 23 L.T.O.S. 72; 18 Jur. 666; 2 W.R. 249; 52 E.R. 65; 42 Digest 119, *1155*.

Brown v. *Burdett* (1888), 40 Ch.D. 244; 60 L.T. 520; 37 W.R. 533; 5 T.L.R. 88, C.A.; 42 Digest 225, *2561*.

Appeal from the refusal by KEKEWICH, J., to review the certificate of a taxing master.

Solicitors, who had acted for a mortgagee, carried in their bill of costs for taxation at the instance of the mortgagor. From the bill more than one-sixth was taxed off. On the solicitors raising objections the master answered that he had taxed the bill upon the principle laid down in *Re Gray* (1), by taking off all the items which could not be charged as between the mortgagee and mortgagor, stating, further, that the bill was made out on a wrong principle, the old practice being relied on by the solicitors. The items disallowed were in the nature of charges as between solicitor and client, such as attendances by solicitors to take steps necessary for the protection of the mortgagee without consultation with the mortgagor, and in respect of unnecessary letters. Thereupon an application was made by the solicitors to review the certificate of the taxing master. The applicants admitted that their application was made in order to obtain a reversal of the ruling of the learned judge in *Re Gray* (1), in which it was submitted that COZENS-HARDY, J., while referring to the earlier decision of *Re Negus* (2) which in turn referred to *Re Brown* (3), had in effect altered the previous practice in such matters. KEKEWICH, J., before whom the application came on to be heard, required a certificate from the taxing master, which was as follows:

> "Your Lordship having desired a certificate from the masters of the Supreme Court (Taxing Office) of the practice generally in cases between the mortgagor and the solicitor of the mortgagee, I beg respectfully to report to your Lordship: That the practice followed by the masters in taxations under s. 38 [of the Solicitors Act, 1843] up to within recent years was to tax as between the solicitor and the client (the party chargeable in the first instance), and not as between the solicitor and the party liable to pay, effect, however, being given, as far as possible, to *Re Negus* (2) *and Re Abbott* (4), and the observations of COTTON, L.J., in *Re Morecroft* (5). The principles, however, laid down by these cases were, in the opinion of the masters, considerably extended by *Re Gray* (1), and since that case the practice in the taxing office in taxations under this section has been to tax, apart from the order, as between the solicitor and the party, or estate liable to pay."

KEKEWICH, J., read this certificate, and, without further argument, refused the application; but his Lordship gave leave to appeal. The solicitors appealed.

George Lawrence for the appellants.

T. L. Wilkinson for the respondent.

Cur. adv. vult.

June 1, 1904. **ROMER, L.J.**, read the following judgment.—I will first deal with this case on principle. When a third party taxes a bill under s. 38 of the

Solicitors Act, 1843, it is clear, both from the wording of the section itself and the authorities, that the taxation must be on the footing of a taxation between the solicitor and the client. But the third party is not, for all purposes in connection with the taxation, to be treated as if he were himself the client. For instance, where the client has paid the bill and might not be able to show special circumstances sufficient to entitle him to have the bill taxed, it does not follow that of necessity the third party is thereby precluded from obtaining taxation. The proviso at the end of s. 38 shows that. And, in my opinion, that proviso is important and useful; and a court will doubtless act upon it in cases where justice requires that the third party should not be bound by what has taken place between the solicitor and the client. Again, the solicitor may have acted for the client in more than one completed matter, and the client may not be entitled, as against the solicitor, to obtain delivery of a bill and taxation, except on the footing of having all the matters included and taxed. But if the third party be only interested in, and liable to pay the costs of, one matter, it is clear, in my opinion, as a matter of principle, that, under s. 38, he can obtain taxation of the bill so far as concerns that one matter only, and on the footing of being liable to pay only the taxed costs of that matter, and that principle really decides this case, and shows that the appeal should fail. For in the present case the third party is a mortgagor, and he is only interested in the relations between the solicitor and his client so far as they concern the position of the client strictly in his character of mortgagee.

The mortgagor, therefore, is entitled, under s. 38, to have taxation of the solicitor's bill limited to the items of costs incurred by the client strictly in his position of mortgagee, and it is on that principle that the taxing master has proceeded. It may well be that the client, as between himself and the solicitor, is liable for costs incurred in relation to the mortgaged property with which the mortgagor is not concerned and for which the mortgagor is not liable. Those will be costs incurred by the mortgagee in his personal capacity so far as concerns the mortgagor, and not costs incurred by him in the capacity of mortgagee strictly and properly considered, and accordingly would not have to be taxed or considered by the taxing master in a taxation by the mortgagor as third party. And I may add, though it may not be necessary to do so for the purposes of the present case, that, if the mortgagee chose to sanction a charge by his solicitor beyond what he and the solicitor knew, or must be taken to have known, could be properly charged, as against the mortgagor, though the mortgagee might be bound for the excess by reason of his sanction, the mortgagor would not be bound, for the sanction by the mortgagee would be held as given by him in his personal capacity, and not in his capacity of mortgagee. With regard to the authorities, they are so numerous that I do not pretend to say that all the observations by the various judges who decided them can be reconciled. But the principle on which this judgment is based is not, in my opinion, contrary to any express decision that has been cited, and that principle has been recognised, and, I think, rightly so, in *Re Brown* (3); *Re Morecroft* (5) (and in particular the judgment of LINDLEY, L.J., in that case); *Re Negus* (2); and *Re Gray* (1); and by the observations of TURNER, L.J., in *Re Dickson* (6), and I do not think it will serve any useful purpose to go through the cases cited seriatim. The appeal will accordingly be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I concur. I wish to add one or two observations. In the first place, I assent entirely to every word read by ROMER, L.J., in so far as it deals with questions regarding all such matters as do not strictly concern the mortgagor, and which involve costs incurred by the mortgagee otherwise than in his capacity of mortgagee. Such costs are outside the costs which the mortgagor is liable to satisfy. So far as I am concerned, I do not wish to go beyond that. It seems to me that when we go that length we are affirming the judgment of CHITTY, J., in *Re Negus* (2), and the judgment of COZENS-HARDY, J., in *Re Gray* (1). In each of those cases there were costs incurred in

respect of matters which did not concern the mortgagor, and which were not costs incurred by the mortgagee as mortgagee, but in his personal capacity. All that it is necessary for us to do in our present judgment is to affirm the principle of those two decisions, which, as ROMER, L.J., has pointed out, are really decisions that were anticipated by LORD ROMILLY, M.R., in *Re Brown* (3). There is one passage in the judgment of COZENS-HARDY, J., in *Re Gray* (1), which expresses all that it is necessary to say in the present case. I find these words ([1901] 1 Ch. at p. 248):

> "The governing idea of CHITTY, J.'s judgment [in *Re Negus* (2)] is that even on a third-party taxation the court is bound to look at the nature of the items and to consider whether, apart from the order, the applicant is under any liability to pay them. In other words, although the solicitor may put in one bill as against his own client a series of items, some of which may go beyond the liability of the third party, the third party does not by obtaining an order to tax render himself liable to the whole bill. With respect to matters falling within his liability under a contract express or implied, he cannot dispute the amount properly payable as between the solicitor and his own client, but in other respects his liability is not increased by obtaining a third-party order to tax."

I wish further to add that I do not think that in any of the cases referred to it has been forgotten that what is authorised in favour of a third party by s. 38 of the Solicitors Act, 1843, is a taxation obtained by a third party against the solicitor. What I mean is that the proceeding which is sanctioned by the section is a wholly different proceeding from that which is described by LORD ROMILLY, M.R., in *Re Massey* (7). He says in that case (34 L.J.Ch. at p. 495) when refusing to grant an order for taxation at the instance of Mr. Waters, a third party:

> "In other words, in my opinion, a bill from Mr. Massey [the solicitor] would have to be submitted to be moderated by the taxing master, and the amount at which the taxing master would fix it would be all that Mr. Waters would be required to pay the directors."

That proceeding or moderation is a proceeding which is not intended to be included by s. 38 of the Solicitors Act, 1843. The appeal will be dismissed with costs.

COZENS-HARDY, L.J.—As this case is in substance, although not in form, an appeal from my decision in *Re Gray* (1), I will content myself with saying that I agree with the judgments which have been delivered by ROMER, L.J., and my Lord.

Appeal dismissed.

Solicitors: *Bower, Cotton & Bower*, for *Longbotham & Sons*, Halifax; *Indermaur & Brown*, for *W. Pearce*, Todmorden.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

NORTHAMPTON CORPORATION *v.* ELLEN

[COURT OF APPEAL (Lord Alverstone, C.J., Sir Richard Henn Collins, M.R., and Romer, L.J.), January 19, 1904]

[Reported [1904] 1 K.B. 299; 73 L.J.K.B. 329; 90 L.T. 71; 68 J.P. 197; 52 W.R. 305; 20 T.L.R. 168; 2 L.G.R. 473] B

Water Supply—Charges—Right of undertakers to charge different rates to different consumers.

In 1884 a municipal corporation acquired the undertaking of a waterworks company by a private Act, which authorised the corporation "to charge for the supply of water for domestic use to any dwelling-house a sum not exceeding 7½ per cent. per annum on the net rateable value of such dwelling-house." The company had statutory power to supply any person with water for any purpose for such remuneration as might be agreed under a special agreement, and by the Act of 1884 all the rights and powers of the company were transferred to and vested in the corporation. C

Held: the corporation had power to charge at different rates, within the 7½ per cent. maximum, for the supply of water for domestic use to dwelling-houses, i.e., in one part of their district at the rate of 5 per cent. and in another at the rate of 7½ per cent. D

Notes. The Waterworks Clauses Act, 1847, was repealed by the Water Act, 1945: 26 HALSBURY'S STATUTES (2nd Edn.) 786.

Considered: *Re Baker, Ex parte Eastbourne Waterworks Co.* v. *Official Receiver*, [1954] 2 All E.R. 790. Referred to: *Border Rural District Council* v. *Roberts*, [1950] 1 All E.R. 370. E

As to charges for the supply of water, see 33 HALSBURY'S LAWS (2nd Edn.) 468–476; and for cases see 43 DIGEST 1087 et seq.

Cases referred to: F

(1) *Hungerford Market Co.* v. *City Steamboat Co.* (1860), 3 E. & E. 365; 30 L.J.Q.B. 25; 3 L.T. 732; 25 J.P. 213; 7 Jur.N.S. 67; 121 E.R. 479; 44 Digest 99, *787*.

(2) *Dobbs* v. *Grand Junction Waterworks Co.* (1883), 9 App. Cas. 49; 53 L.J.Q.B. 50; 49 L.T. 541; 48 J.P. 5; 32 W.R. 433, H.L.; 43 Digest 1090, *219*.

Appeal by the plaintiff corporation from a decision of BIGHAM, J., upon a Special Case stated in the action by consent of the parties. G

The corporation brought this action to recover from the defendant the sum of £1 4s. 9d., the amount of a quarterly instalment of a charge for water supplied for domestic use to the defendant at his dwelling-house at Kingsthorpe. Kingsthorpe was incorporated with the borough of Northampton by the Northampton (Extension) Order, 1900. Before that date it had, since 1861, formed part of the area of water supply. The sum of £1 4s. 9d. was made up of a sum of £1 0s. 3d., a quarter's instalment of an annual rate of 7½ per cent. upon the rateable value of the defendant's house, and 4s. 6d. for extra charges for a bath and water-closets. The defendant disputed only the sum of £1 0s. 3d. H

In 1884 the plaintiffs, under the powers conferred on them by s. 19 of the Northampton Waterworks Act, 1882, purchased the undertaking of the Northampton Waterworks Co., which had been incorporated by the Northampton Waterworks Act, 1861, s. 59 of which provided: I

> "The company may from time to time supply any person with water for any purpose for which such supply may be required, for such remuneration and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water under a special agreement."

The purchase was effected by the Northampton Corporation Waterworks Act, 1884, which provided:

"Section 10. From and after the transfer of the company's undertaking to the corporation all the rights, powers, authorities, and obligations of the company shall be by virtue of this Act transferred to, vested in, and exercisable by and imposed upon the corporation, and the Act of 1861 and the Act of 1882 shall be read and have effect as if the corporation had been therein named instead of the company. . . . Section 36. Section 49 of the Act of 1861 [by which rates varying with different rateable values were authorised] is hereby repealed, and the corporation may charge for the supply of water for domestic use to any dwelling-house a sum not exceeding seven and a half per centum per annum on the net rateable value of such dwelling-house as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable, or if there be no such list then on the net rateable value of such dwelling-house as the same is assessed to the last poor rate."

The defendant had, until June 24, 1901, always paid in respect of his house a water rate of 7½ per cent. on the net rateable value. In 1900 that part of Kingsthorpe in which the defendant's house was situate was included within the boundaries of the borough of Northampton by the Northampton (Extension) Order, 1900. By art. 36 of that order it was provided that the general district rate to be levied in Kingsthorpe should not in any one year for a period of ten years, together with the poor rate, the borough rate, and any other rate made by the corporation in the same year, exceed an amount which would make up a total rate of 5s. 6d. in the pound on the rateable value of any hereditament. From the commencement of the order until June 24, 1901, the plaintiffs demanded a water rate of 7½ per cent. per annum from the defendant and from all other consumers of water for domestic use both in the old borough and in the added districts. On and after June 24, 1901, the plaintiffs reduced the water rate from 7½ to 5 per cent. in the case of domestic consumers within the old borough, but retained the rate of 7½ per cent. in Kingsthorpe and other added districts. The defendant contended that the water rate was a "rate" within the meaning of art. 36 of the order; that, as the other rates payable by him amounted to the maximum of 5s. 6d. in the pound, the plaintiffs could not recover any sum from him in respect of water rate; and that the plaintiffs were not, in any case, entitled to demand of him a higher rate than that demanded from domestic consumers in the old borough, but were bound to place all domestic consumers in the borough on an equality.

By agreement a Special Case was stated for the opinion of the court: (i) whether the plaintiffs were entitled to differentiate the water rate; (ii) whether the corporation were entitled to demand a water rate of the defendant, within ten years of the commencement of the Extension Order, so long as the rates payable by the defendant, exclusive of water rate, amounted to 5s. 6d. in the pound; (iii) whether the corporation were entitled to reduce the water rate for the purpose of creating a deficiency on the before-mentioned grounds. The Case was argued before BIGHAM, J., who held that the corporation had no power to differentiate the water rate, but must charge the same rate over the whole borough, and that the water rate was not a "rate" within the meaning of art. 36, and accordingly gave judgment in favour of the defendant. The corporation appealed.

C. A. Russell, K.C., and *W. Ryland Adkins* for the corporation.
Avory, K.C., *Lampard* and *Campion* for the defendant.

LORD ALVERSTONE, C.J.—There is no doubt about the very great importance of the point raised in this case. If the decision of BIGHAM, J., is to stand upon the main point, I understand it to be a simple and clear decision that, by virtue of the provisions of s. 36 of the local Act of 1884 and any other statutory provisions applicable to this corporation, there is no power to differentiate between persons who pay for a supply of water. The point is one which from time to time has been

suggested during the last twenty years, but, as far as I know, never has before received judicial sanction, at any rate in the way that BIGHAM, J., has decided. There is a great deal to be said primâ facie for equality of charges in respect of such things as the public supply of water in the same way as in the case of charges authorised in a number of provisions in Acts of Parliament relating to the supply of other sorts of commodities. But I have come to a very clear conclusion that that defence is not open to the defendant.

It will be convenient if I briefly state what I understand the point to be, and then refer shortly to the arguments which have been very clearly and ably urged before us. The action was brought by Northampton Corporation to recover £1 4s. 9d., of which £1 0s. 3d. was made up by one quarter's instalment of an annual rate at 7½ per cent. upon the rateable value of £54. There is no question raised by the defendant that the sum claimed is not a proper calculation upon £54 at 7½ per cent., and is within the maximum power which is given to the company by s. 36. On the contrary, so far does the defendant press the point, that he says not only that he must pay at 7½ per cent., but that, everybody else must pay at 7½ per cent., and that, if the corporation do not charge everybody else at 7½ per cent., they cannot recover the 7½ per cent. against him. He did not go so far as to say that they cannot recover anything against him, because this case has been argued on the basis that he would be willing to pay 5 per cent. Counsel for the defendant argues, first of all, that a corporation cannot, if they are relying upon their power to charge under such statutory powers as these, charge except at an equal rate or percentage all the persons who have not made an agreement with them. Further, he raises this point, that, by virtue of the provisional order which added Kingsthorpe to Northampton, the total rates in Kingsthorpe were for a period of ten years not to exceed 5s. 6d. in the pound. He says that the effect of only charging 5 per cent. in the old borough of Northampton would be a larger charge on the general district rate of the borough in respect of the water undertaking than there would be if an equal rate of 7½ per cent. all round had been charged upon all the consumers in Northampton, and therefore, there being a larger charge upon the general district rate, there is a greater probability of the 5s. 6d. being maintained, or at any rate that the inhabitants of Kingsthorpe do not get the opportunity, or prospect, or chance of the rates going below the 5s. 6d.

I propose to take that part of the case first. I am wholly unable to see how that question can possibly be raised in this action. I have already pointed out that the defendant does not deny that the charge made upon him is primâ facie a lawful charge, but says that the corporation have no right to reduce the rates upon the people who live in the old borough of Northampton, and suggests that the reasons stated in the Case as the justification given by the corporation for the course of action they have adopted in reducing the water rate in the old borough of Northampton to 5 per cent. are not good grounds, and that the corporation ought to have acted differently. All I can say is that it seems to me that, in such a proceeding as this, the defendant, unless he can make good the main proposition which BIGHAM, J., has decided in his favour, is not entitled, in answer to a claim for a specific sum of money otherwise lawful, to put himself in the position of a ratepayer who is alleging that the conduct of the corporation is ultra vires and not in accordance with the Act. I do not want to say more about this point except that I see a very great deal of difficulty in any single individual raising it. It may be that a ratepayer who is liable to the district rate may have the right to bring the corporation before some competent court, either with the assistance of the Attorney-General or in some other form of proceedings; it may be that there are proceedings contemplated by the Municipal Corporations Acts, which have sometimes been made available for the purpose of raising such a question as this, in which proceedings it may be that the right of the corporation to reduce the rates of the water-works undertaking, in order that the consequences may follow which they seem to wish—that is, that there may be a greater equalisation of the payment of the total burthen—may be questioned. I am, however, clearly of opinion that, apart from

the ground upon which BIGHAM, J., proceeded, the question cannot be raised in this action in order to cut down the right of the corporation to make the charge in this case which they have now made. That brings me to what is the real and very important point in this case—whether the corporation could or could not differentiate between the charges for water, so that it may be contended that if, in the absence of agreement, they are suing a man for a water rate, the fact that they have in some circumstances charged less to other people makes the whole charge bad. The absence of any equality clause in the Waterworks Clauses Act, 1847, has been the subject of comment on many occasions. I think that *Hungerford Market Co.* v. *City Steamboat Co.* (1) is a very important authority for the view that it is necessary to find, either by Act of Parliament or at common law, some obligation upon the corporation to have uniform dealings with all the persons with whom they deal. It does not go further than that, because one may find such an obligation implied in the way in which the statute had been framed or from the nature of the charge which is being imposed.

With regard to the position of the old Northampton Waterworks Co., I do not wish to deal summarily with a point which is a very serious point. There are a number of sections in the Northampton Waterworks Act, 1861, enabling the company to make contracts of all kinds with respect to all the purposes for which they supply water, and it is sufficient for my purpose to say that s. 59 provides:

> "The company may from time to time supply any person with water for any purpose for which such supply may be required, for such remuneration and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water, under a special agreement."

That gives absolute power to the company to make special bargains. It seems to me that, if a person is minded to make a bargain with the company, and a bargain is made the effect of which is that he pays less for his water, even for domestic purposes, than a person who does not choose to make a bargain, it does not follow that the rate established by the bargain is bad.

In 1884, this waterworks undertaking was transferred to the Northampton Corporation. The transfer of waterworks undertakings to corporations is no new thing, nor is it any necessary part of the ordinary duties of a corporation. The corporation had these waterworks transferred to them for the public benefit. In many cases, I will not say invariably, because I do not pretend to know, they are put under exactly the same obligations as this corporation were put. Under ss. 24 and 25 of the Northampton Corporation Waterworks Act, 1884, the corporation have to keep separate waterworks accounts. The waterworks undertaking is quite separate in their hands from other undertakings, subject to this, that there is the security of the district and borough rates behind it for any deficiency which may arise in the course of carrying it on. I need not refer to the provisions as to working expenses, repayment of rentcharges, payment of interest on mortgage debt, payment of interest on debentures, and providing a sinking fund. The undertaking becomes the corporation waterworks as distinguished from the company's waterworks. Has the power of making agreements been taken away from them? It seems to me that s. 10 of the Act of 1884 shows that all the powers of the waterworks company are transferred to the corporation, putting them in exactly the same position as the company was in, so far as their right of dealing with consumers is concerned. It has been said that s. 36 of the Act of 1884 has repealed s. 49 of the Act of 1861, and has imported an obligation to charge everybody alike, and that if they do not charge everybody alike the charge made is bad. I am unable to take that view. I think the only effect of s. 36 was to alter the standards of payment established by s. 49 of the older Act. It is quite possible that one reason was to fix the rateable value as distinguished from the gross annual value, a question which gave rise to so much litigation in *Dobbs* v. *Grand Junction Waterworks Co.* (2), but, be that as it may, it is quite impossible, in my opinion, to say

that by implication s. 36 of the Act of 1884 overrides the powers which the corporation have, by virtue of being successors to the company, to make agreements with individual consumers. A

That being so, what is the position of this defendant? He admits that he would owe £1 0s. 3d. at the rate of 7½ per cent. under s. 36, but he says that, although that might be so, the corporation have, under some procedure which he attacks, made an arrangement, either public or private, with the ratepayers or water consumers of the old borough that they shall only pay at the rate of 5 per cent. In my opinion, that is no defence to the claim, and, unless it can be said that an unequal charge makes the charge within the maximum bad, there is no defence to this action. B

I will say a word or two upon another point. It is, in my opinion, not correct to speak of this corporation as making a rate for water. There are a great many cases under which corporations may make a rate for water. There are purposes for which they may include the cost of water in the borough rates, and they are entitled to treat those charges as rates. But in the present case the corporation are not making a rate for water in the ordinary sense or proper sense of the term; they are making for water a charge which is fixed by reference to the rateable value and a percentage thereon, and, in my opinion, the suggestion that the power to make these charges in the circumstances of this case is cut down by s. 36 is without foundation. C D

I am, therefore, of opinion that the only ground upon which BIGHAM, J., decided against the corporation—namely, that there was no right to differentiate, or, in other words, that an equality clause must be held to be implied—was wrong, and the judgment must be reversed. I should like to add that I entirely agree with BIGHAM, J., in his finding that art. 36 of the Extension Order, of which the words are "other rates made by the corporation," does not include water rates; on the face of that clause it is clear that the rates there referred to are rates other than water rates. I do not think that the scheme could possibly be worked if it was supposed that a rate for the supply of water, which depends to a certain extent upon the individual, was included in such rates as are there referred to, which are clearly general rates levied quite independently of the supply of a commodity to a particular consumer. Therefore, notwithstanding the respect I attach to the opinion of BIGHAM, J., I think that this appeal must be allowed, and that the corporation are entitled to recover the amount they claim. E F

SIR RICHARD HENN COLLINS, M.R.—I am of the same opinion, and, as we are differing from the learned judge below, I will give my reasons. The question is whether the corporation are entitled to differentiate their water rates—that is to say, whether they are entitled to charge persons in one district at one rate and persons in another district at another rate. The defendant in this case successfully resisted a claim for a rate against him at the rate of 7½ per cent., and resisted it successfully on the ground that other persons in other parts of the borough were only charged at the rate of 5 per cent. BIGHAM, J., upheld that view. We have to see whether the statute (the amount is claimed under statutory authority) has or has not imposed on the authority of the corporation in imposing this charge any limitation other than that defining a maximum. In other words: Is there any provision in a relevant statute that the charge must be made to all persons equally? G H I

We have to begin the discussion by admitting that there is no such limitation clearly expressed on the face of any Act. If it is to be collected at all, it is to be collected from the words of s. 36 of the Act of 1884, and those words, when one examines them, seem to me not to carry the defendant to the full length that it is necessary that he should show that they do carry him in order to succeed in this action. Section 36 repealed the section of the earlier Act which provided a number of different standards by which houses of different value should be assessed to this charge. Then it enacted:

A "the corporation may charge for the supply of water for domestic use to any dwelling-house a sum not exceeding 7½ per cent. per annum on the net rateable value of such dwelling-house as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable. . . ."

B The Act uses the words "water rate" there, but does not, by any other expression, indicate any intention that the rate or the charge shall be equal upon every house in proportion to its value in the borough. The defendant contends that "any dwelling-house" must be read as though it were "all dwelling-houses." That is a gloss which I do not think he can support. The section can be read perfectly easily without substituting "all" for "any," but, even if we did substitute "all," I do C not think that we could get any further in the discussion, because all that is there imposed is a limit of 7½ per cent. as the maximum sum that can be charged by the corporation.

Why are we to impart into that that it is to be an equal sum levied upon every person? The only word in the section that gives countenance to that suggestion, or upon which the argument can be founded, is that that which is to be charged is D called a "water rate," but how do we get from that an implication that that must be an equal charge? It seems to me that the basis of the poor rate, on which that conclusion was founded, is quite different from such a charge as a water rate. No doubt in the original enactment under which what is called the poor rate was established there is no express provision that there is to be absolute equality. The very nature of the charge itself, the reasons why it was imposed, the persons upon E whom it was imposed, and the conditions attaching to it, all essentially involve equality, because it is an imposition upon citizens of a duty to the community in proportion to their means, and from that duty necessarily arises the implication of equality—equality in bearing burthens in proportion to their means. What is the analogy between that and the duty of a person who buys a marketable commodity? The corporation here has taken the right to sell, and the citizens have F the right to buy, a marketable commodity, and there is no analogy between the position of a purchaser under that arrangement and that of a citizen who is bound according to his means to perform a public duty. One can well see the force of the obligation there of equality; but there is no such analogy in the case of a person merely having a demand in his household for a certain commodity which he has the right to go and demand from the persons who supply it. When we consider G that this commodity is necessarily supplied at different costs to different persons in different places, there is no foundation for, and no presumption of, equality; on the contrary, in equity there would be a presumption of inequality, because some persons who demand the water, and are given a right to demand it, are necessarily in places where it may be much more expensive to supply it than it may be in another. Therefore we do not start primâ facie with any presumption that H there ought to be equality of opportunity and equality of obligation. We clearly have to deal with this on first principles, because the sole foundation for the argument for the defendant is the implication to be drawn from the fact that the word "rate" is used in s. 36, and that there is a percentage upon value imposed.

While, as I have said, it seems to me that the case must stand on principle, I think there is some authority upon the matter. I think that *Hungerford Market Co.* v. *City Steamboat Co.* (1), which was the case of a toll, is an instance of the I application of the true principle which I have been attempting to set forth. There the thing to be done was the giving of permission to pass over certain property of the charging authority, and it was held there that there was no obligation of equality or, in other words, that they were entitled to charge tolls at different rates to different persons for what was practically the same privilege or the same opportunity. Why did the court come to that conclusion? Because there were no words imposing the obligation of equality in the statute which entitled the charging authority to demand tolls, there was no statutory provision, and there was no

necessary implication of equality from the relations of the parties. It seems to me that if we examine the words which give the right to impose the charge in the present case, we find no higher implication from the word "rate" in the sense in which it is used and in the connection in which it is used than we can find from the word "toll" in the other case. Both words might be interchanged so far as any implication of equality is to be derived from the use of either one or the other in the collocation in which it is used. It is simply a return made for some privilege used or some article supplied. It is not in any sense based upon equality of duty or of obligation, which is the basis upon which, in the case of poor rate, the inference of equality has been drawn. For these reasons, in addition to those given by the Lord Chief Justice, I am of opinion that we must differ from the decision of BIGHAM, J., and that this appeal must be allowed.

ROMER, L.J.—I have come to the same conclusion, and I need add but little after the judgments which have been already delivered. Certainly, my first impression when the case was opened was rather in favour of the view adopted by the learned judge in the court below, but, now that the case has been fully argued and the various Acts bearing upon the question before us have been examined carefully, I have come to the conclusion that there is nothing in those Acts sufficiently strong to justify this court in holding that all dwelling-houses in Northampton borough must be charged with the same rate.

In the first place, let me consider the Waterworks Clauses Act, 1847, which was incorporated with the special Act of 1861. Was there anything in that Act which would render it clear that, whenever dwelling-houses have to pay for their water what is called a "rate," that rate must be the same percentage upon the value in respect of all those dwelling-houses? I cannot find anything in the Act of 1847 sufficient to lead to that conclusion, and, as has already been pointed out by my Lords, there is no principle here which would primâ facie make it fair that all dwelling-houses should pay the same percentage upon their rateable value or upon their value. As has been pointed out, taking one simple illustration of two houses of the same value, to supply one with water might cost very much more than to supply the other; the two houses although of the same value might not for the purposes of the consumption of water be at all of the same character. Other illustrations might be supplied. Then, there being no principle, as I have said, I cannot find any special provisions in the Act of 1847 which would support the contention of the defendant in this case. I think, in the first place, that under the Act of 1847 the definition of water rate is significant, contained as it is in s. 3 of the Act. I need not repeat the definition. Although, in some of the sections in that Act, it is true that it is difficult to see the exact meaning or effect of certain provisions as to owners or occupiers of dwelling-houses who want water laid on to their premises paying or tendering a water rate in advance unless it means the maximum where no fixed rate is imposed by the special Act, yet, notwithstanding those difficulties, I think a meaning can be given to all those sections without allowing the argument of the defendant. Certainly there is nothing in the difficulties created by those sections which would in themselves justify this court in upholding that argument.

Passing from the Act of 1847, the next Act about which I have to say a word or two is the Northampton Waterworks Act, 1861. It is clear that under that Act there is nothing, having regard to its wording, which would have prevented the company from charging by agreement any dwelling-house less than what it was charging other dwelling-house owners generally, according to what may be called a general rate or charge. Section 59 of the Act of 1861 is not immaterial in that context. It provides that:

> "The company may from time to time supply any person with water for any purpose for which such supply may be required for such remuneration and upon such terms and conditions as shall be agreed upon between the company

A and the person desirous of having such supply of water under a special agreement."

The Act, therefore, contemplates that by agreement the company, if it chooses, may charge certain dwelling-house owners less than they are charging others; and it is noticeable also that, even as between dwelling-houses strictly so called, under B the Act of 1861 there was not a fixed rate, but that the maximum rate that might be charged depended upon the value of the house. Also it is not to be forgotten that, in considering a question of equality as between persons who are taking water, dwelling-houses properly so called may not constitute even a majority of the hereditaments which require a constant water supply from the company. At any rate, under the Act of 1861, I think it is impossible to say that any specific C provision or enactment can be pointed out as tending to support the view that under that Act the company could not as between different dwelling-houses charge a different rate.

I come to the only other Act about which I need say a word—the Northampton Corporation Waterworks Act, 1884. It appears to me sufficient to say that, when you look at ss. 10 and 12 of that Act, it is clear that whatever powers the company D had in this respect under the Act of 1861 the corporation has under the Act of 1884. It seems to me that the corporation have become the owners of the undertaking, and have the same rights with regard to that undertaking as the company had, subject only to those special matters which are mentioned in s. 10 of the Act of 1884. I cannot find in that Act any provisions which would justify this court in saying that the main contention of the defendant in this case is correct, E and ought to be upheld. With regard to the rest of the case, I desire to add nothing to what has been already said by my Lords.

Appeal allowed.

Solicitors: *Sharpe, Parker & Co.*, for *Herbert Hankinson*, Northampton; *Warren, Murton & Miller*, for *Lamb & Skinner*, Kettering.

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

A

ALLISON *v.* CLAYHILLS

[CHANCERY DIVISION (Parker J.), June 12, 13, 14, 15, 1907]

[Reported 97 L.T. 709]

B

Solicitor—Duty to client—Fiduciary relationship—Transaction between solicitor and client—Onus of proving validity—Transaction after cessation of relationship of solicitor and client—Continuance of ascendancy of solicitor over former client—Acquirement by solicitor of special knowledge.

A solicitor is not wholly incapacitated from purchasing property or taking a lease from his client, but where the relationship of solicitor and client exists the onus of upholding the validity of such a transaction will rest on the solicitor. Although the relationship of solicitor and client in its strict sense has been discontinued, the principle as to the onus applies as long as the confidence naturally arising from such a relationship is proved or may be presumed to continue, and so, in the contemplation of a court of equity, it may apply to a transaction in which the solicitor is not actually retained or actually acting for his client in such circumstances that if he neglected his professional duty he would be liable to an action at law for negligence. The test whether the onus rests on the solicitor is whether or not in the particular transaction he owes his client any duty in the contemplation of a court of equity. If he does owe the client any duty, the equal footing on which the parties to any bargain should stand is impaired or destroyed, and the solicitor is solicitor in hac re within the meaning of the authorities although he is not retained to act as solicitor in that particular transaction or any pending transaction. In considering whether any duty exists such as to bring the rule as to onus into operation all the circumstances of the individual case must be weighed and examined. Thus, a solicitor may by virtue of his employment acquire a personal ascendancy over a client and this ascendancy may last long after the employment has ceased, and the duty towards the client which arises out of any such ascendancy will last as long as the ascendancy itself can operate. Again, a solicitor may by virtue of his employment acquire special knowledge, and the knowledge so obtained may impose on him the duty of giving advice or making a full and proper disclosure in any transaction between himself and his client, though such transaction may take place long after the relationship of solicitor and client in its stricter sense has ceased to exist. There may be other circumstances which impose a duty on a solicitor, which duty may continue to exist after the relationship of solicitor and client in the strict sense has ceased.

C

D

E

F

G

Circumstances discussed in which it was **held** that the solicitor was not acting in that capacity towards a former client from whom he was taking a lease.

H

Notes. The observations of PARKER, J., which form the basis of the headnote to this case were approved by a full Board of the Judicial Committee of the Privy Council in *McMaster* v. *Byrne*, [1952] 1 All E.R. 1362, 1368.

Considered: *Demerara Bauxite Co.* v. *Hubbard*, [1923] A.C. 673; *McMaster* v. *Byrne*, [1952] 1 All E.R. 1362, 1368.

As to transactions between solicitor and client, see 36 HALSBURY'S LAWS (3rd Edn.) 85–95; and for cases see 42 DIGEST 76 et seq.

I

Cases referred to:

(1) *Wright* v. *Carter*, [1903] 1 Ch. 27; 72 L.J.Ch. 138; 87 L.T. 624; 51 W.R. 196; 19 T.L.R. 29, C.A.; 42 Digest 79, *702*.

(2) *Edwards* v. *Meyrick* (1842), 2 Hare, 60; 12 L.J.Ch. 49; 6 Jur. 924; 67 E.R. 25; 42 Digest 82, *738*.

(3) *Montesquieu* v. *Sandys* (1811), 18 Ves. 302; 34 E.R. 331, L.C.; 42 Digest 84, *761*.

Also referred to in argument:

Rhodes v. *Bate* (1866), 1 Ch. App. 252; 13 L.T. 778; 12 Jur.N.S. 178; 14 W.R. 292, L.JJ.; 42 Digest 78, *700*.

Gibson v. *Jeyes* (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 42 Digest 80, *724*.

Holman v. *Loynes* (1854), 4 De G.M. & G. 270; 2 Eq. Rep. 715; 23 L.J.Ch. 529; 22 L.T.O.S. 296; 18 Jur. 839; 2 W.R. 205; 43 E.R. 510, L.C. & L.J.; 42 Digest 83, *745*.

Wood v. *Downes* (1811), 18 Ves. 120; 34 E.R. 263; 1 Digest (Repl.) 101, *770*.

Action by the executors and trustees of the will of John Allison to have a lease which was granted by the testator to the defendant, Thomas Clayhills, a solicitor, set aside as having been executed during the existence of the relation of solicitor and client. The plaintiffs, by their statement of claim, alleged (i) that the lease was not a proper one in that it did not contain any power of re-entry on the part of the lessor on the lessee making default in payment of rent or on breach by the defendant of any of the covenants of the lease or of the Licensing Acts; (ii) that the defendant acted as solicitor for himself, and that the testator had no independent advice when he executed the lease; (iii) that the testator was nearly seventy years of age—he had been a man of intemperate habits, had had little or no education, and was not by himself capable of understanding the provisions and effects of the lease; and (iv) that the defendant acted as solicitor for the testator for many years, and in particular at the date of the lease. The facts and the terms of the lease are stated in the judgment.

Hamilton, *K.C.*, and *J. H. Boome* for the plaintiffs.

Buckmaster, *K.C.*, and *C. H. Sargant* for the defendant.

PARKER, J.—This is an action to set aside a lease, the plaintiffs' equity being based on the relationship of solicitor and client alleged to have existed between the lessor and the lessee.

Before going into the facts of the case, I think it might be well to state shortly what I conceive to be the law applicable in the case of a purchase of property by a solicitor from a client or a grant of a lease by a client to a solicitor. It appears to me to be clear that a solicitor is not wholly incapacitated from purchasing property or taking a lease from his client, but, where the relationship of solicitor and client exists, the onus of upholding the validity of such a transaction will rest upon the solicitor. It is, I think, equally clear that, although the relationship of solicitor and client in its strict sense has been discontinued, the same principle applies as long as the confidence naturally arising from such a relationship is proved or may be presumed to continue. There are cases in which it is laid down that this principle only applies when the solicitor is the solicitor of his client in the particular transaction the validity of which is in dispute; but, in my opinion, that only means that when the relationship is of such a nature that it does not impose on the solicitor any duty towards his client in the particular transaction, then the principle has no application. It does not mean, in my opinion, that the principle has no application in any case in which the solicitor is not in the particular transaction actually retained by or actually acting for his client under such circumstances that if he neglected his professional duty he would be liable to an action at law for negligence. Of course, if he be so retained and is so acting, there can be no question that the principle does apply, but, even if he be no longer so retained or acting, his duties in the contemplation of a court of equity may still be such as to throw upon him the onus of upholding the validity of a purchase or a lease from his client. In considering whether this onus lies upon him, the test appears to me to be the proper answer to the question whether in the particular transaction, he owes his client any duty in the contemplation of a court of equity. If he owes his client any duty in the particular transaction, the equal footing on which the parties to any bargain should stand is impaired or destroyed, and the solicitor is, I think, solicitor

in hac re within the meaning of the decisions although not retained to act as solicitor in the transaction or, indeed, in any pending transaction at all. A

Thus, if a solicitor is actually engaged to conduct or is conducting for his client an action, say, for slander, and, while that action is pending, meets his client in the hunting field and bargains and buys from him a horse, each party relying upon his own knowledge of horseflesh, that transaction will stand on the same footing as a transaction between strangers, because the matter is entirely outside any confidential relationship between the parties, and the solicitor owes his client no duty whatever in the particular matter. On the other hand, if a solicitor has once been employed, say, to manage his client's real estate, then, although the employment may have entirely ceased, yet there may still be a duty on the solicitor's part towards his client—for example, that of possibly advising or possibly communicating information which he has obtained while acting as solicitor—and the existence of such a duty may bring the ordinary rule into operation and make the solicitor solicitor in hac re if he subsequently purchases the real estates from his client, although as a matter of fact the relationship of solicitor and client in the strict sense has ceased to exist altogether. B C

In considering whether in any particular transaction any duty exists such as to bring the ordinary rule into operation, all the circumstances of the individual case must be weighed and examined. Thus, a solicitor may by virtue of his employment acquire a personal ascendancy over a client and this ascendancy may last long after the employment has ceased, and the duty towards the client which arises out of any such ascendancy will last as long as the ascendancy itself can operate. Again, a solicitor may by virtue of his employment acquire special knowledge, and the knowledge so obtained may impose upon him the duty of giving advice or making a full and proper disclosure in any transaction between himself and his client, though such transaction may take place long after the relationship of solicitor and client in its stricter sense has ceased to exist. And there may be other circumstances which may impose a duty on a solicitor, which duty may continue to exist after the relationship of solicitor and client in the strict sense has ceased. D E F

In cases where the onus of upholding the validity of a transaction lies upon the solicitor, I think the solicitor must prove that his client was fully informed of all the material facts, understood the transaction, and that the transaction itself, both as to price and otherwise, was a fair one. In *Wright* v. *Carter* (1), STIRLING, L.J., said ([1903] 1 Ch. at pp. 57, 60):

"The client . . . must have competent independent advice," G

but I doubt whether the learned lord justice really meant to lay this down as an invariable rule whatever might be the nature of the transaction in dispute, for, if this were an invariable rule in all transactions, it is difficult to see how either *Edwards* v. *Meyrick* (2) or *Montesquieu* v. *Sandys* (3) were rightly decided; and it is to be observed that in *Wright* v. *Carter* (1) VAUGHAN WILLIAMS, L.J., refuses to lay down any such invariable rule, and COZENS-HARDY, L.J., in stating what the solicitor must prove when the onus for upholding the transaction lies upon him, does not include the fact that the client had independent advice. H

It follows from what I have said, I think, that, in every case of the nature I have been discussing, the first question to be answered is whether in the particular matter complained of the defendant owed any duty to his client, and, if it be determined that he owed such a duty as would throw upon him the onus of upholding the validity of the transaction, the question will arise, secondly, whether he has discharged the onus. [HIS LORDSHIP here stated the facts with regard to the property and the circumstances which led up to the signing of the lease, and continued:] It is that lease, granted under those circumstances, that it is sought to set aside in this action. The lease itself, which has been produced, is a lease which, I think, does in substance give effect to all the terms which were discussed and agreed between the parties; but comments have been made, and I think in one I

respect, at any rate, deservedly made, upon the form which the document took. It commences in the usual way, after stating the parties, by the witnessing part which demises the Grey Horse inn to the lessee with the fixtures therein, except the fixtures specified in the schedule. There is no schedule, but I do not think that is a material matter, because, if it has any effect at all, it has an effect which operates against the defendant and not in his favour. As a matter of fact, there were fixtures which did belong to the lessee, Clayhills having bought them from Allison at his valuation when the property changed from Allison's hands to his hands, but those fixtures are not specified in the lease as apparently they were intended to have been. The demise is for fifteen years. Certain rights are reserved with regard to the common yard and certain conveniences in the common yard. The rent is £90, as had been agreed, and then there come the covenants.

The lessee's covenants are as follows. There is, first of all, a covenant to pay rent in the usual way; then there is a covenant to pay all rates and taxes during the term; then there is a covenant to do certain repairs during the term, with a proviso for the lessor to enter to view the state of repairs; then there is a covenant

> "to do all necessary acts to obtain a grant of a licensed victualler's licence to sell beer, spirits, and wine on the demised premises and on the determination of this demise deliver up the said licences to the lessor, his heirs or assigns."

I think that that covenant would be construed, having regard to the existence of the licences, as a covenant, not only to obtain them, because they were already in existence, but to keep them up during the term and hand them over at the end of the term. Then there is a covenant

> "to do all necessary acts to obtain a transfer of the said licences to the lessor, his heirs and assigns, or to whom he may direct."

That is, I think, common form. Then there is a covenant

> "that the demised premises shall during the continuance of this demise be kept open and used as and for an inn and licensed victualler's house."

There is no express covenant by the lessee that he will not do anything to forfeit the licences or whereby the safety of them would be otherwise impeached, but, having regard to the covenant to deliver over the licences at the end of the term and the covenant that the property shall be used during the term as a licensed victualling house, I think there is not any great substance in the fact that the negative covenant not to do anything to forfeit the licences has been omitted.

There are certain covenants by the lessor, including the covenant to keep the roof outside in repair. Then there is a covenant that on the expiration of the demise the lessor shall purchase from the lessee the fixtures mentioned in the schedule, or any substituted for them, at a price to be fixed, in case of disagreement, by arbitration. Of course, it may be difficult for the defendant to insist upon any such covenant, having regard to the fact that there is no schedule at all, but I do not think the omission of that schedule operates to hurt Allison or his estate. There is a proviso for re-entry, and it is here that I think the lease is somewhat unusual. The proviso for re-entry is a proviso

> "that if the lessee shall become bankrupt or make any assignment for the benefit of his creditors it shall be lawful for the lessor, his heirs and assigns, to put an end to the tenancy hereby created and retake possession of the premises. Provided also that if the licensed victualler's licence at present attached to the demised premises be permanently withheld or withdrawn by the magistrates or licensing authority for the time being the tenancy hereby created shall thereupon cease and determine."

A proviso for re-entry in the case of bankruptcy in the case of a licensed house is an extremely valuable proviso, and I think it is common practice, even if it cannot be described as absolutely usual, to insert such a proviso for re-entry. The

point here made against the lease is that the proviso for re-entry omits what is undoubtedly usual, namely, a provision for re-entry in the event of the rent being unpaid or in arrear, and in the event of there being any other breach of the lessee's covenants contained in the lease. The lease goes on to give in terms which I am satisfied were discussed and agreed between the parties an option at the end of the term to the lessee to purchase the whole block of buildings of which the inn formed part for the sum of £2,500, and also an option in the meantime to take and put into the lease, at an extra rent of £17 a year, the house No. 6, the butcher's shop, and the premises in the common yard let as part of the butcher's shop.

So much for the transaction between the parties. I have now to consider the relationship between the parties because of which it is said the transaction cannot stand. I am satisfied on the evidence that Allison, although he frequently from time to time took more than was good for him, was not what may be called an habitual drunkard, nor was he in any way incapacitated by reason of intemperance from taking part in or understanding business transactions. He was, no doubt, not an educated man in the ordinary sense of the word, nor was he able to read or write with any great facility. Indeed, he always preferred to have his letters written for him, but he could read and could write quite sufficiently for the ordinary purposes of his trade or business, and he was, I think, quite competent to fill in and sign the receipts which he gave to his tenants when he collected the rents, and to understand the nature of invoices which were sent to him for goods; and, further, I think the evidence points to this, that he was a shrewd man of business, and good at making a bargain in his own interests. Indeed, it is quite clear that he had confidence in this respect in his own judgment, not only from the fact that he did in the case of this particular lease fix his own price and stick to it in spite of inducements having been held out to him to reduce it by the intending purchaser or lessee, but he also on various occasions entered into transactions of bargain and sale of properties and leases, acting on his own judgment and not through the intervention of any agent or solicitor.

Now with regard to the defendant. The defendant on various occasions commencing in 1878 or 1879 down to the date of the transaction in question had acted as solicitor for Allison. It is well to consider a little closely the matters in which he did act as such solicitor. In 1878 or 1879 Allison had apparently bought three houses from the devisees of one J. C. Robson. Those houses have nothing to do with the premises which are in question in this action. The point is that he had bought those houses himself, and that he brought the contract to the defendant to carry out that contract for him, and at the same time apparently handed him over certain sums by way of deposit payable under the contract. That transaction was accordingly carried through for Allison by the defendant. Shortly after the completion of the purchase which the defendant had been instructed to complete, the defendant borrowed for Allison a sum of £150 on the security of the houses which he had so bought. Later that mortgage was repaid and a reconveyance taken, and in the matter of the reconveyance the defendant also acted for Allison. Next there was some small dispute between Allison and one of his tenants, and the defendant acted in the matter, recovered the rent from the tenant, and handed it to Allison. Later in 1886 the defendant appears to have been instructed by Allison to prepare for him a lease of the Grey Horse inn to a man named Deas at a rental of £110. It is again noticeable that the employment of the defendant was not with a view to fixing or negotiating the rental, but that he was merely employed to draw up a lease which at any rate was in contemplation, if it had not actually been agreed to, the terms of the lease having been in fact arranged or contemplated by Allison relying on his own judgment and not on the judgment of the defendant. That matter, however, fell through because the proposed tenant refused to give the rent of £110, and subsequently the defendant in like manner prepared a lease of the public-house in question to one Batey at £70 a year. Again the terms of that arrangement were told to him by Allison, and he had himself nothing to do with fixing those terms, but was concerned merely in carrying out a bargain which had

already been made. In 1888 he acted as Allison's solicitor on the purchase of two houses from a Mr. Newby, but again he had nothing to do with the price which was paid, but only had to carry out a transaction which apparently the testator had entered into in reliance upon his own judgment. In 1889 the testator desired himself to occupy the house which he had let to Batey, and for that purpose he asked the defendant to prepare and serve a proper notice to quit, and that was done by the defendant. Between 1889 and 1895 the defendant does not appear to have transacted any business for Allison with the exception that on one occasion he helped him to fill up a form of return for income tax, for which, however, no charge was made, and it is as likely as not that he did that in a friendly capacity rather than as a solicitor; but in 1895 there is an entry in the defendant's book which no doubt represents exactly what was done. He attended Allison as to borrowing money for him on his house in Harris Street; the deeds were left for perusal, and nothing more was done. It appears with regard to that house in Harris Street that the defendant did not act on any occasion for Allison. Allison had purchased it through the intervention of another solicitor, a Mr. Steavenson.

I think I have gone through in detail everything which was done by the defendant in any way in his capacity as solicitor for Allison prior to the date of the lease now in question, and the question I have to decide is whether those occasions on which he acted as solicitor for Allison imposed upon him any duty which was operating towards Allison at the date when Allison entered into this bargain for a lease with an option to purchase. I think the amount of work done by a solicitor for a client is immaterial in a matter of this sort, and the amount of work done by the defendant for Allison, having regard to the time, was extremely small. It is true that on several occasions he was employed, but he was employed in small matters, and had really no opportunity of getting into such intimate relations with Allison as would give rise to any presumption of ascendancy or personal influence. The nature of the things upon which he was employed is not without its importance. He was not employed in any of them to negotiate the terms of any bargain; he was merely employed, as far as one can gather from the evidence which has been given, to carry out isolated transactions which required the preparation of some documents which could be better prepared by a lawyer than by anybody else in order to give effect to transactions already entered into by his client. The only exception to that, I think, is the case of the borrowing of money or the case where he acted as against the tenant in order to recover rent. It is also observable, merely to show the amount of work which was done, that as a matter of fact the fees of the solicitor during all this period amounted to a very small sum—not more, I think, than £30 at the most. Under these circumstances I have come to the conclusion that the defendant was never in a position to acquire, and did not acquire, any personal influence or ascendancy over Allison. I have further come to the conclusion that he was never in a position to acquire, and did not acquire, any special information with regard to the property the subject-matter of the transaction which is now impeached, which information he was bound to disclose to Allison.

If, therefore, the relationship of solicitor and client existed between those two gentlemen in the particular matter which is complained of—that is to say, if the defendant can in any way be considered to have been a solicitor of Allison in hac re—it seems to me that can only be because of the mere possibility, as it was put in *Edwards* v. *Meyrick* (2), of the personal influence arising out of previous transactions. On the whole, I come to the conclusion, especially having regard to the evidence as to the bargaining which took place, as to the nature and character of Allison, and as to the way he evidently knew how to look after his own interests, that there was no such personal influence possible at the time of this bargain, and that, therefore, in this bargain the defendant was not acting as solicitor in hac re. In fact it appears to me to be a case which is within the case put by LORD ELDON in *Montesquieu* v. *Sandys* (3)—namely, where he says that there is no authority established nor was it ever laid down that an attorney cannot purchase from his

client what was not in any degree the object of his concern as attorney. I do not think in this case the leasing of the property in question can be considered to be in any way the concern of the attorney. He was not employed on any occasion to negotiate a lease or to negotiate a sale. LORD ELDON said (18 Ves. at p. 313):

> "The client making the proposal [in the present case the proposal came entirely from Allison] himself proposing the price [in this case Allison himself fixed the price, and could not be induced to reduce it]—no confidence asked or received . . . [I do not think there was any confidence asked or received in the matter of this bargain at all] and both ignorant of the value [that expression 'both ignorant of the value' appears to me merely to mean that they were both equally in a position to measure the value of the property, each of them acting upon his own idea as to what it was worth]. Under such circumstances he is not the attorney in hac re."

I think that means simply that under these circumstances the solicitor owes no duty to his client, and, therefore, not being under any duty to advise him against the act or to advise as to the act at all, he may be the purchaser without having to undertake the onus which rests upon a solicitor in other cases.

I think the only possible point which can be suggested in all the evidence which points in any way to any conclusion opposite to that at which I have arrived is the one answer of Walton's in the course of his examination. When he asked Allison whether he desired to have the lease read over by anyone else, he said: "No. Mr. Clayhills had always done what was right by him, and he did not wish to be at any expense in the matter." The only question I have to ask myself is whether—it was not proved in any way that that was communicated to the defendant, or that he personally took the view that he was being trusted in any way by Allison—that one answer is sufficient to induce me to modify the conclusion which I have arrived at from the nature and position of the parties and the nature and extent of the transactions which have already been carried out by the one for the other, or whether I may disregard that and treat it as I otherwise, without that evidence, would feel myself bound on the evidence to treat it—as a case where the solicitor was not the solicitor in hac re and did not have any duty towards his client. I have come to the conclusion that the mere fact that Walton said that Allison trusted the defendant in the matter is not sufficient to induce me to come to any other conclusion than I should have come to without that particular piece of evidence, especially as I think it is established that what Allison really said to Walton was that he would look through the lease, and, if he thought there was anything about which he required advice, he would have advice.

I might stop my judgment there, because the onus would not, on the finding of fact which I have already given, lie upon the defendant to substantiate the transaction; but, having regard to the fact that the evidence has been gone into at some length, I think I ought to give my views upon what would be the result of this action if I held that there was any duty upon the defendant to advise Allison, or to give him information, or any such duty as would impose upon him the onus which the court imposes upon solicitors who purchase or take leases from their clients. I am satisfied that throughout Allison understood the matter, and I think it is quite clear that he understood the matter, because he communicated the result of what he had done to Hewitt, and he appears to have done so in intelligent language, because Hewitt, who got this information from nobody else, knew exactly what the state of affairs was, and in this respect also I may refer again to the evidence of Deas, Walton, and the defendant himself, which evidence I see no reason to doubt. Again, it appears to me that he had all the information with regard to all the material circumstances of the case, and that, if it were necessary, if the onus lay upon the defendant, the defendant has shown that all the explanation for the purpose of understanding this was given to Allison. Again, with regard to the question of value, I am perfectly satisfied that £90 a year was more than the thing

was worth at the time. I think the proper rent was £75, perhaps, whereas £90 was given. Again, if I come to the price which is to be given for the option, it appears to me that there is no substantial difference in the evidence which has been given. Of course, some valuers put a larger multiplier as the number of years purchase than others; but what we have here is this, that in the case of the witness Moses, who first looked over the property, he made the value out then, after the alterations which I am going to mention presently, at £3,000, and he admitted that no doubt the increased value of the alterations would be something varying from £1,000 at one time to £500 or £600 at another time. If that is so, I would reduce the value of the property to £2,500, the sum mentioned in the lease. So that there does not seem to me to be any real conflict of evidence between him and the other witness, Parlour, who was quite clear in his evidence as to what the value of the house was, and, indeed, he is the only witness who knew the house at the time, went into it at the time, and was in a position to judge of its value at the time. He says the rent of £70 was a fair rent, that the proper multiplier on that rent was twenty years' purchase, and that the property was not worth even the £1,800 which the defendant originally, in negotiating the bargain, consented to give for it. So that it appears to me, taking the evidence of value as a whole, it is amply established that the bargain was a good one for Allison, and, indeed, not only a good one, but I think it is established that the price was a liberal one under the circumstances.

The only point upon which I should have any doubt at all if I held that the onus were upon the defendant is the one question of the form of the lease, and it is only in one respect that I think I should have any doubt with regard to that form. It does seem to me that that lease ought to have contained the usual proviso for re-entry besides the special proviso in the case of bankruptcy, and the question I have to ask myself, or should have had to ask myself, is: Is the omission of that proviso sufficient to invalidate the transaction which otherwise was perfectly fair, which all parties I think understood, and which was at the time of considerable advantage to the client, whose executors are now seeking to set it aside? On the whole, I come to the conclusion that, assuming the onus to be on the defendant, the mere fact of the omission of that proviso would not be sufficient in a transaction of this sort, where everything was otherwise perfectly fair, to invalidate the transaction at this distance of time—ten years after it was entered into; and especially having regard to the intermediate transaction which I will now mention. It appears that in 1900 or 1901 the matter of this lease was prominent to the minds of the parties because the defendant elected to bring into the public-house the premises which he had a right to bring in under the lease, consisting of No. 6, the butcher's shop, and the outhouses in the yard. He apparently gave verbal notice of his intention to do so to Allison, and Allison thereupon entered into another transaction or bargain with him, with a view again to his own advantage, to get a modification of the original terms, and he succeeded again in getting his own way, that, instead of giving up to the defendant the whole of the premises and the defendant paying him a rent of £17 a year, which was the rent of the premises originally, he managed to persuade the defendant to vary the agreement in this respect, that he was only to take part of the premises at a rent of £10, leaving the rest of the premises, which Allison let for £17, thereby giving Allison a clear profit of £7 a year. That points to the fact that Allison exactly knew his position, and that he was acting on the assumption that the lease was perfectly good, and it seems to me that Allison fully understood his position and fully understood the nature of the transaction, and, although perhaps his attention had never been directly called to the fact of this omission, I do not think myself if it had been it would have made the slightest difference to him. He was perfectly satisfied with his bargain, and under the circumstances, therefore, if it was really necessary for me to decide the point—if I hold that the onus was upon the defendant—I should say that that fact alone was not sufficient to make me say that the bargain, which was otherwise fair and

advantageous to the client, was voidable at this date. Under all these circumstances it appears to me that the action fails and I ought to dismiss it.

Solicitors: *George & William Webb*, for *Richard Thomas Hett*, Darlington; *Chester, Broome & Griffithes.*

[*Reported by* W. Hunter Bond, Esq., *Barrister-at-Law.*]

CLARE *v.* JOSEPH

[Court of Appeal (Lord Alverstone, C.J., Fletcher Moulton and Buckley, L.JJ.), May 2, 1907]

[Reported [1907] 2 K.B. 369; 76 L.J.K.B. 724; 96 L.T. 770; 23 T.L.R. 498; 51 Sol. Jo. 467]

Solicitor—Costs—Agreement—Need to be in writing—Verbal agreement to accept reduced costs—Enforcement by client—Attorneys and Solicitors Act, 1870 (33 *& 34 Vict., c.* 28), *s.* 4.

By s. 4 of the Attorneys and Solicitors Act, 1870: "An attorney or solicitor may make an agreement in writing with his client" respecting his remuneration.

Held: the section was merely designed to enable either a solicitor or his client to take advantage of the provisions of the section, and it did not prevent a client from enforcing a verbal agreement with his solicitor as to his remuneration.

Notes. The Attorneys and Solicitors Act, 1870, was repealed by the Solicitors Act, 1932, itself repealed by the Solicitors Act, 1957, of which see now s. 57 and s. 59: 37 Halsbury's Statutes (2nd Edn.) 1099, 1101.

Applied: *Gundry* v. *Sainsbury*, [1910] 1 K.B. 645. Considered: *Re Simmons and Politzer*, [1954] 2 All E.R. 811; *Re A Solicitor*, [1955] 3 All E.R. 305.

As to agreements by solicitors as to costs, see 36 Halsbury's Laws (3rd Edn.) 124–130; and for cases see 42 Digest 126 et seq.

Case referred to:

(1) *Jennings* v. *Johnson* (1873), L.R. 8 C.P. 425; 37 J.P. 695; 42 Digest 126, *1206.*

Also referred to in argument:

Ibberson v. *Neck* (1886), 2 T.L.R. 427; 42 Digest 126, *1208.*

Re Lewis, Ex parte Munro (1876), 1 Q.B.D. 724; 45 L.J.Q.B. 816; 35 L.T. 857; sub nom. *R.* v. *Munro, Re Lewis*, 24 W.R. 1017, D.C.; 42 Digest 126, *1211.*

Re Thompson, Ex parte Baylis, [1894] 1 Q.B. 462; 63 L.J.Q.B. 187; 70 L.T. 238; 42 W.R. 462; 10 T.L.R. 89, D.C.; 42 Digest 127, *1217.*

Bewley v. *Atkinson* (1879), 13 Ch.D. 283; 49 L.J.Ch. 153; 41 L.T. 603; 28 W.R. 638, C.A.; 17 Digest (Repl.) 252, *567.*

Re Whitcombe (1844), 8 Beav. 140; 1 New Pract. Cas. 79; 14 L.J.Ch. 19; 4 L.T.O.S. 130A; 50 E.R. 56; 42 Digest 129, *1236.*

Re Eyre (1847), 10 Beav. 569; 17 L.J.Ch. 62; on appeal (1848), 2 Ph. 367; 17 L.J.Ch. 277; 11 L.T.O.S. 41; 41 E.R. 985, L.C.; 42 Digest 133, *1275.*

Drax v. *Scroope* (1831), 2 B. & Ad. 581; 1 Dowl. 169; 9 L.J.O.S.K.B. 291; 109 E.R. 1259; 42 Digest 214, *2389.*

Re Fernandes, [1878] W.N. 57; 22 Sol. Jo. 348; 42 Digest 127, *1214.*

Re Owen, Ex parte Payton (1885), 52 L.T. 628; sub nom. *Re Owen, Ex parte Peyton*, 2 Morr. 87, D.C.; 42 Digest 132, *1257.*

Appeal by the plaintiff from a decision of the Divisional Court (RIDLEY and DARLING, JJ.) reversing the decision of the judge of the Southwark County Court in an action by the plaintiff to recover the sum of £14 as money had and received by the defendant to the use of the plaintiff.

The defendant had acted as solicitor for the plaintiff in an action brought by the plaintiff against one Shepherd upon the terms of a written agreement as to costs. Those terms were that, in the event of the action being successful, the defendant should make no charge against the plaintiff for costs, but would recover his costs from the other party, but that, in the event of the action being unsuccessful, the defendant should receive from the plaintiff the same amount of costs as he would have recovered from the other party if the action had been successful. No dispute arose in the present case with respect to that agreement. The defendant also acted as solicitor for the plaintiff in a subsequent action brought by the plaintiff against one Hawkins. In that action the plaintiff was successful, and the amount recovered and the taxed costs were received by the defendant as solicitor for the plaintiff. Out of the money recovered in the action against Hawkins the defendant retained the sum of £14 in respect of his costs as the plaintiff's solicitor in that action, being the difference between the party and party and the solicitor and client costs, and he refused to pay over that sum to the plaintiff. The plaintiff brought this action to recover that sum of £14, alleging that, with respect to the action against Hawkins, a verbal agreement as to costs had been made between him and the defendant to the same effect as the written agreement with respect to the action against Shepherd. The defendant denied that any such verbal agreement had been made. The action was tried with a jury, and the jury found that the verbal agreement alleged by the plaintiff had been made. The defendant also contended that the agreement relied on by the plaintiff was required, by s. 4 of the Attorneys and Solicitors Act, 1870, to be in writing, and that the plaintiff could not rely upon a verbal agreement.

By the Attorneys and Solicitors Act, 1870, s. 4:

> "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements, in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained: Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require the opinion of a court or a judge to be taken thereon by motion or petition and such court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made."

The county court judge gave judgment in favour of the plaintiff for the amount claimed. The defendant appealed, and the Divisional Court (RIDLEY and DARLING, JJ.) allowed the appeal and ordered judgment to be entered for the defendant. The plaintiff appealed to the Court of Appeal.

J. A. Simon for the plaintiff.
Ricardo for the defendant.

LORD ALVERSTONE, C.J.—In this case a question of considerable difficulty is raised. I have come to the conclusion that the contention of the plaintiff is right.

It seems to me that the learned judges in the Divisional Court did not deal with the main point in the case, which convinces me that the solicitor is bound by this agreement—that is, the whole scheme of s. 4 of the Attorneys and Solicitors Act, 1870, as shown by its opening words, having regard to the previous state of the law upon this matter. The previous state of the law is, I think, correctly stated in CORDERY ON SOLICITORS (3rd Edn.) at p. 261. Before the Act of 1870, agreements made between a solicitor and his client were considered by the courts on the application of the client, and agreements by a solicitor to take less costs than he would otherwise be entitled to were held to be binding. These agreements were also examined by courts of equity, which considered whether they were fair and reasonable. It seems to me that this Act of Parliament was intended to provide fresh safeguards for the client, and to give rights to the solicitor if he complied with the conditions which provided those safeguards. It enabled the solicitor to make an agreement as to costs with his client in writing which might be binding upon the client, and then provided as a further safeguard that the client could have the agreement examined by a taxing master, who could refer the agreement to the court if he thought it was not fair and reasonable. The Act seems to me to be an empowering Act for solicitors, and not to affect the position of a client who sets up and relies on an agreement made with his solicitor.

It has been said that it is difficult to put that construction upon the Act because it deals with agreements for payment

> "at a less rate than the rate at which he would otherwise be entitled to be remunerated."

I was somewhat pressed by that argument, but I think that the answer to it is to be found in the words immediately preceding those words. The preceding words say that a solicitor may make an agreement for payment "either by a gross sum, or by commission or percentage, or by salary or otherwise." It seems to me, therefore, that the words "at a less rate" may be accounted for by the fact that the previous words contemplated various modes of payment as to which the ordinary rate of fees and charges might have to be considered and compared, and though the rate might turn out to be less than the ordinary rate, yet the taxing master might think that the agreement was not fair and reasonable owing to certain provisions in it. Unless the words "at a less rate" indicate that it is necessary to put a different construction upon s. 4, I think that the proper construction is that the Act, when it says "a solicitor may make an agreement in writing with his client," simply enables a solicitor to make such an agreement so as to bind the client, subject to certain qualifications.

We have been pressed to say that the words of s. 4 mean that no agreement as to costs between a solicitor and client is binding unless in writing. If the legislature had thought that a solicitor required as much protection as a client, it would, I think, have used words to that effect and said that an agreement between solicitor and client must be in writing. The words of the section, however, only purport to empower a solicitor to make agreements in writing with a client which when signed by the client shall bind him, subject to the protective provisions of the Act; and thus the section gives rights to the solicitor which he had not before. I think, therefore, that the effect of this Act is to make it necessary that there shall be an agreement signed by the client when the solicitor wishes to rely on the agreement. The learned judges in the Divisional Court took a contrary view—that the legislature intended to deal with the rights of both parties, and to put solicitor and client into the same position with regard to the necessity for an agreement in writing. They did not direct their attention to what seems to me to be the broad scheme of the Act, which is to empower solicitors to make certain agreements binding on their clients provided those agreements are in writing, and

did not consider the point that different language would have been used if it had been intended to enact that all agreements between solicitor and client must be in writing.

With regard to the authorities, it seems to me to be quite clear that *Jennings* v. *Johnson* (1) is an authority in favour of the view which I have expressed, and I cannot agree with the distinction which was drawn in the Divisional Court between that case and the present case, that, though an agreement by a solicitor to take nothing for costs might not be within the Act, yet an agreement to take less than the ordinary rate would be within the Act. In my opinion, if a solicitor could say that an agreement to take less than the ordinary rate is not binding unless it is in writing by reason of s. 4, a fortiori he could say that a verbal agreement to take nothing for costs was not binding. *Jennings* v. *Johnson* (1) was decided by a court of great authority, and I think that that decision applies to the present case, and that it was a correct decision. In my opinion, the object of this Act was to enable solicitors to make these agreements in writing subject to the provisions in the Act for the protection of clients, and the language of the Act does not include an agreement which a client sets up against a solicitor. The decision of the Divisional Court was wrong, and this appeal must be allowed.

FLETCHER MOULTON, L.J.—This is an action for money had and received by the defendant to the use of the plaintiff. The defendant as against the plaintiff's claim sets up a claim for costs. To that the plaintiff replied that there was a verbal agreement by the solicitor, the defendant, to take less than the ordinary costs to which he would otherwise be entitled, and that that agreement was an answer to the alleged set-off on which the defendant relied. The solicitor denied that any such agreement had been made, but at the trial the jury found that the agreement was made and was verbal. Therefore, the only way in which the solicitor can avoid judgment being given against him in the action is by contending that the agreement is one to which the law will not give effect. To establish that contention, he relies on s. 4 of the Attorneys and Solicitors Act, 1870. That section provides:

> "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor. . . ."

The solicitor here contends that that prohibits and makes unenforceable any verbal agreement between solicitor and client, and requires all agreements as to the remuneration of solicitors to be made in writing. The first thing to remark is that the section is in form purely an enabling and not a disabling clause. That being so, unless forced to do so, I would not construe such a clause as taking away any previously existing rights or powers, or as restricting any previous right of the client.

What was the state of the law when this Act was passed? Agreements between solicitor and client as to the terms upon which the solicitor should do his client's business were not unenforceable. If the agreement was in favour of the solicitor, it was viewed with great jealousy by the courts, because it was an agreement made between a legal adviser and his client, and there were, therefore, opportunities for taking undue advantage, and the courts were reluctant to enforce such an agreement unless satisfied that there had been no abuse by the solicitor of his position as legal adviser. When the agreement was in favour of the client the courts often held the solicitor to his bargain and enforced the agreement. Therefore, the provisions of s. 4 of the Act of 1870 were not required to enable the parties to make agreements; nor was s. 4 required in order to strengthen the hands of the court to examine into agreements of this kind. Before that Act the courts had full power to examine into these agreements. In my opinion, the provisions of s. 4 do not do more than define the procedure for exercising that control of the courts over these agreements. I think that s. 4 was intended to hold the balance equally between solicitor and client, and for that reason agreements to charge less

than the ordinary amount of remuneration were brought within the section just as much as agreements for payment at a greater rate than that at which the solicitor would otherwise be entitled to be remunerated. Section 4 is only the introductory section of a group of sections which ends with a section of great importance (s. 15) to the effect that where an agreement has been made under s. 4 the solicitor's bill for the amount due under the agreement shall not be subject to any taxation except as provided in the Act.

Therefore, in my opinion, the provisions of s. 4 only point to the mode in which a solicitor can obtain for himself, and the way in which a client can obtain for himself, the benefit of the group of sections contained in Part 1 of the Act—that is, ss. 4 to 15. If a solicitor or a client wants the benefit of the privileges conferred by those sections, he must comply with the provisions of s. 4 and make an agreement in writing. In my opinion, s. 4 does not impose any other obligation, and its provisions apply only if the party wishes to take the benefit of that part of the Act. In the present case the plaintiff is not seeking any of the benefits given by ss. 4 to 15; he only says that there was an agreement to take a certain amount of remuneration and seeks to hold the solicitor to that bargain. Before the Act of 1870 the solicitor would have been held to such a bargain. Here the client does not ask for anything under ss. 4 to 15 of the Act, and, in my opinion, he is therefore in exactly the same position as he would have been in before the Act of 1870, and the courts will enforce the agreement. I agree that this appeal must be allowed.

BUCKLEY, L.J.—I agree that this appeal must succeed. At the trial the jury found that there was a verbal agreement that if the action were successful no charge should be made against the plaintiff for costs, but that the solicitor should recover his costs from the other party. To succeed on this appeal the solicitor must show that the Attorneys and Solicitors Act, 1870, provides that he shall not be bound by that bargain. Before that Act if an agreement was made that a solicitor should be paid more than the ordinary rate of remuneration he could not get that greater rate of remuneration. The solicitor was under disabilities with regard to making such an agreement by reason of his position as the adviser of his client. Then the Act of 1870 was passed, which contains s. 4, the relevant provisions of which have been read. The effect of that Act is, in my opinion, the same as if it had recited the disabilities under which solicitors were placed, and had then said that under certain conditions a solicitor could make an agreement in writing with his client. The object of the Act was to relieve a solicitor from some of the disabilities under which he previously lay. After the opening words of s. 4, the whole operative effect of the section is that benefits are reserved to the client in the matter. For instance, before the solicitor can enforce the agreement it must be examined and allowed by a taxing master, and the taxing master may refer the agreement to the court if he thinks it not fair and reasonable, and the court can reduce the amount payable or cancel the agreement altogether. Those subsequent provisions cut down the benefit given to the solicitor by the earlier part of the section. Before the Act of 1870 an agreement to take less than the ordinary rate of remuneration was binding upon a solicitor; but it was not binding upon the client if as a whole it was detrimental to the client. The effect of s. 4 is that an agreement, if set up by the solicitor, must be in writing before it can bind the client. The client never was bound by an agreement, and, therefore, the protection of the Act of 1870 was not required for him; and the Act itself does not purport to confer anything upon the client. All that the Act does is to enable the solicitor to do certain things subject to certain conditions. Therefore, in my opinion, there is nothing in the Act of 1870 to make a verbal agreement by a solicitor as to his remuneration unenforceable by the client because it is not in writing. I agree, therefore, that this appeal must succeed.

Appeal allowed.

Solicitors: *Hicklin, Washington & Pasmore*; *Hyam Joseph.*

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

A

EDEN *v.* NORTH EASTERN RAIL. CO.

[House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford and Lord Atkinson), May 7, July 9, 1907]

[Reported [1907] A.C. 400; 76 L.J.K.B. 940; 97 L.T. 254; 71 J.P. 450; 23 T.L.R. 685; 51 Sol. Jo. 623]

B

Railway—Support—Right to support from subjacent minerals—Mining lessee required not to work minerals—Compensation—Other minerals leased to lessee available for working—Contingency of railway ceasing to exist—Railways Clauses Consolidation Act, 1845 (*8 & 9 Vict., c.* 20), *s.* 78.

C

The "compensation for such mines" which a railway company is bound to make under s. 78 of the Railways Clauses Consolidation Act, 1845, to the owner, occupier, or lessee of any mines or minerals lying under the railway and required by the railway company to be left unworked in order to support the railway is the profit which would have been made out of the working of the minerals so required to be left if the working had not been prevented. Where the lessee of minerals has other minerals, the subject of his lease, which he could have worked instead of the minerals required to be left unworked by the railway company and these other minerals would last until the end of his lease, the compensation due to him is not reduced to the excess of the expense of working those minerals over the expense of working the minerals required to be left unworked.

D

E

Per Lord Atkinson: I do not think that any appreciable deduction can be made from the sum which the company are bound to pay as compensation by reason of the remote contingency that, should the railway cease to exist, the owner's right to win the minerals would revive.

Notes. Section 78 of the Railway Clauses Consolidation Act, 1845, was re-enacted with some amendment by s. 15 of the Mines (Working Facilities and Support Act, 1923 (19 Halsbury's Statutes (2nd Edn.) 972).

F

Considered: *Rugby Portland Cement Co.* v. *London and North Western Rail. Co.*, [1908] 2 K.B. 606; *Glenboig Union Fireclay Co.* v. *I.R.Comrs.* (1922), 12 Tax Cas. 427. Referred to: *London and North Eastern Rail. Co.* v. *B.A. Collieries, Ltd.*, [1945] 1 All E.R. 51.

As to railway company's right of support from subjacent and adjacent minerals, see 26 Halsbury's Laws (3rd Edn.) 353 et seq., and cases there cited.

G

Cases referred to:

(1) *Glasgow Corpn.* v. *Farie* (1888), 13 App. Cas. 657; 58 L.J.P.C. 33; 60 L.T. 274; 37 W.R. 627; 4 T.L.R. 781, H.L.; 11 Digest (Repl.) 163, *363*.

(2) *Great Western Rail. Co.* v. *Bennett* (1867), L.R. 2 H.L. 27; 36 L.J.Q.B. 133; 16 L.T. 186; 15 W.R. 647, H.L.; 11 Digest (Repl.) 164, *375*.

H

(3) *Smith* v. *Great Western Rail. Co.* (1877), 3 App. Cas. 165; 47 L.J.Ch. 97; 37 L.T. 645; 42 J.P. 404; sub nom. *Great Western Rail. Co.* v. *Smith*, 26 W.R. 130, H.L.; 11 Digest (Repl.) 168, *397*.

(4) *Midland Rail. Co. and Kettering, Thrapston and Huntingdon Rail. Co.* v. *Robinson* (1889), 15 App. Cas. 19; 59 L.J.Ch. 442; 62 L.T. 194; 54 J.P. 580; 38 W.R. 577; 6 T.L.R. 100, H.L.; 11 Digest (Repl.) 162, *353*.

I

(5) *Bwllfa and Merthyr Dare Steam Collieries (1891), Ltd.* v. *Pontypridd Waterworks Co.*, [1903] A.C. 426; 72 L.J.K.B. 805; 89 L.T. 280; 52 W.R. 193; 19 T.L.R. 673, H.L.; 11 Digest (Repl.) 136, *199*.

(6) *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25; 42 L.T. 334; 44 J.P. 392; 28 W.R. 357, H.L.; 34 Digest 656, *556*.

Also referred to in argument:

Barnsley Canal Co. v. *Twibell* (1844), 7 Beav. 19; 3 Ry. & Can. Cas. 471; 13 L.J.Ch. 434; 31 L.T.O.S. 258; 49 E.R. 969, L.C.; 11 Digest (Repl.) 176, *441*.

Re Bidder and North Staffordshire Rail. Co. (1878), 4 Q.B.D. 412; 48 L.J.Q.B. 248; 40 L.T. 801; 27 W.R. 540, C.A.; 11 Digest (Repl.) 211, *768*. A

Appeal from an order of the Court of Appeal (VAUGHAN WILLIAMS, FLETCHER MOULTON and BUCKLEY, L.JJ.), reported [1907] 1 K.B. 402, reversing a decision of BIGHAM, J., reported [1906] 1 K.B. 195, upon a Special Case stated by an arbitrator. B

The appellant Eden was a tenant for life in possession of and owner of the reversion to real estate in the county of Durham, and the appellants James Joicey & Co., Ltd., were lessees of the coal under the said lands under a lease for a term of twenty-one years from Jan. 1, 1886. On Aug. 11, 1892, James Joicey & Co., being desirous of working the coal under or within the prescribed distance from three bridges forming part of a railway of the respondents, gave notice to the C respondents in conformity with s. 78 of the Railways Clauses Consolidation Act, 1845, and the respondents by counter-notice dated Nov. 2, 1892, required the appellants to leave certain percentages of coal unworked, as mentioned in the notice, for the support of the railway, expressing their willingness to pay to the parties entitled thereto all such compensation as might be payable according to law. The quantity of coal so required by the respondents to be left unworked D was 6,156 tons. The appellants and the respondents being unable to agree the amount of compensation, the matter was referred to arbitration. The arbitrator gave an alternative award in the form of a Special Case, to the effect that, if the court should be of opinion that the appellants' contentions were correct, the respondents should pay to James Joicey & Co. the sum of £730, and should pay to the other appellant the sum of £155, and that, if the court should be of opinion E that the respondents' contentions were correct, the respondents should pay to James Joicey & Co. the sum of £100, and to the other appellant the sum of £310. When the Case came before BIGHAM, J., he took the view that the appellants' contentions were right. On appeal the Court of Appeal reversed that decision, and the appellants appealed to the House of Lords.

F

C. A. Russell, K.C., and *MacSwinney* for the appellants.
Cripps, K.C., *Upjohn, K.C.*, and *Ryde* for the respondents.

Their Lordships took time for consideration.
July 9, 1907. The following opinions were read.

LORD LOREBURN, L.C.—The appellants, Mr. Eden and others, are lessors G and lessees respectively of coal mines, part of which lie under the line of the North-Eastern Railway. In 1892 the lessees were desirous of working the coal lying under part of the line, and, conformably with the Railways Clauses Consolidation Act, 1845, gave notice to the railway company under s. 78 of that Act. Thereupon the railway company required the lessees to leave certain portions of unworked coal under their line as pillars for its support, expressing their H willingness to pay such compensation as the law required. In this way the railway company became bound to pay, in accordance with the Act of Parliament, "compensation for such mines or any part thereof," whatever that means. What it does mean is the real question here. Very few further facts need notice. The lessees in the ordinary way and regular course of working would have worked I this coal immediately had they not been obliged under the statute to leave it in pillars as a support for the railway. Had they so worked it they would have made a clear profit out of it of £730, and the lessor would have received as rent in respect thereof the sum of £155. Accordingly, if the proper basis of compensation is the profit which lessor and lessees respectively would have made by working the coal, as it would have been worked in the ordinary course, then the sums payable by the railway company are £730 and £155 respectively. And that is what they claim in this appeal.

The arbitrator has further found that

"there is left unworked in the Shield Row seam [the seam in question] under the said lands a quantity of coal which the coal company will not in the ordinary course be able to exhaust within the term of the before-mentioned lease, which expires on Jan. 1, 1907."

So, if the lessees, instead of working the reserved coal, chose to work some other part of the same mine, they would be able to make their profit on the substituted coal instead of on the coal which they would have worked if they had not been obliged to leave it in pillars as described. The railway company fastens, legitimately enough, on this circumstance as the foundation of their argument. They say that the statute does not require them to purchase this coal, which literally is true, but merely to compensate the owners thereof. And they urge that the lessees, though wishful to work this particular coal, had plenty more which they might work, and in fact did work, instead of it. Thus, argues the railway company, the lessees will be indemnified if they receive the increased expenses and loss to which they have been put by having to work this substituted coal instead of the reserved coal. They say compensation means indemnity and no more. If this be the true view, the lessees are entitled only to £100, and that sum is payable on the ground that the prohibition against working the reserved coal tended in some degree to accelerate a diminution of output in these mines, and also to accelerate the time when the lessees would be obliged to work coal more expensive to get. The railway company, no doubt, would admit that, in addition to this payment, they would have been liable to compensate the lessees for the profit which they would have made in working the reserved coal itself ultimately, when they had exhausted the other coal in their mines. But that point is not raised, for there is so much other unworked coal that the lessees cannot, in the ordinary course, exhaust it before the expiration of their lease. Similarly, in regard to the lessor, the railway company contend that the measure of compensation payable to him is not the rent which he would have received in respect of the reserved coal if it had been worked, but the diminution in the value of the reversion caused by service of the statutory notice, and estimated at the date of such notice. It is agreed that upon this footing the lessor is entitled to £310. The railway company argue that this sum, and not £155, is what the lessors are entitled to receive, for, say they, compensation means indemnity and no less.

In deciding between these rival contentions the first step is to weigh the language of the Act of Parliament itself. The words used in s. 78 are "compensation for such mines or any part thereof." Looking at that section and at s. 6, the railway company is to compensate owners for the value of that part of the mines which is "taken or used." In its primary sense the Act certainly appears to mean that the owners according to their several interests are to receive the value of the actual coal actually placed under embargo. If one and the same person owned the mine and worked it, the obvious course would be to say, "You are about to work this coal, and if you work it you would make a net profit of, say, £500. We prevent you from working it, and so we pay you £500." It would be very strange if in such a case a railway company could say, "You have a very large coalfield of 100 acres in extent. We are preventing you from working only one acre. You must first work out your other ninety-nine acres, and that will take you twenty years. Accordingly we will not pay you £500, the present profit you would make on the one acre, but we will pay you the present value of the profit which you would have made twenty years hence out of this one acre had we not laid an embargo upon it. If you have suffered any other loss by diminution of output or increase of working expenses, we will pay that too." I cannot think that such a principle could be defended. If it were applied, for example, to building land worth £200 an acre over all, the sum payable for a small part of it taken compulsorily might be much less than the selling value on the plea that the whole of the land would not be sold for building at once, and that it was

to be assumed that the plot compulsorily taken would have been the last to be sold for building. Whether the land is "taken" or is "used" within the meaning of the Act seems to me a matter indifferent. The value must in either case be paid.

That being the rule where there is only one interest in the land or mine—namely, the fee simple—is there any difference where there are, as in this case, a lessees' interest and a reversionary interest? According to the railway company's argument the rule which I have stated would not then apply. I cannot see why it should not apply. What is taken away from the owners and what is given to the railway company is the same whether the ownership is in one hand or in more. There must be a distribution among those entitled to compensation, if they be more than one, but the sum to be distributed must still be the same—namely, the value of what has been taken from them, and that is the value of the reserved coal at the time at which it was laid under an embargo. That value is found to be in all £885, of which £730 is allotted to the lessees and £155 to the lessor. It is true that upon the figures stated in the Special Case apportioning to lessor and lessees their several shares the lessees will on this footing be able to make a profit out of the transaction beyond what they could have made if the coal had not been taken under the Act. It is also true that the lessor will only receive £155, while the damage done to the reversion by the railway company's exercise of statutory powers amounts to £310. But these figures were mostly agreed figures. The division of the money might have been different if it had been disputed. It is assumed that the lessees, whose term is limited, will work only at the usual rate of working. They are entitled to work more rapidly if they please, and in proportion to the rapidity of working the anomaly in the distribution will disappear. On the other hand, if the respondents are in the right, then the railway company will get for £410 that which is worth £885. This shows the danger of departing from the simple principle that a railway company under this Act is to pay to the value of what it takes or uses. How the proceeds are to be divided may be a complicated question. It is not in dispute here between the lessor and lessee. What is in dispute is the sum payable by the railway company, and on that I agree with the decision of BIGHAM, J.

LORD MACNAGHTEN.—It seems to me that the judgment of BIGHAM, J., is perfectly right. It is, I think, in accordance with the provisions of the Railways Clauses Act as to mines and minerals, and consistent with views expressed in this House on more than one occasion.

I do not propose to trouble your Lordships by going through the sections of the Act which bear upon the question in debate. They have often been cited here, and your Lordships are, I am sure, familiar with them. But I will take the liberty of quoting a passage from the opinion of LORD WATSON in *Glasgow Corpn.* v. *Farie* (1). It contains, I think, a remarkably clear and accurate exposition of the scope and effect of the provisions of the Waterworks and Railways Clauses Acts concerning mines and minerals. LORD WATSON said (13 App. Cas. at pp. 675, 676):

> "The relation which they establish between seller and purchaser in regard to all minerals which may be held to be excepted, appears to me to be, as LORD WESTBURY said in *Great Western Rail. Co.* v. *Bennett* (2), clearly defined, useful to the railway company or waterworks undertakers, and at the same time fair and just to the mineowner. The latter, who is forced to part with the surface of his land and all uses for which it is available, is not compelled to sell his minerals, whilst he is not in a position to ascertain their marketable value or the impediments that might be occasioned to the convenient working of his mineral field by his parting with a strip which intersects it. On the other hand, those who deprive him of the right to a portion of the surface and its uses by compulsory purchase enjoy the benefit of subjacent and adjacent support to their works without payment so long as the minerals below or adjoining these works remain undisturbed; but it is upon the condition that if they desire such

support to be continued they must make full compensation for value and intersectional damage, whenever the minerals required for that purpose are approached in working, and would in due course be wrought out."

So LORD WATSON's opinion certainly was that if the undertakers require the use in perpetuity of part of the mine for the support of their works they must make compensation, and the compensation must be the value of the minerals left unworked.

The same view was expressed in *Smith* v. *Great Western Rail. Co.* (3). That was a case where the notice to the railway company had been given by a lessee. LORD PENZANCE said (3 App. Cas. at p. 185):

"There is this further to be observed: that the directors are not only to arrange with the lessee, but, if he is a person who is entitled to take all the coal, the compensation for preventing him from taking the coal must be the full value of the coal left. . . . The full value of the coal, and nothing less than the full value of the coal, deducting, of course, the cost of getting it, must be the measure of the compensation which would be due to this lessee."

The same view is to be found in several other cases. For instance LORD WESTBURY, in *Great Western Rail. Co.* v. *Bennett* (2) and LORD HERSCHELL, in *Midland Rail. Co.* v. *Robinson* (4), both speak of the consequence of a counter-notice by the railway company as a "purchase" of the minerals comprised in the counter-notice. Having regard to the point which was raised and decided in *Bwllfa and Merthyr Dare Steam Collieries, Ltd.* v. *Pontypridd Waterworks Co.* (5), the word "purchase" may not, perhaps, be the most accurate expression that could be applied to the transaction, but at least it shows beyond the possibility of doubt that the understanding of those two noble and learned Lords was that the coal required to be left unworked was to be bought and paid for in full.

When the language of the enactment is tolerably plain, and the views expressed in this House have been uniformly consistent with the ordinary meaning of the language used, I have some difficulty in understanding the judgment of the learned judges of the Court of Appeal. They seem to have ignored s. 78 altogether, and to have treated the case as if it fell under s. 81. Section 81 does provide for compensation for damage "by reason of the continuous working of the mines being interrupted," but the compensation which is provided there is given for what LORD WATSON calls "intersectional damage." As the enactment says, it is meant to cover "additional" losses. It is to be in addition to, not in substitution for, the compensation to be provided by s. 78. Of course, although some things are clear, there are difficulties in the construction of these sections. It is clear that the only person who can initiate proceedings by giving notice under s. 78 is the person actually working the mine, whether he be owner, lessee, or occupier. And he can only give notice when he is approaching the protected area and is in a position to get the minerals within it. When the company give their counter-notice, defining the minerals which they require to be left unworked, and signify their willingness to make compensation, further working is prohibited, and the obligation on the part of the railway company to make compensation arises. But then the only person who can give the notice may have merely a temporary or precarious interest. What is to happen in that case? And how is the compensation to be dealt with? But these difficulties are, I think, more apparent than real, and would probably disappear in practice. There is no difficulty in the present case. All persons interested are before the court. There is no controversy between lessor and lessees. The lessees say: "We are in a position to work out the whole of the coal within the protected area, and we are entitled to do so." The lessor says: "That is quite true, but I must have my royalty." There can be no dispute about the lessor's claim, nor can there, I think, be any doubt that the lessees are entitled to be paid the whole value of their interest in the coal which the railway company require to be appropriated in perpetuity as and for a support for their works.

Then it was said: "If there is to be an embargo on working and the lessees are to be paid the value of the coal left unworked, they will be free to use their appliances and machinery in some other part of the mine comprised in their lease, and so they will get what VAUGHAN WILLIAMS, L.J., calls a 'windfall,' and the position of the reversioner or those who may be his successors will, or may be, altered too." Well, it may be so. But what have the railway company to do with that? They prevent the lessee from working. They are entitled to do so on signifying their willingness to make compensation. It cannot surely be any concern of theirs how their action, which is perfectly legitimate, affects the interests of others. If anybody is aggrieved, he has or may have his remedy, but it will not be against the railway company. They are secure. Whatever comes of it, they will be none the worse. The conclusion at which the Court of Appeal has arrived seems to me to lead to results both unjust and inconvenient. As VAUGHAN WILLIAMS, L.J., says, one result is that the railway company "get the user of the reserved pillar of coal for practically nothing." Surely that is unjust. And it must be highly inconvenient on a question of compensation to permit the company to embark on an inquiry as to how the lessees can best mitigate the loss sustained by the embargo on their operations. The railway company have no right to a general inspection of the plans of their workings. They have no right to manage their business for them or to direct their operations. Their simple duty is to pay compensation for the use of the support which they require, and in this case there is no dispute or question as to the parties to whom the compensation is payable. I am, therefore, of opinion that the appeal must be allowed, and the judgment of BIGHAM, J., restored, with costs both here and below.

LORD JAMES OF HEREFORD.—As the Lord Chancellor has stated the formal matters out of which this case has risen I do not propose to repeat them. It is found as a fact in the Special Case upon which these proceedings are based that, if this notice had not been given and obeyed, the coal in question would have been worked by the coal company in due course from Dec. 31, 1903, and thereby a profit of £730 would have been made, and the lessor would have received as rent a sum of £155. In answer to the claim for these two sums the railway company rely upon the facts stated in the Special Case. In effect this answer is that the coal company had other coal, the subject of their lease, which they could have worked instead of the coal which they were forbidden by the notice to work, which workable coal would last until the end of their lease in 1907; that the entire expense of working such coal, beyond that of working the notice coal, was £100; and that this was the only compensation to which the appellants were entitled. The question for determination is therefore clearly defined. Are the lessor and the lessees entitled, under the terms of s. 78 of the Railways Clauses Consolidation Act, to the profit on the coal which they were prevented from working, or are they only entitled to be compensated for the increased cost of working the more distant coal? The words of the section are:

> "If the company be willing to make compensation for such mines [the subject of the notice], [the owner] shall not work or get the same."

The notice not to work was given under s. 78, and was intended as an offer to bear the liability created by it. It is said by BIGHAM, J.: What is the railway company to pay for? It is to pay "for such mines"—that is to say, in this case, for the coal which it required to be left unworked. The railway required the support of certain coal, and in justice there seems to be no reason why the actual value of such support should not be paid for. The mineowners are to be paid the net value of the coal which they are precluded from working, and I can find nothing in the statute to show that if substituted coal can be worked, that coal upon which the railway company has laid an embargo, and so appropriated, shall not be paid for. Such, expressed in very plain and forcible language, is the judgment of BIGHAM, J. The Court of Appeal, however, throw upon the coalowners

A the duty of looking round in order to find some other workings which should compensate them for the loss sustained through obeying the notice of the railway company. I find nothing in the words of s. 78 to justify this judgment, and, as I think that the view of Bigham, J., is correct, I submit that the decision of the Court of Appeal should be reversed.

B **LORD ATKINSON.**—No question was raised in this case as to the bona fide intention of the owner to work by his lessee the minerals for which compensation is claimed. Under the provisions of s. 78 of the Railways Clauses Consolidation Act, 1845, in a case such as this compensation is to be paid for the mines. It is quite true, as was insisted upon by counsel on behalf of the company, that there has not been here any sale or transfer of any property or of any right or interest C in it, but the minerals of the owners have been dedicated, as it were, to the use of the company. The only purpose which they can subserve while the railway continues to exist is to support the superincumbent soil of the company. And the owner of the minerals, or of any interest in them, will be as effectually deprived of all use, benefit, or enjoyment of them as if they had been destroyed, or removed and disposed of. I do not think that any appreciable deduction can be made from D the sum which the company are bound to pay as compensation by reason of the remote contingency that, should the railway cease to exist, the owner's right to work and win these minerals will revive. This result has been brought about not by a tortious act, whether wilful or negligent, but by the legitimate exercise by the railway company of a right conferred upon them by statute. On what principle, then, is the compensation to be paid by the railway company? If the minerals E had not been leased, and had been removed innocently—that is to say, removed without the commission of any tortious act—the owner would have been entitled to obtain as compensation the value of these minerals in situ. If, as in this case, there be no physical difficulty in the way which would render the working, winning, and raising of them not reasonably practicable, then a fair test of that value would be the price which the minerals would fetch as and when won and raised, less the F cost of working the mine, winning and raising them.

The principle upon which an owner is to be compensated when his property is thus innocently destroyed is laid down by Lord Hatherley in *Livingstone* v. *Rawyards Coal Co.* (6) in the following words (5 App. Cas. at pp. 34, 35):

> "Those principles are that the owner shall be re-possessed as far as possible G of that which was his property, and that, in respect of that which was destroyed, or removed, or sold, or disposed of, and cannot therefore be restored in specie, there shall be such compensation made to him as will in fairness give to the one party the whole of that which was his, or the whole value of that which was his, and will at the same time give to the other, in calculating that value, just allowance for all those outlays which he would have been obliged to make H if he had been entering into a contract for that being done which has, by misfortune, or inadvertence on both sides, and through no fault, been done."

There has been no outlay here by the company such as is adverted to in this passage. There was no physical difficulty in working the mine such as existed in that case; and, therefore, it appears to me to be clear, on the authority of *Smith* v. *Great Western Rail. Co.* (3) and *Bwllfa and Merthyr Dare Steam Col-* I *lieries* v. *Pontypridd Waterworks Co.* (5) that if no lease had been executed the contingency of the railway ceasing to exist being negligible, the owner would have been entitled to receive as compensation the full value of the minerals in situ. This sum the railway company would, in my opinion, be bound to pay.

I cannot follow the reasoning by which it is sought to establish that the company should pay a smaller or a different sum because the proprietor's rights had been split up, as it were, and an estate or interest in the property created by him in another. Though, no doubt, it may in some cases be a matter of some difficulty to apportion between several persons interested the sum to be paid by the company

as compensation for the property, of the benefit and enjoyment of which they have all been deprived, I think that in this case no such difficulty exists. If the lessees had continued to win, and raise, and sell this coal, it is found that they would have made, after deducting the royalty and cost, £730. Taking the test which I have mentioned, the value of the coals in situ was, therefore, £730 plus the royalty—that is, £855 in all—and I think that the company must pay that value. It would seem to me that a fair way of dividing the value of the coal in situ between the lessor and the lessees is to give to the lessor the royalty to which he would have been entitled had this coal been won and raised and sold, and to the lessees, who were entitled to win and raise it, the balance of this sum of £855—namely, £730. The lessees have worked and won coal in another part of the mine included in their lease, coal which it is found that they could not have won had they continued to work the coal put under embargo. They have paid the royalty on the coal so won in the new area; and it is quite true that if at the termination of the lease the price of coals should be such that the lessor could get for the coal in the new area, which, but for the notice from the railway company, would have been then unworked, a higher royalty than that reserved by this lease, the lessor would have been damnified to the extent of the difference between the royalties. But if the price of coal should have then so fallen that the possible royalty would have been less than that actually received, he would, in the remote result, have gained by the action of the railway company in diverting the activities of the lessees from the old to the new area. It is difficult to see how that affects the railway company. They are bound to pay to the owners the value of the property which they take. The proportions in which the owners may be disposed to divide the sum so paid between themselves is a matter with which they have no concern. Again, it is urged that since it has been found that the lessees could not have worked the two areas, the old and the new, and as it would only cost them £100 more to work the new area than it would have cost them to work the old one, they are to be paid nothing more than this £100. This contention assumes a right in the company to take away or render useless a man's property, which he may be engaged in working at a profit, and to pay him nothing for it because he may happen to have other property lying waste, on which if he expended the labour and capital employed on that taken he would realise an equal profit, if he should not be able to work or cultivate both at the same time. I think, therefore, that the true measure of compensation is that first set forth in the Special Case, that the question submitted by the arbitrator should be answered to this effect, and that the appeal be allowed and the judgment of BIGHAM, J., restored.

Appeal allowed.

Solicitors: *Rawle, Johnstone, Gregory, Rowcliffe & Rowcliffe*, for *Cooper & Goodger*, Newcastle-on-Tyne; *R. F. Dunnell.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

Re RICHARD AND GREAT WESTERN RAIL. CO.

[Court of Appeal (Sir Richard Henn Collins, M.R., Stirling and Mathew, L.JJ.), November 4, 7, 8, 1904]

B [Reported [1905] 1 K.B. 68; 74 L.J.K.B. 9; 91 L.T. 724; 69 J.P. 17; 53 W.R. 83; 21 T.L.R. 37; 49 Sol. Jo. 53]

Railway—Support—Right to support from subjacent minerals—Mining lessee required not to work minerals—Compensation—Power of arbitrator to award interest—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict.*, *c.* 20), *s.* 78.

C When a railway company has given notice to a mineowner, under s. 78 of the Railways Clauses Consolidation Act, 1845, requiring him not to work the minerals under or within the prescribed distance from the railway, there is no purchase of the minerals by the railway company or and transfer of the property therein, and, therefore, there is no contract, express or implied and no breach of duty sounding in damages which would entitle the arbitrator, who assesses D the amount of compensation payable by the railway company to the mine-owner, to award interest upon the amount of compensation from the date of the notice to the date of the award. There is nothing in the nature of a debt until the amount of the compensation has been ascertained. From that time forward interest may be awarded, but from no earlier date.

E **Notes.** Section 78 of the Railway Clauses Consolidation Act, 1845, was re-enacted with some amendment by s. 15 of the Mines (Working Facilities and Support) Act, 1923 (19 Halsbury's Statutes (2nd Edn.) 972).

Referred to: *Swift* v. *Board of Trade*, [1925] A.C. 520; *B. A. Collieries, Ltd.* v. *London and North Eastern Rail. Co.*, [1943] 2 All E.R. 637.

As to a railway company's right of support from subjacent and adjacent minerals, see 26 Halsbury's Laws (3rd Edn.) 353 et seq., and cases there cited.

F Cases referred to:

(1) *Caledonian Rail. Co.* v. *Carmichael* (1870), L.R. 2 Sc. & Div. 56, H.L.; 11 Digest (Repl.) 203, *708*.

(2) *Bwllfa and Merthyr Dare Steam Collieries (1891), Ltd.* v. *Pontypridd Waterworks Co.*, [1903] A.C. 426; 72 L.J.K.B. 805; 89 L.T. 280; 52 W.R. 193; 19 T.L.R. 673, H.L.; 11 Digest (Repl.) 136, *199*.

G (3) *Fletcher* v. *Lancashire and Yorkshire Rail. Co.*, [1902] 1 Ch. 901; 71 L.J.Ch. 590; 66 J.P. 631; 50 W.R. 423; 18 T.L.R. 417; 11 Digest (Repl.) 176, *443*.

(4) *Birch* v. *Joy* (1852), 3 H.L.Cas. 565; 10 E.R. 222, H.L.; 40 Digest (Repl.) 211, *1718*.

H (5) *Great Northern Railway* v. *Inland Revenue Comrs.*, [1901] 1 K.B. 416; 70 L.J.K.B. 336; 84 L.T. 183; 65 J.P. 275; 49 W.R. 261; 17 T.L.R. 218; 45 Sol. Jo. 237, C.A.; 11 Digest (Repl.) 167, *391*.

Also referred to in argument:

Mercer v. *Liverpool, St. Helens and South Lancashire Rail. Co.*, [1903] 1 K.B. 652; 72 L.J.K.B. 128; 88 L.T. 374; 67 J.P. 77; 19 T.L.R. 210; affirmed, [1904] A.C. 461; 73 L.J.K.B. 960; 91 L.T. 605; 68 J.P. 533; 53 W.R. 241; I 20 T.L.R. 673, H.L.; 11 Digest (Repl.) 289, *1951*.

London, Chatham and Dover Rail. Co. v. *South Eastern Rail. Co.*, [1893] A.C. 429; 63 L.J.Ch. 93; 69 L.T. 637; 58 J.P. 36; 1 R. 275, H.L.; 35 Digest 183, *123*.

Rhys v. *Dare Valley Rail. Co.* (1874), L.R. 19 Eq. 93; 23 W.R. 23; 11 Digest (Repl.) 244, *1123*.

Appeal by the defendants, the Great Western Rail. Co., from a decision of Channell, J., and a cross-appeal by the plaintiff to enforce an award, and also

the argument of the questions submitted by the award in the form of a special case. A

The plaintiff, Mr. Philip Richard, was the owner or lessee of seams of coal lying near and under a railway belonging to the Great Western Rail. Co. He gave notice to the company under s. 78 of the Railways Clauses Consolidation Act, 1845, of his intention to work the coal lying under and within the prescribed distance of the railway. The railway company thereupon gave him notice, under the provisions of s. 78, requiring him not to work a specified part of the coal, upon the ground B that the working thereof was likely to damage the railway, and stating that they were willing to pay compensation. The matter went to arbitration, and the umpire made the following award in the form of a Special Case:

"For expenses and losses incurred by reason of the continuous working of the said colliery and mines having been interrupted, and the working and development of portions of the said colliery stopped, and otherwise in consequence of the service by the company of the counter-notice, the sum of £16,639. C Provided, nevertheless, and I hereby declare, that the above sum is calculated on the assumption that the said Philip Richard had under the said disputed agreement a legal or equitable right on the date of the counter-notice to work the said three veins and seams of coal belonging to Sir R. Morris . . . but if the said Philip Richard had not under such agreement such legal or equitable D right to work such last-mentioned veins and seams of coal, then I do hereby award and declare that the before-mentioned sum of £16,639 shall be reduced to the sum of £14,654, and that such reduced sum shall be the amount which the railway company is to pay to Philip Richard. And I further award that the railway company shall pay to Philip Richard upon the said sum of £16,639, as and for interest down to the date of this award, the sum of £3,174; and in E case the said Philip Richard shall not be entitled to the said sum of £16,639 and such interest as aforesaid, but only to the said sum of £14,654, then that the said railway company shall pay to Philip Richard the sum of £2,795 as and for interest upon the said sum of £14,654 down to the date of this award; and, further, that the railway company shall pay to Philip Richard further interest at the rate of £4 per cent. per annum upon whichever of the said two sums of F £16,639 and £14,654 he may be entitled to recover under this award, to be calculated from the date of the award down to the date of payment."

The umpire stated the following questions for the opinion of the court: (i) Whether the plaintiff had any legal or equitable rights under the disputed agreement; (ii) whether the umpire had jurisdiction to award that interest should be paid on the sum awarded for compensation from the date of the counter-notice to the date G of the award. The motion for leave to enforce the award, and the argument upon the Special Case, were heard before CHANNELL, J., who held that (i) the plaintiff had not a legal or equitable right to work Sir Robert Morris' coal under the alleged agreement, and (ii) that he was entitled to the interest awarded, i.e., £14,654 plus £2,795. The railway company appealed, and the plaintiff cross-appealed against finding (i). H

By the Railways Clauses Consolidation Act, 1845, s. 78:

"If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the I company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appears to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company, and such owner, lessee, or occupier, do not agree

as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

C. A. Cripps, *K.C.*, *Moon*, *K.C.*, and *Howard Wright* for the railway company. *Abel Thomas*, *K.C.*, and *S. T. Evans*, *K.C.*, for the plaintiff.

SIR RICHARD HENN COLLINS, M.R.—In this case there are two appeals—an appeal and a cross-appeal. The point on the first appeal, which is that of the railway company, is whether the arbitrator in this case was entitled to allow a sum for interest in addition to a sum for compensation assessed under the provisions of s. 78 and the following sections of the Railways Clauses Consolidation Act, 1845.

I think that the point as to interest is concluded by decisions in the House of Lords. It is this. The mineowner, who has mines under the works of the railway company, gave notice under the provisions of s. 78 of the Act of 1845 indicating that he was about to work his mines in the neighbourhood of the railway. That let in the right of the railway company to give a cross-notice which would have the effect of staying his working of the mines on their paying him compensation. It seems to me to have been clearly decided that the arbitrator on such a question is not entitled to give a sum for interest in addition to a sum for compensation. It rests upon the principle underlying the case itself which is not one of sale and purchase. It is a claim for compensation; the compensation given by the arbitrator under the statutory provisions measures the whole rights of the parties. I will turn to the case in the House of Lords which raised this question. It is *Caledonian Rail. Co.* v. *Carmichael* (1), and this is the headnote (L.R. 2 Sc. & Div. at p. 56):

> "Where a pecuniary claim has been left by the creditor for years unascertained and unexamined, the debtor having always been ready and willing to meet the demand, it was held by the House, reversing the decision below, that the right to interest on the principal sum did not commence until after the debt had been established, and the precise amount settled. Per Lord Westbury: Interest can be demanded only in virtue of a contract, or where the principal money has been wrongfully withheld."

Then came another case, also in the House of Lords, *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.* (2). The headnote of that case is this ([1903] A.C. at p. 426):

> "Owners of coal mines under and near waterworks gave the undertakers notice, under s. 22 of the Waterworks Clauses Act, 1847, that they intended to work the coal. The undertakers replied by a counter-notice requiring the mineowners not to work, and stating their willingness to make compensation. In an arbitration under the Act and the Lands Clauses Acts to assess the compensation, the mineowners gave evidence to prove that coal rose in value after the date of the counter-notice. Held: that there was no purchase of the coal or transfer of the property in the coal; that the inquiry was not what was the value of the coal at the date of the counter-notice, but what would the coalowners, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it; and that the evidence was admissible."

Taking those two decisions together, it appears that the real matter to be determined in these proceedings is not what is the price to be paid as upon a sale, but what is the sum to be assessed by way of compensation, and in that case the stage is never arrived at where there is a contract, express or implied, to pay interest, nor is there the only other alternative—that of a breach of duty sounding in damages, which lets in the right to recover interest in the nature of damages. There is simply an assessment of compensation, and at no stage in the discussion, until after the amount due has been ascertained, can the implication as to interest arise. Neither, in the circumstances, is there any foundation for any claim for breach of contract in not paying the money over at a reasonable time. If any such

question could arise, it could only arise after the amount had been ascertained in manner provided by the Act of Parliament. That does not embrace the obligation to pay interest in addition to compensation. It seems to me that those short grounds are enough to decide this case. *Fletcher* v. *Lancashire and Yorkshire Rail. Co.* (3), the case before BUCKLEY, J., which was relied on as suggesting a contrary view, turned upon a different Act of Parliament, which involved a sale, and thereby, of course, involved the ascertaining of the price, where the general principle of obligation to pay purchase money arises, and may involve an obligation to pay interest. That is not this case. For reasons which I have pointed out here, this case turns on the decision dealing with a precisely similar case—namely, the assessment of compensation. Then it has also in it the element for which I referred to *Caledonian Rail. Co.* v. *Carmichael* (1) as an authority—namely, the absence of any facts from which, as LORD WESTBURY puts it, there can be an implication of a contract to pay interest (L.R. 2 Sc. & Div. at p. 66):

> "Interest can be demanded only in virtue of a contract expressed or implied, or by virtue of the principal sum of money having been wrongfully withheld."

Therefore, in my opinion, the appeal on the first point succeeds. The ground upon which CHANNELL, J., came to the contrary conclusion was one, indeed, that was pressed before us here, but which, in my opinion, is not enough to justify a decision in favour of the plaintiff. That point is that there was an admission before the arbitrator by counsel for the railway company. It appears to me that, putting it at the highest, the court is not bound by the admissions of counsel on points of law, and certainly the court is not bound unless that admission has had such an effect on the conduct of the case as to make it inequitable to adhere to it. Nothing of that kind seems to have taken place in this case; on the contrary, we find on the face of the award that the point is raised for our decision. The arbitrator has separated the sum payable by way of compensation from the sum payable by way of interest, and, therefore, it seems to me quite obvious that that point was one which he deemed open for decision and has left for us. Therefore, I do not think we should be doing right if, in those circumstances, we were to consider ourselves bound by an admission of law made by counsel in the course of the case. I do not think that it binds us, and I do not think there is any ground, legal or equitable, which debars us from deciding on the point raised by the arbitrator on the face of the award according to our view of the law.

In my view, for the reasons I have given, the arbitrator had no jurisdiction to award interest in addition to compensation, and therefore it seems to me that the first appeal succeeds. With regard to the cross-appeal by the mineowner, I have come to the conclusion that the judgment of CHANNELL, J., was right. Therefore, the cross-appeal must fail.

STIRLING, L.J.—I am of the same opinion as regards both appeals, and I have very little to add.

On the original appeal, the short question is whether an arbitrator appointed to assess the amount of compensation which is payable to a mineowner under s. 78 and s. 81 of the Railways Clauses Consolidation Act has jurisdiction to award interest eo nomine upon the sum which he awards. The main contention in support of his jurisdiction so to do was that there is a legal principle established by the decision of the House of Lords in *Birch* v. *Joy* (4), and applied very recently by BUCKLEY, J., in *Fletcher* v. *Lancashire and Yorkshire Rail. Co.* (3), which entitled the arbitrator to award interest. On that point there seems to me to be a short answer when the alleged principle is inquired into. *Birch* v. *Joy* (4) is a decision of the House of Lords, and, of course, is a binding decision, but it was decided with reference to the rights of a vendor and purchaser of real estate under an ordinary contract for sale and purchase. *Fletcher* v. *Lancashire and Yorkshire Rail. Co.* (3) was a case which was decided by BUCKLEY, J., upon the terms of a special Act of Parliament, not upon the Railways Clauses Consolidation Act. In

A that case BUCKLEY, J., came to the conclusion that the relation of vendor and purchaser existed, and he thereupon applied the rule which had been laid down in the House of Lords in *Birch* v. *Joy* (4).

The answer to the claim founded on these cases in the present case is that here the relation of vendor and purchaser does not exist. That has been expressly decided in two cases, both of which are binding on this court. First of all, in B *Great Northern Railway* v. *Inland Revenue Comrs.* (5), a decision under the Stamp Act, which involved the consideration of the very clauses with which we have to deal on this appeal. The other case is the more recent case of *Bwllfa and Merthyr Dare Steam Collieries, Ltd.* v. *Pontypridd Waterworks Co.* (2), which was not a decision on the Railways Clauses Act, but was a decision on the Waterworks Clauses Act, which contains, however, sections which are identical with those C with which we have here to deal. The decision of the House of Lords there was that proceedings under the clauses there dealt with did not establish the relation of vendor and purchaser. I shall read only a few sentences from what was laid down by the noble Lords who advised the House in that case. The EARL OF HALSBURY, L.C., said ([1903] A.C. at p. 428):

D "It was not a purchase of the coal, nor is it analogous to a purchase of the coal."

LORD MACNAGHTEN said (ibid. at p. 431):

"The counter-notice by the undertakers, following a notice of the mineowners under s. 22, does not operate to make a contract, or to transfer property. It is not even a step towards a contract or a step towards expropriation. The under- E takers acquire no property in the minerals. The property remains where it was. The mineowner is prohibited from working, and the undertakers are bound to make full compensation. That is all."

Therefore, it seems to me that that ground, which is the fundamental ground of the argument, fails.

F There were two subsidiary points which were referred to. First of all, it was said that the learned counsel who appeared for the company before the arbitrator made an admission which gave jurisdiction to the arbitrator to deal with the case in the way that he did, but I cannot think that that admission could give the arbitrator jurisdiction to deal with the case in a way which is not justified by the principles of law which are applicable to it. It was also suggested that in this case there had been delay, and delay attributable to the company. Whether that, if established, G would raise a case which would entitle an arbitrator to award interest, I am not prepared to say at this moment. I will only say that it seems to me, when the facts are looked at, they do not justify the awarding of interest on any such ground. That disposes of the appeal. As regards the cross-appeal, I have very little to say. I agree with the learned judge who decided the case on both points which he decided. That being so, the cross-appeal must fail.

H

MATHEW, L.J.—I am of the same opinion. With reference to the question of the right to payment of interest, it is argued that the counter-notice which was served in this case created the relation of vendor and purchaser as between the colliery proprietor and the railway company. Is there any authority for any such contention? The counter-notice is merely a notice that the company, in accor- I dance with the terms of the Act of Parliament, are willing to submit the claim of the colliery owner to arbitration, and, until the amount has been ascertained, it is impossible to say that there is anything in the nature of a contract to sell and buy. Nobody can predicate at the time when the counter-notice is given what the value of the interest in the reserved coal is or may be. That has to be ascertained, and ascertained in the ordinary course. It is said: Suppose there is delay in ascertaining the amount. It seems to me the law does not provide for any such case. The colliery owner has ample power to compel the railway company to proceed to arbitration as soon as is reasonable and as soon as is practically possible; but if there be

any delay, it is not, as it appears to me, a matter which is provided for in the enactments with reference to compensation. It could not be said here that the company had been guilty of any default. It must be assumed that the compensation was ascertained here in a reasonable time, having regard to the difficulties in the case. There was no liability—nothing in the nature of a debt—until that compensation had been so ascertained. From that time forward the interest might be claimed, but from no earlier date. Then the plaintiff relied on the supposed admissions of counsel for the railway company in the matter that he was entitled to interest. When we come to look closer into what occurred, it appears to me that it would be most unreasonable and quite unjust that a court of law should be bound by what took place in this case. That being so, we ought to look to see what the law is without reference to the supposed estoppel of the company. With reference to the question of interest, I entirely agree that the appeal must be allowed. With reference to the cross-appeal, I will not repeat what has been already said, as I agree that the claimant cannot succeed.

Appeal allowed. Cross-appeal dismissed.

Solicitors: *R. R. Nelson*; *Pontifex, Hewitt & Pitt.*

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

LAW *v.* LAW

[Court of Appeal (Vaughan Williams, Romer and Cozens-Hardy, L.JJ.), November 7, 8, 9, 10, 11, 12, 14, December 5, 1904]

[Reported [1905] 1 Ch. 140; 74 L.J.Ch. 169; 92 L.T. 1; 21 T.L.R. 102; 53 W.R. 227; 49 Sol. Jo. 118]

Partnership—Sale of share—Avoidance—Sale by one partner to another—Failure of partner with greater knowledge of accounts to make full disclosure.

In a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser, who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows; and, unless such information has been furnished, the sale is voidable and may be set aside.

Res Judicata—Settlement of action—"Full discharge of all claims"—Fraudulent misrepresentation—Subsequent discovery of further misrepresentations.

An action brought by a partner against his co-partner for damages for fraudulent misrepresentation consisting of the non-disclosure of partnership assets whereby, he alleged, he was induced to enter into a contract to sell his share in the business to the co-partner was settled, all charges of fraud being withdrawn and the co-partner paying a certain sum in full discharge of all claims. The vendor did not insist on his full rights and, in particular, did not obtain a full disclosure relating to the assets. Later, the vendor discovered that further substantial assets had not been disclosed, and he brought a further action against the purchaser's executors alleging that the settlement of the first action was not binding on him and claiming a rescission of the contract of sale.

Held: the vendor had deliberately made his election to settle his claim on the terms stated; no fraud in bringing the settlement about was alleged; and it was too late for him to be allowed to re-open the transaction.

Notes. As to rights of partners inter se, see 28 HALSBURY'S LAWS (3rd Edn.) 545 et seq.; and for cases see 36 DIGEST (Repl.) 526 et seq. As to res judicata, see 15 HALSBURY'S LAWS (3rd Edn.) 184–187; and for cases see 21 DIGEST 132 et seq.

Cases referred to:

(1) *Maddeford* v. *Austwick* (1826), 1 Sim. 89; 57 E.R. 512; affirmed (1833), 2 My. & K. 279, L.C.; 36 Digest (Repl.) 573, *1310.*

(2) *Clough* v. *London and North Western Rail. Co.* (1871), L.R. 7 Exch. 26; 41 L.J.Ex. 17; 25 L.T. 708; 20 W.R. 189, Ex. Ch.; 21 Digest 357, *1380.*

Also referred to in argument:

Dunne v. *English* (1874), L.R. 18 Eq. 524; 31 L.T. 75; 1 Digest (Repl.) 536, *1645.*

Wilding v. *Sanderson*, [1897] 2 Ch. 534; 66 L.J.Ch. 684; 77 L.T. 57; 45 W.R. 675; 13 T.L.R. 540; 41 Sol. Jo. 675, C.A.; 12 Digest (Repl.) 102, *602.*

Elzey v. *Adams* (1864), 2 De G.J. & Sm. 147; 3 New Rep. 696; 10 L.T. 492; 10 Jur. 459; 12 W.R. 586, L.JJ.; 4 Digest (Repl.) 213, *1910.*

Callisher v. *Bischoffsheim* (1870), L.R. 5 Q.B. 449; sub nom. *Calisher* v. *Bischoffscheim*, 39 L.J.Q.B. 181; 18 W.R. 1137; 12 Digest (Repl.) 225, *1679.*

Re Blythe, Ex parte Banner (1881), 17 Ch.D. 480; 51 L.J.Ch. 300; 4 L.T. 908; 30 W.R. 24, C.A.; 12 Digest (Repl.) 226, *1686.*

Miles v. *New Zealand Alford Estate Co.* (1886), 32 Ch.D. 266; 55 L.J.Ch. 801; 54 L.T. 582; 34 W.R. 669, C.A.; 12 Digest (Repl.) 225, *1681.*

Redgrave v. *Hurd* (1881), 20 Ch.D. 1; 51 L.J.Ch. 113; 45 L.T. 485; 30 W.R. 251, C.A.; 35 Digest 47, *417.*

Knight v. *Marjoribanks* (1848), 11 Beav. 322; affirmed (1849), 2 Mac. & G. 10; 2 H. & Tw. 308; 47 E.R. 1700, L.C.; 36 Digest (Repl.) 573, *1311.*

Scarf v. *Jardine* (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 30 W.R. 893, H.L.; 12 Digest (Repl.) 669, *5178.*

Campbell v. *Fleming* (1834), 1 Ad. & El. 40; 3 Nev. & M.K.B. 834; 3 L.J.K.B. 136; 110 E.R. 1122; 35 Digest 75, *733.*

Appeal from a decison of KEKEWICH, J., in an action for a declaration that certain deeds and a consent order in a previous action for damages for fraudulent misrepresentation were not binding and should be set aside.

After the death of their father, John Law, in 1874, the partnership business of John Law & Sons was carried on in Yorkshire by his four sons, William Law, James Law, Samuel Law, and Joseph Law, but without any articles of partnership, in equal shares. In 1893 Samuel Law died, allowing the bulk of his property to remain in the business, and thereafter the three survivors continued to carry on the business. In 1899 Joseph Law died leaving, by his will, all his estate between the two surviving brothers (William Law and James Law) by whom the business was then carried on. William Law latterly had taken no active part in the business. In 1900 James Law offered to purchase William Law's share for £10,000. William Law consulted a solicitor, Charles Edward Lacey, who went to Yorkshire with the object of negotiating for the sale of his share. Ultimately the solicitor agreed, on behalf of William Law, to sell for £21,000 his share in the partnership business and his interest in the estate of Joseph Law, who had died in 1899. In July, 1900, two deeds were executed to carry the agreement into effect, and the purchase money was paid. William Law subsequently discovered that some assets of the business had not been disclosed when the negotiations for the sale of his share had taken place, and commenced an action against James Law for damages for fraudulent misrepresentation in respect thereof. On Feb. 25, 1901, a consent order was made staying all further proceedings in that action upon the terms of an agreement of Feb. 15, 1901, whereby all charges of fraud were withdrawn, and James Law was to pay William Law £3,550 in full discharge of all claims. This sum was paid, and in August, 1901, James Law died. Shortly afterwards William Law discovered that some further assets of the business, amounting to several

thousands of pounds, had not been disclosed, and he brought another action against James Law's executors and the executor of Joseph Law claiming a declaration that the two deeds of July, 1900, and the consent order of Feb. 25, 1901, were not binding upon him, and ought to be set aside—the non-disclosure giving rise to a right in equity to a rescission of the contract of sale—and for consequential accounts and inquiries. The defendants admitted that certain mortgages and other securities existed, but denied that they formed any part of the assets of the business; and they contended that the consent order of Feb. 25, 1901, precluded William Law from bringing the second action. William Law having died since the commencement of the second action, it was continued by his executor, John Law, who contended that James Law, as managing partner, being in a fiduciary position to William Law, was under a positive duty to make the fullest disclosure of the partnership assets to William Law, and that, in the circumstances of the case, this applied as well to the compromise of the first action as to the original transaction. In 1904 the action came on for trial before KEKEWICH, J., who gave judgment for the defendants. William's executor, John Law, appealed.

Neville, K.C., and *Frederic Thompson* for John Law.

Sir Edward Clarke, K.C., *P. Ogden Lawrence, K.C.*, and *George Lawrence* for the executors of James Law.

Warmington, K.C., *Younger, K.C.*, and *Austin-Cartmell* for the executor of Joseph Law.

Cur. adv. vult.

Dec. 5, 1904. **COZENS-HARDY, L.J.**, read the following judgment of the court.—This is an appeal from a decision of KEKEWICH, J., who dismissed with costs an action seeking to set aside a sale by William Law to James Law of his interest in a partnership business carried on between William and James. The vendor and purchaser are both dead, but their representatives are before the court.

It is clear law that, in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows, and that, unless such information has been furnished, the sale is voidable and may be set aside: see *Maddeford* v. *Austwick* (1). The original sale on July 2, 1900, by William to James was for £21,000, payable half in cash and half at six months secured by a bond. We will assume that this sale could have been set aside by William on the ground that James had not disclosed the existence of partnership assets represented by mortgages and other securities to a very large amount standing in the names of James and his late brother Joseph, who had also been a partner. But shortly after the completion of the sale William undoubtedly ascertained the existence of some of what we will call "the suppressed assets." He thereupon consulted counsel, and his case then was, not merely that there had been no proper disclosure by James of the assets in question, but that the sale had been brought about by an actual representation by or on behalf of James that there were no partnership assets beyond those appearing in certain probate valuations which certainly did not disclose the assets in question. We may here observe that the appellant, William's executor, does not raise any case of misrepresentation before us. He bases his case solely on the ground of non-disclosure, giving rise to a right in equity to a rescission of the contract of sale.

The counsel who was consulted advised that an action should be brought for damages for misrepresentation, the measure of damages being one-half of the value of the omitted assets, and counsel added that, as there was some doubt whether all the assets had even then been discovered, it would be well to ask that an account be taken of all further assets belonging to the partnership, and to claim half of their value also. Following this advice, which was given on Nov. 8, 1900, William,

on Jan. 22, 1901, issued a writ in the Queen's Bench Division. This action was settled by an agreement dated Feb. 15, 1901, which was embodied in a consent order on Feb. 25, 1901, staying the action. All charges of fraud or fraudulent representations being withdrawn, the sum of £3,550 was paid by James to William in discharge of every claim relating to any matter whatsoever between the plaintiff and defendant and in full discharge thereof. Before this settlement was arrived at William had ascertained that there were still further partnership assets not disclosed by James, and he surmised and believed that there might be others, though he was not aware of their particulars or amount.

Under these circumstances, it was, of course, open to William, if he chose, not to insist on his full rights, and in particular not to obtain full disclosure of what the assets consisted, and to come to a settlement or compromise with James on that footing. And this is what he did. What his reasons were for so doing concerned him alone, and it would be idle now to speculate whether he was influenced by fraternal affection, or by an idea that his partnership drawings may have been greater than those of James, or by some other reason. But after the settlement so come to, in our opinion it was not possible for William to re-open the transaction. He deliberately made his election, and by that election he is bound: see *Clough* v. *London and North Western Rail. Co.* (2) (L.R. 7 Ex. at p. 34). It cannot be sufficient to allege and prove that, if the action had been fought out, the plaintiff would have recovered damages greatly in excess of £3,550. No separate and independent fraud is even alleged in bringing about the settlement of February, 1901. William may have been induced to settle largely by reason of representations made by the daughter of James as to her father's health, but these representations were not untrue. He was not induced by any statement or assurance on the part of James or his advisers that there were no other suppressed assets.

But the case against the present claim to rescind does not even rest solely on what we have just stated. We have purposely passed over two facts of great importance. William Law, after he had been advised by counsel, assigned the bond to secure the second instalment of £10,500 to trustees, and subsequently, on Jan. 8, 1901, William joined with the trustees in an action on the bond to recover this instalment. Proceedings in this action were stayed on Jan. 18 on payment by James to the trustees of £10,532 1s. 8d., being the balance of all principal moneys and interest, with costs amounting to £3 5s. This was four days before the writ in the action for damages was issued. In point of fact William, with knowledge that the sale might be upset or that damages might be recovered, deliberately postponed proceedings with that view until after he had obtained payment of the balance of the purchase money, to which he had no title except on the footing that the sale was not to be set aside. It is now too late for William to repudiate the contract of which he has thus deliberately secured the benefits. It has been strenuously argued that the duty resting on the purchasing partner continued in full force and effect up to and after the settlement of the action, so that James could not rely upon a binding election by William unless and until full disclosure had been made. We know of no authority which supports this proposition, and it seems to us to be contrary to principle. It seems impossible to hold that under such circumstances as existed here William could not, if he chose, come to a binding settlement or compromise or make a binding election not to rescind without full disclosure by James. In our opinion, KEKEWICH, J., was right in the view which he took as to the effect of what was done in January and February, 1901, and this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Barfield & Barfield*; *Bower, Cotton & Bower*, for *Longbotham & Sons*, Halifax; *Robbins, Billing & Co.*, for *John Law Garsed*, Elland.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

WORTHING CORPORATION *v.* HEATHER

[CHANCERY DIVISION (Warrington, J.), July 24, 26, 1906]

[Reported [1906] 2 Ch. 532; 75 L.J.Ch. 761; 95 L.T. 718; 22 T.L.R. 750; 50 Sol. Jo. 668; 4 L.G.R. 1179]

B

Landlord and Tenant—Lease—Option to purchase freehold—Perpetuities—Option exercisable outside perpetuity period—Liability of original covenantor—Liability of assignee of reversion.

A lessor demised to a local board of health a public park for the term of thirty years, granting the board an option to buy the freehold at any time during that period. The lessor died, and in an action by the plaintiffs, as successors in title to the board, against the devisees and executor of the lessor to enforce the option,

C

Held: the option was exercisable outside the period of perpetuity, and, it being irrelevant that the option created a charitable interest as there was no gift over from one charity to another, it infringed the rule against perpetuities; the option could not, therefore, be specifically enforced against the devisees of the lessor, but, nevertheless, the estate of the lessor was liable in damages for breach of covenant.

D

Notes. Although specific performance of a covenant which infringes the rule against perpetuities cannot, as WARRINGTON, J., held, be obtained against an assignee from the original covenantor, it seems that specific performance can be obtained against the personal representatives of the original covenantor so long as the property in question is still in their possession (see 29 HALSBURY'S LAWS (3rd Edn.) 297 (r)).

E

Considered: *Hutton* v. *Watling*, [1947] 2 All E.R. 641. Referred to: *Wright* v. *Dean*, [1948] 2 All E.R. 415.

As to the application of the rule against perpetuities to interests under contracts, see 29 HALSBURY'S LAWS (3rd Edn.) 297–298; as to its application to charitable gifts arising in futuro, see ibid. pp. 305–306. For cases see 37 DIGEST 80–82.

F

Cases referred to:

(1) *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch.D. 562; 51 L.J.Ch. 193; 45 L.T. 505; reversed, 20 Ch.D. 576; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620, C.A.; 37 Digest 79, *195*.

G

(2) *Woodall* v. *Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 92 L.T. 292; 53 W.R. 203; 21 T.L.R. 78; affirmed, [1905] 2 Ch. 266; 74 L.J.Ch. 561; 93 L.T. 257; 54 W.R. 7; 21 T.L.R. 581, C.A.; 37 Digest 81, *211*.

(3) *Re Bowen, Lloyd Phillips* v. *Davis*, [1893] 2 Ch. 491; 62 L.J.Ch. 681; 68 L.T. 789; 41 W.R. 535; 9 T.L.R. 380; 37 Sol. Jo. 386; 3 R. 529; 37 Digest 58, *28*.

H

(4) *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460; 1 H. & Tw. 533; 19 L.J.Ch. 33; 15 L.T.O.S. 497; 13 J.P. 778; 14 Jur. 339; 41 E.R. 1343, L.C.; 8 Digest (Repl.) 440, *1308*.

(5) *Re Tyler, Tyler* v. *Tyler*, [1891] 3 Ch. 252; 60 L.J.Ch. 686; 65 L.T. 367; 40 W.R. 7; 7 T.L.R. 654, C.A.; 8 Digest (Repl.) 440, *1307*.

I

(6) *Re Lord Stratheden and Campbell, Alt* v. *Lord Stratheden and Campbell*, [1894] 3 Ch. 265; 63 L.J.Ch. 872; 71 L.T. 225; 42 W.R. 647; 10 T.L.R. 574; 38 Sol. Jo. 602; 8 R. 515; 37 Digest 106, *407*.

(7) *Freeman* v. *Freeman* (1691), 2 Vern. 233; 1 Eq. Cas. Abr. 87; Prec. Ch. 28; 23 E.R. 751; 38 Digest (Repl.) 851, *667*.

(8) *Jervis* v. *Bruton* (1691), 2 Vern. 251; 1 Eq. Cas. Abr. 87, pl. 8; 23 E.R. 762; 7 Digest (Repl.) 183, *161*.

(9) *Collins* v. *Plummer* (1708), 2 Vern. 635; 1 P. Wms. 104; 23 E.R. 1015; 42 Digest 443, *139*.

(10) *Poole's Case* (prior to 1610), cited in Moore, K.B., p. 810; 72 E.R. 920; 37 Digest 83, *220.*

(11) *Tatton* v. *Mollineux* (1610), Moore, K.B. 809.

Also referred to in argument:

Borland's Trustee v. *Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279; 70 L.J.Ch. 51; 49 W.R. 120; 17 T.L.R. 45; 37 Digest 80, *199.*

Muller v. *Trafford*, [1901] 1 Ch. 54; 70 L.J.Ch. 72; 49 W.R. 132; 37 Digest 82, *213.*

Re Oliver's Settlement, Evered v. *Leigh*, [1905] 1 Ch. 191; 74 L.J.Ch. 62; 53 W.R. 215; 21 T.L.R. 61; 37 Digest 68, *102.*

Egerton v. *Earl Brownlow* (1853), 4 H.L.Cas. 1; 8 State Tr.N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 37 Digest 29, *7.*

Sykes v. *Beadon* (1879), 11 Ch.D. 170; 48 L.J.Ch. 522; 40 L.T. 243; 27 W.R. 464; 12 Digest (Repl.) 313, *2417.*

Walsh v. *Secretary of State for India* (1863), 10 H.L.Cas. 367; 2 New Rep. 339; 32 L.J.Ch. 585; 8 L.T. 839; 9 Jur.N.S. 757; 11 W.R. 823; 11 E.R. 1068, H.L.; 8 Digest (Repl.) 442, *1322.*

Chamberlayne v. *Brockett* (1872), 8 Ch. App. 206; 42 L.J.Ch. 368; 28 L.T. 248; 37 J.P. 261; 21 W.R. 299, L.C. & L.JJ.; 8 Digest (Repl.) 439, *1299.*

Collins v. *Blantern* (1767), 2 Wils. 341; 95 E.R. 847; 12 Digest (Repl.) 290, *2229.*

Fisher v. *Bridges* (1854), 3 E. & B. 642; 1 Jur.N.S. 157; 118 E.R. 1283; sub nom. *Bridges* v. *Fisher*, 23 L.J.Q.B. 276; 23 L.T.O.S. 223; 18 J.P. 599; 2 W.R. 706; 2 C.L.R. 928, Ex. Ch.; 12 Digest (Repl.) 310, *2387.*

Action on a covenant in a lease.

The plaintiffs were the successors of the local board of health for the district of Worthing. The defendants were Charles Herbert Heather, Vincent James Heather, and Edward Sayers, being the two devisees and executor respectively under the will of Fanny Heather. By an indenture of lease dated Oct. 1, 1878, made between Fanny Heather and the local board, Fanny Heather devised to the local board a piece of land of about seven acres in Worthing for a term of thirty years as from Sept. 29, 1876, at a yearly rent, the board agreeing for themselves and their successors that the land should be used during the term for the purposes of a public park only. The deed also contained the following covenant:

"Provided always, and it is hereby agreed and declared that in case the said board, their successors or assigns, paying the said rent hereby reserved, and observing, performing, and keeping all the covenants on their part herein contained, shall be desirous, at any time during the said term hereby granted, to purchase the fee simple and inheritance of the said premises at the sum of £1,325, and of such their desire shall give to the said Fanny Heather, her heirs or assigns, six calendar months' previous notice in writing, expiring at the end of any half year of the said term, then and in such case the said Fanny Heather, her heirs or assigns, shall deliver to the said board, their successors or assigns, a copy of the abstract of title to the same premises, which was delivered to her on the occasion of her purchase thereof, such abstract commencing with indenture of May 30, 1832, between Richard Lindup and Jane his wife of the first part, George Newland of the second part, Francis Lindup of the third part, and Richard Newland and James Stubbs of the fourth part, and no prior or other title shall be required. And will, on payment by the said board, their successors or assigns, of the said sum of £1,325, together with interest thereon at the rate of £5 per cent. per annum from the expiration of such notice until payment, and of all rent then accrued, execute a proper conveyance and assurance of the said premises and the inheritance thereof in fee simple unto the said board, their successors and assigns, or as they shall direct; such conveyance or assurance to contain similar covenants on the part of the said board, their successors or assigns, with the said Fanny Heather,

her heirs and assigns, to those hereinbefore contained relative to the user of the said premises solely as a public park, walk, or pleasure ground, and to the erection thereon of no other erection or building except such lodge and other buildings as are hereinbefore referred to (such covenants being so framed as that the burden thereof shall so far as is possible run with the said premises)."

On Aug. 17, 1905, the corporation gave the notice provided for in the covenant, but the defendants contended that the covenant was void as infringing the rule against perpetuities, and refused to convey. The corporation therefore brought this action, claiming a declaration that they were entitled to specific performance of the covenant conferring the option, and in the alternative damages against the estate of Fanny Heather for breach of covenant.

H. Terrell, K.C., and *R. J. Parker* for the plaintiff.
Rowden, K.C., and *C. Stafford Crossman* for the defendants.

WARRINGTON, J.—This is an action for, first, specific performance of a certain contract taken in the form of an option to purchase contained in a lease; secondly, and alternatively, for damages for breach of that contract. The contract is not denied. The defences to it are purely legal. The first defence is that, so far as it is an action for specific performance, it cannot be enforced because in equity, in which court alone specific performance can be granted, it creates an interest in the land, and that interest is void as infringing the rule against perpetuities. The action is defended, so far as it is an action for damages, on the ground that it is a contract which tends to bring about an infringement of the rule against perpetuities, and, therefore, cannot be enforced in a court of law any more than it would be enforced in a court of equity in the way of specific performance.

First with regard to the claim for specific performance. If the covenantee had been an individual, and if the purpose for which the land was to be granted had not been, as it is, a charitable purpose—a point with which I shall have to deal directly—it is admitted that after the decisions of the Court of Appeal in *London and South Western Rail. Co.* v. *Gomm* (1), and my own decision in *Woodall* v. *Clifton* (2), it would be impossible for this court to hold that that contract could be specifically enforced. It is said, however—and I propose to deal with this point first—on the part of the plaintiffs that the purpose for which this land was to be conveyed was a charitable purpose, and therefore, notwithstanding the fact that the interest which the deed creates would in an ordinary case be void for remoteness, the object being charity, it would not be so void. In my opinion no distinction can be drawn on that ground between this case and the ordinary case of a contract with an individual. Although the interest of the charity is created by the contract, it does not become effective until the happening of a future event, and it is the very postponement of its effectiveness which renders it obnoxious to the rule against perpetuities. In my judgment the case in this aspect of it is indistinguishable from the case of a limitation to an individual followed by a limitation to a charity, void because it is not to take effect until a time outside the limits of the rule against perpetuity. I think it is clear in that case the limitation would be void notwithstanding that it is a limitation to a charity.

In *Re Bowen, Lloyd Phillips* v. *Davis* (3) it was decided by STIRLING, J. ([1893] 2 Ch. at p. 491) that

"the principle established by *Christ's Hospital* v. *Grainger* (4) and in *Re Tyler, Tyler* v. *Tyler* (5) that the rule against perpetuities has no application to the transfer in a certain event of property from one charity to another does not extend to cases where (i) an immediate gift in favour of private individuals is followed by an executory gift in favour of charity, or (ii) an immediate gift in favour of charity is followed by an executory gift in favour of private individuals."

A The same principle is illustrated by *Re Lord Stratheden and Campbell* (6). There the testator bequeathed an annuity of £100 to be provided to the Central London Rangers, a volunteer corps, on the appointment of the next lieutenant-colonel. It was held, first, that that bequest was a charitable bequest; and, secondly, that the gift was void because it infringed the rule against perpetuities. There, as in the present case, immediately on the death of the testator, just as here on the execu-
B tion of the deed, the charity obtained an interest—that is to say, they were entitled, if it were not void, to this bequest; but the bequest in that case, as the interest in this case, was to become effective only on the happening of a future event, which was too remote. It seems to me that that case is a direct authority against the contention of the plaintiffs, founded on the argument that the covenantee in this case was a charity.

C I come to the second aspect of the action in which it is a mere action at common law for damages for breach of the contract. Would that contract have been void at common law? That is to say, was it such a contract that a court of law would not entertain an action for damages for its breach? It is a contract to convey land to the purchaser upon the happening of an event which might occur at a more remote period than lives in being and twenty-one years afterwards. In the act of
D making such a conveyance there is nothing illegal—that is to say, if the covenantor chose in the year 1898 to convey this land to the corporation of Worthing she would have been performing a perfectly legal act. The act, therefore, which the covenant binds the covenantor to perform is not an illegal act. What alone is illegal is the limitation of land which is to take effect at a period too remote. How is it that that contract, which is in form a mere personal contract that the covenantor will
E do such an act, becomes a limitation? In a court of common law it would not have that effect. So far as regards the jurisdiction in a court of common law, the covenantor might convey away the land notwithstanding the covenant. He might devise it; he might allow it to descend, and the covenantee would have no means of getting the land either from the grantee or from the devisee or from the heir-at-law. The only right which the covenantee would have had in a court of common
F law would have been to recover damages. In a court of equity the covenant is held to affect the conscience of the covenantor in such a way that he cannot convey away the land to any person who is in the same position as he is himself—that is to say, to a person who is not a purchaser for value without notice; and by the operation of the doctrine of specific performance the covenantee in a court of equity is regarded as having an actual interest in the land to which the covenant applies.
G In other words, in the contemplation of a court of equity, the contract, being for valuable consideration, is executed to the extent for which the interest, which ought under that contract to be created by the subsequent act on the part of the covenantor, is created by the covenant itself.

There is no conflict between the doctrines of law and equity in this respect. The relief given in a court of equity is merely relief supplemental to, and in most cases
H more effectual than, the relief given at common law, but there is no conflict between the doctrines of law and equity, so as to compel one to regard this covenant merely as creating a limitation upon the equitable doctrines. It remains since the Judicature Act, as it did before, a common law contract capable of being enforced in a court of common law without reference to the laws of equity. Realising that difficulty, the defendants are compelled to rest their case upon the contention that the
I contract, though not in a court of common law effecting that which the law regards as against public policy—namely, the tying up of land for a period beyond that allowed by the rule—indirectly tends to bring about the same result. It is there that I join issue with the defendants. It seems to me that, rightly considered, the contract does not tend to bring about that result. It is quite true that the covenantor may, if he pleases, carry it out, and it may be to his advantage to do so, but he is not compelled to carry it out. It seems to me that that argument depends on this fallacy. It is not, in my opinion, the contract which is void because it infringes the rule against perpetuities, but it is the limitation which, by the opera-

tion of the doctrines of the court of equity, it is the effect of the contract to create that is void. The contract remains a valid contract in every respect, but it is the limitation it creates in the contemplation of the court of equity, and it is that alone which is void. It seems to me, therefore, that in principle there would have been in an old court of common law before the Judicature Act no defence to this action; and, further, that in this court also, since the Judicature Act, there is no defence, because for this purpose the court is sitting as a court of common law.

Is there any authority which compels me to say that that opinion which I have already formed on principle is not the correct opinion? I have been referred to three cases reported in 2 Vern.—*Freeman* v. *Freeman* (7), *Jervis* v. *Bruton* (8), and *Collins* v. *Plummer* (9). The only one of those three which in any way helps the defendants is *Jervis* v. *Bruton* (8). The case is very shortly reported, and the report is in these terms (2 Vern. at p. 251):

> "John Morris settles land on his daughter and the heirs of her body, remainder to his own right heirs, and takes a bond from the daughter not to commit waste; the daughter having levied a fine, and afterwards committing waste, the bond was put in suit."

The only report of the judgment is this (ibid.):

> "Per curiam, an idle bond and decreed to be delivered up to be cancelled; and like *Poole's Case* (10) cited in the case of *Tatton* v. *Mollineux* (11), where a recognisance conditioned that the tenant in tail should not suffer a recovery, is decreed to be delivered up, as creating a perpetuity."

It is very difficult to understand that. No reasons are given for the finding that it was an idle bond. There is a note which throws some light on it by the editor of the edition of Vernon's Reports which I have before me. It is edited by John Raithby, and that note states this (ibid.):

> "The settlement was on the daughter in fee, and on her marriage with the plaintiff who had survived her were settled in trust to the use of the plaintiff and his wife (the daughter of the said John Morris) for life, to the use of their heirs begotten by the plaintiff, and for default of such issue, to the heirs of the plaintiff; the plaintiff's wife died without having had any issue, and the decree declared that the bond in question had been ill obtained against the said plaintiff's wife, and that the plaintiff was seised in fee; and decreed the bond to be delivered, and the defendants to pay costs at law (they having proceeded on the bond) and in this suit."

It seems to me that that note throws some light on the report, and that the reason of the finding was not that which at first sight would appear to be the reason if one were to take the report by itself.

But in *Collins* v. *Plummer* (9) we have a case on the other side which may fairly be set against *Jervis* v. *Bruton* (8) even if *Jervis* v. *Bruton* (8) is to be regarded on the point which I have before me. In that case the headnote is this (2 Vern. at p. 635):

> "A. on his marriage settles land to the use of himself for life, then to the wife for life, remainder to the heirs of his body begotten on the wife, remainder to his own right heirs, and covenants in the settlement not to bar the entail nor suffer a recovery; and having one daughter, to whom on his marriage he had given a good portion, he suffers a recovery, and by will devises the estate to his daughter for life, and to her first, etc., sons in tail, with remainders over. On a bill for a specific performance of the covenant, the court would not decree it, but leave the party to recover damages at law for breach of the covenant."

It is plain, therefore, that the court in that case did not hold the covenant to be void at law, because it is difficult to understand why, if the court had so held, it did not exercise the further equitable jurisdiction of granting an injunction to restrain proceedings at law on the covenant when it refused specific performance.

It seems to me that the court in that case regarded the covenant as a valid covenant at law, although it could not be enforced specifically in equity.

Another authority which has been referred to is *London and South Western Rail. Co.* v. *Gomm* (1). That was an action in equity only to enforce a somewhat similar contract to the present one. It was an action, not brought against the covenantor or against the legal personal representative of the covenantor, but brought against the person in whom the land affected by it was then vested. It was, therefore, an action which could not have been brought at common law, and was capable only of being founded on the equitable doctrine of specific performance. KAY, J., before whom the matter first came, said this (20 Ch.D. at p. 576):

> "A contract to buy or sell land and covenants restricting the use of land, though unlimited, are not void for perpetuity. In these latter cases the contracts do not run with the land, and are not binding upon an assign, unless he takes with notice. They are not, properly speaking, estates or interests in land, and are therefore not within the rule";

and he held that the contract did not create an interest in the land. On that last finding his decision was reversed by the Court of Appeal; but the Court of Appeal did not for a moment throw any doubt upon this—that the rule against perpetuities is a rule which is applicable to property, and not a rule which is applicable to contract, and that, but for the fact that what was sought to be enforced was an interest in land which had been created by the contract, the rule against perpetuities would not have had any reference to that case. It is quite true that the judges in the Court of Appeal did use expressions to the effect that the contract was void, but such expressions as that must be taken to be used in reference to the facts of the case which was before them; and they had not to consider any such question as that which I have to consider—namely, whether an action for damages at law could have been brought upon the contract. That some such idea was in the mind of the Master of the Rolls I think appears from the passage where he says this (20 Ch.D. at pp. 580, 581):

> "If, then, the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell, who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land."

Then he goes on to decide that in that view, giving an interest in land, the contract is void or ineffectual; but the Master of the Rolls in that case distinguishes between the personal contract and that which gives an interest in land, and it is in the latter aspect only that he holds the contract to be void.

It seems to me, therefore, that sitting here in this part of the action to administer the common law, I must hold that the covenant is a valid covenant, and that the plaintiffs are entitled to recover damages on its breach against, of course, the estate of the original covenantor. It has been agreed on all hands that at the trial evidence should not be given as to the amount of damages, and I must therefore direct

an inquiry as to the damages, and in default of admission of assets there must be the usual decree for administration of the real and personal estate of Mrs. Heather. A

Solicitors: *John Hands*, for *William Frederick Verrall*, Worthing; *Waller & Co.*, for *Bennett & Marsh*, Worthing.

[*Reported by* D. R. Chalmers-Hunt, Esq., *Barrister-at-Law.*]

B

C

LAW *v.* LLEWELLYN

[Court of Appeal (Romer and Cozens-Hardy, L.JJ.), February 27, 1906]

[Reported [1906] 1 K.B. 487; 75 L.J.K.B. 320; 94 L.T. 359; 70 J.P. 220; 54 W.R. 368; 50 Sol. Jo. 289] D

Slander—Privilege—Absolute privilege—Words spoken by magistrate in the course of judicial proceedings—Words spoken after withdrawal of case.

A magistrate is a judge within the meaning of the rule that defamatory observations made by a judge in the course of his judicial duties are not actionable, even though made without reasonable or probable cause and maliciously and after a charge, relating to which the observations had been made, had been withdrawn. E

The defendant, a magistrate, after acceding to the application of the plaintiff to be permitted to withdraw a criminal charge, made certain defamatory observations concerning him. In an action for slander brought by the plaintiff against the defendant,

Held: the observations were privileged as they were made in the course of the defendant's judicial duties as a magistrate. F

Munster v. *Lamb* (1) (1883), 11 Q.B.D. 588 and *Hodson* v. *Pare* (2), [1899] 1 Q.B. 455 applied.

Allardice and Boswell v. *Robertson* (3) (1830), 1 Dow. & Cl. 495 distinguished.

G

Per Curiam: it would make no difference to the decision if the observations were made before or after leave to withdraw the charge was given as they were all made in the course of one transaction.

Notes. Referred to: *Addis* v. *Crocker*, [1960] 1 Q.B. 87.

As to absolute privilege, see 24 Halsbury's Laws (3rd Edn.) 48 et seq.; and for cases see 32 Digest 102 et seq. H

Cases referred to:

(1) *Munster* v. *Lamb* (1883), 11 Q.B.D. 588; 52 L.J.Q.B. 726; 49 L.T. 252; 47 J.P. 805; 32 W.R. 243, C.A.; 32 Digest 105, *1368*.

(2) *Hodson* v. *Pare*, [1899] 1 Q.B. 455; 68 L.J.Q.B. 309; 80 L.T. 13; 47 W.R. 241; 15 T.L.R. 171; 43 Sol. Jo. 223, C.A.; 32 Digest 108, *1395*. I

(3) *Allardice and Boswell* v. *Robertson* (1830), 1 Dow. & Cl. 495; 6 E.R. 610, H.L.; 32 Digest 104, *1349*.

(4) *Seaman* v. *Netherclift* (1876), 2 C.P.D. 53; 46 L.J.Q.B. 128; 35 L.T. 784; 41 J.P. 389; 25 W.R. 159, C.A.; 32 Digest 106, *1374*.

Also referred to in argument:

Scott v. *Stansfield* (1868), L.R. 3 Exch. 220; 37 L.J.Ex. 155; 18 L.T. 572; 32 J.P. 423; 16 W.R. 911; 32 Digest 104, *1352*.

Hodgson v. *Scarlett* (1818), 1 B. & Ald. 232; 106 E.R. 86; 32 Digest 105, *1366*.

Appeal from a decision of CHANNELL, J., at chambers.

On Jan. 30, 1905, two persons obtained from the plaintiff a sum of £10 by way of loan (on a promissory note to pay £12 10s. in three months) on the faith of certain statements. The loan not having been repaid, the plaintiff took proceedings against the debtors in the county court and in the course of these proceedings the plaintiff, as he alleged, discovered that the loan had been obtained from him fraudulently. He thereupon swore an information at the county police-court, and caused summonses to be issued against the debtors to answer a charge of obtaining the loan by false pretences, but before the hearing of the summonses took place the amount of the plaintiff's claim in the county court proceedings was satisfied. Thereupon the plaintiff, being advised that in the absence of certain witnesses it would be impossible to obtain a conviction against the debtors, decided that he would not proceed further with the prosecution of them, and at the adjourned hearing of the summonses he instructed counsel to ask the magistrates that the charge might be withdrawn upon certain terms as to costs. The matter was accordingly mentioned to the court by the plaintiff's counsel, and leave was given for the charge to be withdrawn. After such leave had been given, however, the defendant, a justice of the peace, who was sitting as chairman of the justices, said that in their opinion this criminal charge had been a "gross attempt to blackmail"; that "it would have been well if the matter had come before the public prosecutor"; and that from what they had heard of the plaintiff "he had been in the habit of trying to extort money from persons by illegal means." The plaintiff then commenced an action in the King's Bench Division against the defendant, alleging by his statement of claim that the defendant meant, and intended to mean, that the plaintiff was a blackmailer, and had brought an unfounded criminal charge against the debtors; and that he had been and was guilty of having committed some criminal offence or offences; and he further alleged that by reason of the same defamatory matter he had been and was greatly injured in his character and reputation and had suffered damage; and he claimed damages accordingly. The defendant applied to have the statement of claim struck out on the ground that it disclosed no reasonable cause of action, the point taken before the master being that the defendant, sitting as a magistrate, was absolutely privileged, and that, therefore, no action would lie against him: *Munster* v. *Lamb* (1). The master was of opinion that there was a question to be tried as to whether the defendant could set up the plea of privilege under all the circumstances, and therefore made no order, but without prejudice to the right of the defendant to set up the point of law in his defence. The defendant then appealed to the judge in chambers (CHANNELL, J.), who was of opinion that no action would lie, but gave the plaintiff leave to appeal. The plaintiff accordingly appealed to the Court of Appeal.

S. T. Evans, *K.C.*, and *Montague Lush*, *K.C.* (with them *Lewis Thomas* and *Harold Stowe*), for the plaintiff.

Eldon Bankes, *K.C.*, and *Hugh Fraser*, for the defendant, were not called upon to argue.

ROMER, L.J.—In my opinion this appeal fails. In opening the appeal leading counsel for the plaintiff said—and in my opinion said rightly—that it was hopeless to contend at the present day that a justice of the peace sitting in petty sessions to dispose of a criminal case which came before him was not acting judicially; and that, consequently, a defamatory statement made in the course of the proceedings before him could not be actionable as against that justice. That was, to my mind, clearly settled beyond controversy at the present day by the two cases of *Munster* v. *Lamb* (1) and *Hodson* v. *Pare* (2). They are both to the same effect, and show that a magistrate is a judge within the meaning of the rule, that observations made by a judge in the course of his judicial duties when sitting as a judge are not actionable, even though it is alleged or suggested that the observations were made without reasonable or probable cause and maliciously. The plaintiff's

junior counsel boldly attempted to re-argue that question, and he did so by reference to a decision of *Allardice and Boswell* v. *Robertson* (3). With reference to that case, all I need say is this: Whether it be law in Scotland at the present time or not, I cannot say; but certainly it is a case dealing with Scottish law, and is not binding upon this court, and is no authority for the proposition for the purpose of which counsel cited it. It is not an authority against the law as I have stated it, and as illustrated by the cases to which I at first referred. It is said that *Allardice and Boswell* v. *Robertson* (3) was referred to without disapproval by LORD COCKBURN, C.J., in *Seaman* v. *Netherclift* (4). All I need say with regard to that is, that, if reference is made to that case, it will be observed that the Lord Chief Justice was not referring to that case for the purpose of approving it, or anything of the sort. It was a case that had been cited to him, and what he said with reference to that case was that it was not an authority precisely for the case which he had to decide then. And that clearly was so. Of course, it formed in nowise a recognition by the Lord Chief Justice that *Allardice and Boswell* v. *Robertson* (3) was an authority in the English courts for the point of law which it purports to decide.

That being so, so far as the law is concerned it is clear that this action against the defendant will not lie, if it be that the observations which are said to have been made by the defendant, and which are said to have been slanderous and malicious, were uttered by him in the course of his duty as magistrate. To my mind, they were clearly uttered under such circumstances as made them privileged. The circumstances are stated in the statement of claim, and shortly they amount to this. The plaintiff had brought a criminal charge against two persons, and when that charge came before the defendant, sitting, as he did, as a justice of the peace in sessions, the plaintiff then stated that he had withdrawn the charge and agreed to pay the costs of the solicitors of the persons against whom the charge had been made, upon their undertaking to bring no action against the plaintiff in respect of the proceedings, which he had instituted. Being a criminal charge, it could not have been withdrawn as a matter of course. Under the circumstances it was clearly impossible for the magistrates to insist upon the charge not being withdrawn—it would have done no good, especially as the magistrates were of opinion that there was no real crime committed by the persons in respect of whom the charge had been made. Under those circumstances he had to state why, in his opinion, nothing could be done except to allow the charge to be withdrawn, and it was upon that he made the observations which are said to be libellous. In my opinion it was clearly within his jurisdiction at that time to have made observations with regard to an impending summons. They were observations made, therefore, in the course of his judicial duty, and consequently are not actionable.

In those circumstances it seems to me that this action is clearly frivolous and vexatious. As I have stated, the law is clear, and the statements in the statement of claim are clear, and, that being so, it appears to me that the learned judge below rightly discharged his duty in striking out the statement of claim as being frivolous and vexatious. I am of opinion that his decision was right, and that the appeal should be dismissed with costs.

COZENS-HARDY, L.J.—I agree.

Leading counsel for the plaintiff pointed out that the court had dealt with the case on the assumption, rightly taken from the statement of claim, that it was in the course of the proceedings that the words complained of were uttered. He then submitted that if the magistrate had said "We will allow this case to be withdrawn" and had then added the defamatory words, then the words would not have been spoken "in the course of the proceedings." He then asked for leave to amend in order that the matter might be determined.

COZENS-HARDY, L.J.—It makes no difference whether the magistrate said at first: "We will allow this case to be withdrawn" and then uttered the words com-

plained of, or whether he said: "In our opinion the facts are so-and-so, and, therefore, the charge should be withdrawn."

ROMER, L.J.—It makes no difference whatever. The observations are made in the course of one transaction. We refuse leave to amend, and we dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Herbert G. Rastall*, for *A. Jestyn Jeffreys*, Neath; *Bell, Brodrick & Gray*, for *T. J. Hughes & Lewis*, Bridgend.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re JOHNSON. SANDY *v.* REILLY

[CHANCERY DIVISION (Farwell, J.), February 23, 1905]

[Reported 92 L.T. 357; 49 Sol. Jo. 314]

Will—Residue—Gift of "household property including house"—Inclusion of leasehold property—Intention that entire residuary estate should pass.

A testatrix by her will appointed executors and trustees, and, after giving certain specific legacies, continued: "With the exception of the above legacies, I direct that the remainder of my household property, including house in M., should be sold, and, after paying funeral, testamentary expenses, and debts, be equally divided" as therein mentioned. The testatrix's personal estate comprised two leasehold houses, shares, money on deposit at the bank, and household furniture.

Held: as the testatrix had included in the gift of "household property" certain leasehold property her intention was that the entire residuary estate should pass.

Gift—Donatio mortis causa—Delivery of subject-matter of gift—Imperfect delivery—Box containing share certificates and personal ornaments handed to friend—Retention of key by donor.

The testatrix shortly before her death had intrusted a parcel containing a box to the care of a friend, and had requested this friend to carry out her instructions. At a subsequent interview the testatrix drew the friend's attention to a small key with a label attached thereto, saying: "If I die, that will be sent to you." On the day of the testatrix's death the key with the label was received by the friend, and the box was found to contain share certificates and valuables, with a paper giving directions as to the persons to whom the testatrix desired the contents of the box to be given.

Held: as the testatrix had retained the key, she had not parted with her dominion over the property contained in the box, and consequently the handing over of the box did not constitute a valid donatio mortis causa.

Notes. Considered: *Re Craven's Estate*, [1937] 3 All E.R. 33. Referred to: *Re Craven, Crewdson* v. *Craven* (1908), 24 T.L.R. 750; *Re Wasserberg, Union of London and Smith's Bank, Ltd.* v. *Wasserberg*, [1914–15] All E.R.Rep. 217; *Re Lillingston, Pembery* v. *Pembery*, [1952] 2 All E.R. 184.

As to descriptions of property in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 236 et seq.; and for cases see 44 DIGEST 711 et seq. As to delivery of donationes mortis causa, see 18 HALSBURY'S LAWS (3rd Edn.) 402–403; and for cases see 25 DIGEST 550 et seq.

Case referred to:

(1) *Hawkins* v. *Blewitt* (1798), 2 Esp. 663, N.P.; 25 Digest 554, *381*.

Also referred to in argument:

Kendall v. *Kendall* (1828), 4 Russ. 360; 6 L.J.O.S.Ch. 111; 38 E.R. 841; 44 Digest 710, *5543*.

Re Powell's Trust (1858), John. 49; 32 L.T.O.S. 252; 5 Jur.N.S. 331; 7 W.R. 138; 70 E.R. 334; 44 Digest 729, *5827*.

Treasury Solicitor v. *Lewis*, [1900] 2 Ch. 812; 69 L.J.Ch. 833; 83 L.T. 139; sub. nom. *Re Dash, Treasury Solicitor* v. *Lewis*, 48 W.R. 694; 16 T.L.R. 559, 25 Digest 552, *371*.

Duffield v. *Elwes* (1827), 1 Bli.N.S. 497; 4 E.R. 959; sub nom. *Duffield* v. *Hicks*, 1 Dow. & Cl. 1, H.L.; 25 Digest 549, *351*.

Moore v. *Moore* (1874), L.R. 18 Eq. 474; 43 L.J.Ch. 617; 30 L.T. 752; 38 J.P. 804; 22 W.R. 729; 25 Digest 531, *209*.

Re Weston, Bartholomew v. *Menzies*, [1902] 1 Ch. 680; 71 L.J.Ch. 343; 86 L.T. 551; 50 W.R. 294; 18 T.L.R. 326; 46 Sol. Jo. 281; 25 Digest 544, *302*.

Reddel v. *Dobree* (1839), 10 Sim. 244; 59 E.R. 607; sub nom. *Riddell* v. *Dobree*, 3 Jur. 722; 25 Digest 554, *382*.

Re Dillon, Duffin v. *Duffin* (1890), 44 Ch.D. 76; 59 L.J.Ch. 420; 62 L.T. 614; 38 W.R. 369; 6 T.L.R. 204, C.A.; 25 Digest 543, *298*.

Adjourned Summonses to determine the construction of a will and the validity of an alleged donatio mortis causa.

The testatrix, Mary Amelia Johnson, in her will dated May 17, 1904, appointed executors and trustees, gave certain specific legacies and continued:

"With the exception of the above legacies, I direct that the remainder of my household property, including house in Mildmay Grove, should be sold, and, after paying funeral, testamentary expenses, and just debts, be equally divided between my four sisters—viz., Mrs. Sandy, Minnie and Louie Reilly, and Florence Reilly."

The testatrix had been suffering for some years previous to the date from cancer, and about May 10, 1904, had asked a friend, Mrs. Mary Potter Birchall, of Stoke Newington, to mind a parcel for her, and "if anything happened to her" to carry out the instructions written in that parcel. On May 17 following, the maid of the testatrix came to the house of Mrs. Johnson with a parcel tied up in brown paper, and asked her to keep it for the testatrix. On the following day Mrs. Birchall called on the testatrix, who asked her to carry out her wishes.

On May 22, 1904, Mrs. Birchall called to see the testatrix who was in hospital awaiting an operation. While the testatrix was getting a handkerchief from a locker a small key with a label attached fell to the floor. The label was addressed to Mrs. Birchall and the testatrix said to her: "If I die, that will be sent to you; that will tell you what to do."

Nothing further passed between the testatrix and Mrs. Birchall on the subject, and on June 7, 1904, an operation was performed on the testatrix, who died on June 10, 1904. On the same day Mrs. Birchall received the key with a label containing her address attached thereto. Surmising that the testatrix was dead, she opened the parcel and found it to contain a box containing certain share certificates, ornaments, jewellery, and plate. With this was a paper signed by the testatrix, which commenced as follows:

"In the event of my death, I, Mary Amelia Johnson, hereby authorise Mrs. Birchall, of 54 Leswin Road, Stoke Newington, to distribute the various gifts herein. To my niece Ethel Sanday, my fifty Venesta shares, curb chain, brooch, and earrings."

There followed a number of names, after each of which an ornament contained in the box was written. The testatrix's will was duly proved by her two executors on July 7, 1904, at the principal Probate Registry. The estate, which comprised

two leasehold houses, shares, money on deposit at the bank, and household furniture, was in net value about £1,160. A summons was taken out by the executors for the construction of the will and other matters incidental to the estate, and the following points came up for determination: (i) Whether the gift of the remainder of testatrix's household property, "including house in Mildmay Grove," passed the whole of her residuary personal estate; (ii) whether the handing over to Mrs. Birchall of the box under the circumstances mentioned constituted a valid donatio mortis causa of the contents of the same. The two points were separately argued.

Manning for a defendant claiming under the residuary gift.
Yardley for another defendant claiming as one of the next-of-kin.

FARWELL, J.—This is a case very near the line either way. It must be noted, however, that the testatrix first appoints trustees whom she must have intended to be trustees of some property or other, but all the legacies that she gives are specific ones. Then it will be noted that the expression "household property" does not represent to this testatrix the meaning that it usually conveys, which is household furniture, as she includes in it by name certain leasehold property. I think I may hold, therefore, that household furniture here means residuary estate.

The point as to the donatio mortis causa was next argued.

Manning for a defendant claiming under the will.
Yardley for a defendant claiming as one of the next-of-kin.
Ball for the executors.
Farwell for a defendant claiming under the alleged donatio.

FARWELL, J.—This is rather a curious point. The question is whether there was sufficient in the delivery of the box to enable me to hold that the testatrix parted with dominion over it. The argument against this is that she retained the key. In *Hawkins* v. *Blewitt* (1) there was more than a retention of the key. Here there was only the retention of the key, and it is said that this fact alone should not prevent me from deciding that here there was a valid donatio mortis causa. Having regard to what the lady is reported to have said to her friend in reference to the key, "If I die, that will be sent to you," it seems clear that she did not intend to part with her dominion over it. If she had intended to part with her dominion, she would not have said this. It seems clear there was no question here of parting with the dominion, and, consequently, there is here no valid donatio mortis causa.

Solicitors: *Rawlinson & Son*; *Claremont & Haynes*.

[*Reported by* J. ARTHUR PRICE, ESQ., *Barrister-at-Law*.]

GOLDSMITHS' COMPANY *v.* WYATT

[Court of Appeal (Sir Richard Henn Collins, M.R., Cozens-Hardy and Farwell, L.JJ), November 16, 17, 19, 30, 1906]

[Reported [1907] 1 K.B. 95; 76 L.J.K.B. 166; 95 L.T. 855; 71 J.P. 79; 23 T.L.R. 107; 51 Sol. Jo. 99]

Trade Mark—Plate—Assay—Hall-mark—Imported watch-cases—Customs Act, 1842 (5 & 6 *Vict.*, *c.* 47), *s.* 59.

Gold and silver watch-cases forming parts of completed watches imported into the United Kingdom are "plate" within the meaning of s. 59 of the Customs Act, 1842, and must be assayed, stamped, and marked under that section before the watches are sold, exchanged, or exposed to sale in the United Kingdom.

Notes. By the Assay of Imported Watch-Cases (Existing Stocks Exemption) Act, 1907, s. 1 (25 Halsbury's Statutes (2nd Edn.) 1129), all watch-cases imported into the United Kingdom from foreign parts before June 1, 1907, are exempted from assay in the United Kingdom and are not subject to the provisions of the Customs Act, 1842, s. 59, or the Revenue Act, 1883, s. 10. By the Hall-Marking of Foreign Plate Act, 1939 (25 Halsbury's Statutes (2nd Edn.) 1237), foreign plate more than 100 years old is exempted from assay, stamping and marking.

Considered: *R.* v. *Wicks*, [1946] 2 All E.R. 529. Referred to: *Waddle* v. *Sunderland Union* (1908), 2 Konst. Rat. App. 506; *Sadler* v. *Whiteman*, [1910] 1 K.B. 868; *Fabergé* v. *Goldsmiths' Co.*, [1911] 1 Ch. 286; *Egan* v. *A.-G.*, [1930] 1 Ch. 238; *Jennings* v. *Kelly*, [1939] 4 All E.R. 464.

As to the marking of gold and silver plate, see 32 Halsbury's Laws (2nd Edn.) 670 et seq.; and for cases see 43 Digest 238, 239. For the Revenue Act, 1883, s. 10, see 21 Halsbury's Statutes (2nd Edn.) 530; for the Customs Act, 1842, ss. 59, 60, see ibid. vol. 25, p. 1099; for the Hall-Marking of Foreign Plate Act, 1904, see ibid. p. 1128; for the Plate (Offences) Act, 1738, see ibid., p. 1040.

Cases referred to:

(1) *R.* v. *Loxdale* (1758), 1 Burr. 445; 97 E.R. 394; 42 Digest 663, *731*.

(2) *Smith* v. *Brown* (1871), L.R. 6 Q.B. 729; 40 L.J.Q.B. 214; 24 L.T. 808; 36 J.P. 264; 19 W.R. 1165; 1 Asp.M.L.C. 56; 1 Digest (Repl.) 169, *555*.

(3) *Clyde Navigation Trustees* v. *Laird* (1883), 8 App. Cas. 658, H.L.; 42 Digest 685, *986*.

(4) *R.* v. *Inland Revenue Comrs.*, *Ohlson's Case*, *Garland's Case*, [1891] 1 Q.B. 485; 55 J.P. 117; 39 W.R. 317; sub nom. *R.* v. *Inland Revenue Comrs.*, *Ex parte Ohlson*, *Ex parte Garland*, *R.* v. *Inland Revenue Comrs.*, *Ex parte Ohlson*, *R.* v. *Inland Revenue Comrs.*, *Ex parte Garland*, 60 L.J.Q.B. 376; 64 L.T. 57; sub nom. *Re Ohlson and Garland* (*Pawnbrokers*) *and Inland Revenue Comrs.*, 7 T.L.R. 121, D.C.; 37 Digest 22, *175*.

(5) *Feather* v. *R.* (1865), 6 B. & S. 257; 35 L.J.Q.B. 200; 12 L.T. 114; 29 J.P. 709; 122 E.R. 1191; 16 Digest (Repl.) 264, *329*.

Appeal by the plaintiffs from a decision of Channell, J., reported [1905] 2 K.B. 586, upon a Special Case stated in an action.

The action was brought by the plaintiffs for the King and for themselves for (i) £40 for penalties under s. 59 of the Customs Act, 1842, and the Plate (Offences) Act, 1738, in respect of the sale and exposing for sale of certain gold and silver watch-cases of foreign manufacture imported into the United Kingdom of Great Britain and Ireland from foreign parts since the commencement of the Customs Act, 1842, which said gold and silver watch-cases were sold and exposed for sale in England before the same had been assayed, stamped, and marked as alleged to be required by the Customs Act, 1842, and the Hall-Marking of Foreign Plate Act, 1904; and (ii) a declaration that the said gold and silver watch-cases are respectively

gold and silver plate within the meaning of ss. 59 and 60 of the Customs Act, 1842, s. 10 of the Revenue Act, 1883, and the Hall-Marking of Foreign Plate Act, 1904. Pursuant to the order of a master a Special Case was stated for the opinion of the court.

The plaintiffs were the Wardens and Commonalty of the Mystery of Goldsmiths of the City of London, a guild and corporation with divers privileges inter alia the searching, assaying, marking, and regulating wrought plate in order to ascertain the standard thereof for the good and safety of the public. The defendant was William Wyatt, carrying on business as a watchmaker, jeweller, and dealer in plate at 198, Ebury Street, Eaton Square, London. On March 14, 1905, four watches, of which two were in silver watch-cases and two in gold watch-cases, were exposed for sale by the defendant at his shop, and were then and there sold by him (the defendant) to one Sir Walter Sherburne Prideaux, an agent of the plaintiffs, for the sum of £7 7s. None of the four watch-cases was battered within the meaning of s. 59 of the Customs Act, 1842, nor were they richly engraved, carved, chased, or set with jewels or other stones, and they were each and all of them of foreign manufacture, and had been imported into the United Kingdom of Great Britain and Ireland since the commencement of the Customs Act, 1842. None of the four watch-cases was wrought or made prior to 1800. In the opinion of the Commissioners of Customs, none of the four watch-cases could be properly described as hand-chased, inlaid, bronzed, or filigree work of an Oriental pattern. The watch-case forming part of watch No. 3 was not incapable of receiving the marks referred to in the Plate (Offences) Act, 1738, or any of such marks by reason of the smallness or thinness thereof. None of the four watch-cases so exposed for sale and sold on Mar. 14, 1905, at the time of the exposure for sale had been assayed or stamped and marked with the marks of the plaintiffs or with the marks of any other duly authorised assay office in the United Kingdom of Great Britain and Ireland. All the watch-cases bore Swiss government hall-marks, indicating the true standard of gold or silver employed in their manufacture, and the dome of the watch-case No. 3 bore the mark "cuivre," denoting that the same was of base metal.

No legal proceedings had been instituted by the plaintiffs since 1842 in respect of the sale and exposing for sale of foreign watch-cases forming part of watches imported into the United Kingdom of Great Britain and Ireland and sold or exposed for sale before the same had been assayed, stamped, and marked. Gold and silver watch-cases forming part of gold and silver watches imported into the United Kingdom of Great Britain and Ireland since the passing of the Revenue Act, 1883, had not been entered to be warehoused nor deposited in a bonded warehouse, but had been delivered for home use before they had been assayed, stamped, and marked. All highly finished articles of foreign plate, after being assayed, stamped, and marked by an assay officer, had to go back to the shop for the marks to be "set" and "finished" before such articles could be placed on the market. The assaying, stamping, and marking of British-made watch-cases was invariably performed while the cases were in the rough and before they were polished, and before the movements were inserted therein. Foreign-made watch-cases were never imported into the United Kingdom without being made up into finished watches, but formerly such cases when intended to be assayed and marked were, like British watch-cases, sent to the assay offices in an unfinished state, and were subsequently "finished."

The points of law raised by the Special Case for the opinion of the court were: (i) Whether the said gold and silver watch-cases forming part of the said watches were respectively gold and silver plate within the meaning of ss. 59 and 60 of Customs Act, 1842, s. 10 of the Revenue Act, 1883, and the Hall-Marking of Foreign Plate Act, 1904; (ii) whether upon the facts set out in the Special Case and agreed between the parties the defendant was liable to penalties under the Customs Act, 1842, which penalties are defined by the Plate (Offences) Act, 1738, in respect of the sale and exposing for sale of any one or more of the said gold and silver watch-cases. CHANNELL, J., held that gold and silver watch-cases, forming

parts of complete watches imported into the United Kingdom were not "gold and silver plate" within the meaning of s. 59 of the Customs Act, 1842; he therefore answered both the questions raised in the Special Case in the negative and directed judgment to be entered for the defendant. The plaintiffs appealed.

The Customs Act, 1842, provides:

'Section 59. All gold and silver plate, not being battered, which shall be imported from foreign parts after the commencement of this Act and sold, exchanged or exposed to sale within the United Kingdom of Great Britain and Ireland, shall be of the respective standards now required for any ware, vessel, plate, or manufacture of gold or silver wrought or made in England; and no gold or silver plate so to be imported as aforesaid, not being battered, shall be sold, exchanged, or exposed to sale within the said United Kingdom, until the same shall have been assayed, stamped, and marked, either in England, Scotland, or Ireland, in the same manner as any ware, vessel, plate or manufacture of gold or silver wrought or made in England, Scotland, or Ireland respectively is or are now by law required to be assayed, stamped, and marked; and every goldsmith, silversmith or other person whatsoever, who shall sell or expose to sale in England, Scotland, or Ireland any gold or silver plate so to be imported as aforesaid, and not being battered, before the same shall have been so assayed, stamped, and marked as aforesaid shall be subject and liable to the like penalties and forfeitures in all respects and to be recoverable in the same manner, as the penalties and forfeitures now by law imposed upon goldsmiths and silversmiths selling, exchanging, or exposing to sale in England, Scotland, or Ireland respectively any ware or manufacture of gold or silver plate made or wrought in England, Scotland, or Ireland respectively, and not assayed, stamped, and marked as required by law: Provided always, that no article or ware of gold or silver so to be imported as aforesaid shall be liable to be assayed, stamped, or marked as aforesaid which would not be liable to be assayed, stamped, or marked if it had been wrought or made in England."

J. Eldon Bankes, K.C., and *Graham Campbell* for the plaintiffs.

Sir Robert Finlay, K.C., and *Frank Newbolt* (*Sebastian* with them) for the defendants.

Cur. adv. vult.

Nov. 30, 1906. **FARWELL, L.J.**, read the following judgment of the court.— The question in this case is whether gold and silver watches imported from abroad as completed articles must be assayed and stamped by the Goldsmiths' Company under s. 59 of the Customs Act, 1842. It is not disputed that such watches if made in the United Kingdom, and that watch-cases of gold and silver if imported into the United Kingdom without works, must be so assayed and stamped; but it is contended, and CHANNELL, J., has held, that the completed article is under no such liability. The question depends upon the construction of s. 59 of the Customs Act, 1842, a section which has nothing to do with customs, but is in fact, although not in name, an amendment or extension of the existing Act for preventing frauds and abuses in gold and silver ware, the Plate (Offences) Act, 1738.

The prevention of adulteration of gold and silver and the preservation for that purpose of a fixed standard of these metals, authenticated by test and mark, have been the subject of divers statutes from an early date. The Plate (Offences) Act, 1738, recites statutes commencing with 28 Edw. 1, c. 20 [repealed] and states in its preamble that

"the standards of the plate of this kingdom are both for the honour and riches of this realm and so highly concern His Majesty's subjects that the same ought to be most carefully observed and all deceits therein to be prevented as much as possible."

A Section 1 forbids in England the working or making of any gold or silver vessel, plate, or manufacture of gold or silver of less than a fixed fineness. Section 2 excepts jewellers' work—namely, gold or silver wherein any jewels or other stones are set, jointed night earrings of gold, and gold springs of lockets. Section 5 forbids the sale or exportation of "any gold or silver vessel, plate, or manufacture of gold or silver" until it has been marked with the Goldsmiths' marks. Section 6 B excepts a number of small articles such as rings, sleeve buttons, rims of snuff-boxes, stoppers to glass bottles, and the like, and also

> "any gold or silver vessel, plate, or manufacture of gold or silver so richly engraved, carved, or chased or set with jewels or other stones as not to admit of an assay to be taken of or a mark to be struck thereon without damaging, C prejudicing, or defacing the same."

Section 8 imposes a penalty on (amongst other things) marking with any counterfeit mark "any wrought plate of gold or silver whatsoever." Section 9 recites that great frauds are daily committed by the private working of "silver plate," and provides that any working goldsmith or silversmith who shall work "any gold or silver vessel, plate, or manufacture of gold or silver whatsoever" by the Act D required to be marked, shall send with every parcel of such gold or silver a memorandum containing the date, name, and abode of worker and "all the species in such parcel of plate and the number of each species." Section 11, after reciting that it may be necessary to use a greater quantity of soder in or about one piece of wrought plate than another, provides that the wardens shall determine what soder is necessary in or about "every piece of plate which shall be brought E or sent" to the assay office to be marked. Section 13 recites that the Goldsmiths' Company have for many years been at great expense in assaying and marking "wrought plate" and

> "the same hath of late years very much increased by their assaying and marking several sorts of small wares of gold and silver which were not here-F tofore usually assayed and marked, and of which there are much greater quantities now made than were heretofore made"

and proceeds to authorise certain charges on "any piece or parcel of wrought plate of gold or silver" not exceeding (amongst others)

> "for assaying, trying, and marking gold watch-cases or gold watch boxes, G tenpence a piece."

And s. 20 provides for the hours during which the assay office shall be kept open "for the taking in plate" and "if any parcel of plate" be found to be of coarser alloy than the proper standard, the Goldsmiths' Company are authorised to break and deface "such parcel of plate."

H It is reasonably clear that "plate" is used in this Act in two distinct significations—first, when used in conjunction with "vessel or manufacture of gold or silver" it means dish or platter as contrasted with cup or bowl; secondly, when used by itself, it connotes "plate" as a genus including as species vessel, dish, and every other form of gold or silver manufacture except the jewellers' work mentioned in s. 2, and the rings and other articles mentioned in s. 6, but I including articles so far removed from any ordinary meaning of "plate" as watch-cases, snuff-boxes, hooks for watch chains, and buckles. It is not nor could it be contended that the insertion of works within a watch-case could take it out of this Act, nor that composite articles do not come within the Act; the provisions of s. 11 are alone enough to show that the Act extends to composite articles. The construction of this Act is important because, in our opinion, the principle laid down by LORD MANSFIELD in 1758 in *R.* v. *Loxdale* (1) is as sound now as it was then, and has often been acted upon by the courts—e.g., in *Smith* v. *Brown* (2). LORD MANSFIELD says (1 Burr. at p. 447):

"Where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other." A

Section 59 of the Customs Act, 1842, obviously refers to and extends the Plate (Offences) Act, 1738, although it does not mention it in express terms, and although all the other sections of the later Act relate to different matters. The Act is professedly a Customs Act, but it relates to other matters. For instance, s. 39 extends an Act regulating the admeasurement of merchant shipping. The object of s. 59 is to extend the provisions of the Plate (Offences) Act, 1738, with respect to assaying and marking to gold and silver plate (not being battered) imported from foreign parts; and in such a section it is reasonable to expect that if the legislature has adopted the phraseology of the earlier Act, it intends that such phraseology shall have in the later Act the same meaning that it bears in the earlier. B C

We have already shown that "plate," when used by itself in the earlier Act, and not in collocation with "vessel or manufacture of gold or silver," connotes the genus "plate"; and when we find "gold and silver plate" and "ware, vessel, plate, or manufacture of gold or silver" in s. 59 of the later Act, we conclude that the same meanings are to be attached to them as in the earlier Act. This is borne out by the proviso at the end of s. 59. The Plate (Offences) Act, 1738, excepted a number of small articles under ss. 2 and 6, which but for the exception would have fallen into the category of "plate," and s. 59 follows this by first providing for the stamping of plate, and then excepting from that category the same articles that are excepted therefrom in the earlier Act. D E

Reference was made by counsel for the defendants to the schedule which contains a list of articles on which Customs duties were imposed and the amount of such duties, and reliance was placed on the fact that plate appears in class 6 and gold and silver watches in class 19 as different articles. But this is not material. The tables refer to s. 40, and are for the purpose of taxation; s. 59 is for a different purpose altogether, and we think that neither the Customs clauses and the tables in this Act, nor any of the numerous other Customs Acts cited to us, have any bearing on the construction of s. 59. Lord Mansfield's principle is expressly confined to Acts in pari materia, and it would be especially dangerous to apply phrases in taxing Acts, where for the purpose of increasing revenue words are often given by definition in the Act a wide and unusual signification, to statutes relating to other purposes. F G

Finally it is apparent from the Acts referred to above, and especially from the preamble to the Plate (Offences) Act, 1738, that the aim and object of the legislature was to set up and preserve standards for all gold and silver manufactured articles in England (with the exception of the small articles already mentioned); and it is difficult to find any ground on which it can be suggested that the legislature meant imported gold and silver watches to be excepted, when it is admitted that gold and silver watch-cases must be stamped, and the more so, because it is not a question of taxation, but of preserving uniform standards for all manufactured articles of gold or silver in the kingdom. It was suggested that foreign watches could not be assayed and stamped after they were completed, but the facts stated in the Special Case do not amount to this, and we apprehend that it is a mere question of convenience. H I

One or two points urged by counsel and mentioned in Channell, J.'s judgment remain to be noticed. It is said that no one would use "plate" as including gold and silver watches in common parlance. We are not concerned to dispute this, but the question is not as to the meaning of the word "plate" in ordinary language, but in Acts of Parliament, where it undoubtedly includes gold and silver watch-cases. If a gold or silver watch-case is "plate," we fail to see why the insertion of works makes it any less "plate" than it was before such insertion; it is "plate" by reason of the gold or silver metal in it, and the metal is unchanged

whether the article remains a watch-case or develops into a watch. It was urged that there had been a uniform practice since the Customs Act, 1842, of treating watches imported from abroad as exempt from assay. The Special Case states no such usage. The facts set out fall far short of it. But in our opinion the principle of contemporanea expositio cannot be applied to so modern a statute. LORD WATSON has expressed the true view in *Clyde Navigation Trustees* v. *Laird* (3) (8 App. Cas. at p. 673):

> "I have only to add that, in my opinion, such usage as has in this case been termed contemporanea expositio is of no value whatever in construing a British statute of the year 1858. [His Lordship was speaking in 1883.] When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period. But I feel bound to construe a recent statute according to its own terms, when these are brought into controversy, and not according to the views which interested parties have hitherto taken."

The utmost that could be said in the present case (if the facts stated amount to usage) would be, as LORD BLACKBURN suggests at page 670 of the same case, that any court would be cautious, and not decide unnecessarily against it. The only authority referred to by counsel for the defendants was a dictum of STEPHEN, J., in *R.* v. *Inland Revenue Comrs., Ohlson's Case* (4); but we doubt if he intended to say anything more than is expressed by LORD BLACKBURN above. The argument that traders have embarked in business on the strength of this usage is not supported by any facts set out in the Special Case, and would be disposed of, if alleged, by *Feather* v. *R.* (5). The Merchandise Marks Act, 1887, was referred to, but it is not in pari materia. The compulsory identification of foreign-made articles as such has no connection with the standard of gold and silver articles imported into this country. With all respect, therefore, we are unable to agree with CHANNELL, J. His judgment must be discharged, and the two questions in the Case should be answered in the affirmative, and the defendants must pay the costs here and below.

Appeal allowed.

Solicitors: *Prideaux & Sons*; *James & James.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

Re FLEW. Ex Parte FLEW

[Court of Appeal (Vaughan Williams, Romer and Cozens-Hardy, L.JJ.), December 16, 19, 1904]

[Reported [1905] 1 K.B. 278; 74 L.J.K.B. 280; 92 L.T. 333; 53 W.R. 438; 12 Mans. 1]

B

Bankruptcy—Scheme of arrangement—Approval by court—"Reasonable security" for payment of statutory composition—Speculative scheme—Refusal to approve scheme even though sanctioned by creditors—Scheme depending on conditional releases negotiated by debtor—Bankruptcy Act, 1890 (53 & 54 *Vict.*, *c.* 71), *s.* 3 (9).

C

Although the court will generally be reluctant to refuse to approve of a scheme of arrangement between a debtor and his creditors which has been duly approved by the creditors, especially where the estate will require considerable expense in its realisation, yet the court will consider, under the Bankruptcy Act, 1890, s. 3 (9), whether the scheme is for the benefit of the creditors. Where the court considered a scheme very speculative, and that it did not provide reasonable security for the payment of 7s. 6d. in the pound on all the unsecured debts provable against the debtor's estate, the court refused to approve of it although the creditors had duly expressed their approval.

D

Per Curiam: It is not easy to obtain the approval of a scheme depending upon conditional releases negotiated by a debtor, but it may be possible where there has been a full disclosure of all the facts and all the negotiations.

Re Pilling, Ex parte Board of Trade (1), [1903] 2 K.B. 50, considered.

E

Bankruptcy—Adjudication—Refusal to approve scheme of arrangement—Immediate adjudication only in exceptional circumstances.

Where the court has refused to approve of a proposed scheme of arrangement between a debtor and his creditors, an immediate adjudication of bankruptcy will only be made against the debtor in the most exceptional circumstances.

F

Notes: The Bankruptcy Act 1890, s. 3 (9) has been replaced by the Bankruptcy Act, 1914, s. 16 (10) which reduces the amount for which security need be provided from 7s. 6d. in the pound to 5s. in the pound.

As to compositions and schemes of arrangement under the Bankruptcy Acts, see 2 Halsbury's Laws (3rd Edn.) 341–348. For cases see 4 Digest (Repl.) 190, and 5 Digest (Repl.) 1156–1164. For the Bankruptcy Act, 1914, s. 16 (10), see 2 Halsbury's Statutes (2nd Edn.) 343.

G

Case referred to:

(1) *Re Pilling, Ex parte Board of Trade*, [1903] 2 K.B. 50; 72 L.J.K.B. 392; 88 L.T. 667; 51 W.R. 465; 19 T.L.R. 388; 47 Sol. Jo. 435; 10 Mans. 142, C.A.; 5 Digest (Repl.) 1161, *9384*.

H

Also referred to in argument:

Re Bottomley, Ex parte Bottomley (1893), 10 Morr. 262; 5 Digest (Repl.) 1161, *9381*.

Re Burr, Ex parte Board of Trade, [1892] 2 Q.B. 467; 61 L.J.Q.B. 591; 66 L.T. 553; 8 T.L.R. 515; 9 Morr. 133, C.A.; 4 Digest (Repl.) 190, *1722*.

I

Appeal by F. R. Flew and J. P. Flew, against whom a receiving order had been made, from the refusal by a registrar to approve of a scheme of arrangement by the debtors with their creditors.

The debtors carried on business as builders, and a receiving order was made against them on July 15, 1904, on the petition of a creditor. On Aug. 23, 1904, an adjourned meeting of the creditors was held, and a resolution was duly passed accepting the following scheme of arrangement proposed by the debtors:

"1. That the property of the debtors which would become divisible amongst their creditors, if they were adjudged bankrupt under these proceedings, shall

vest in the trustee hereinafter mentioned, and that such trustee shall administer the aforesaid property in the like manner and with the like powers and duties and subject to the like conditions in all respects as though the debtors had been adjudged bankrupt, and such trustee aforesaid had been appointed trustee in the bankruptcy. 2. To pay in full, forthwith on the approval by the court of this scheme, all Board of Trade and court fees then due, including the fees and expenses of the official receiver. 3. To pay in full, forthwith on the approval by the court of this scheme, all preferential debts directed by the Bankruptcy Act, 1883, and the Preferential Payments in Bankruptcy Act, 1888, to be paid in priority to other debts, and also all proper fees, costs, charges, and expenses of and incidental to the proceedings under the bankruptcy petition and of and incidental to this arrangement, including the costs, charges, and expenses, and the remuneration of the trustee for his services. 4. To pay to all their unsecured creditors in respect of all debts provable under the receiving order made against the debtors, and in full satisfaction and discharge of the same, a composition of 20s. in the pound, payable in instalments of not less than 5s. in the pound as and when the realisation of the debtors' assets will allow. 5. The payment of the aforesaid preferential debts, fees, costs, charges, and expenses, and of the said composition to be secured by the vesting of the property of the debtors in a person to be appointed by the creditors as trustees subject to and in terms of clause 1 of this scheme. 6. That on the approval by the court of this scheme of arrangement the receiving order be discharged (and the order of adjudication annulled). 7. That . . . [five persons named] be appointed the committee of inspection under this proposal to superintend the carrying out of the proposal by the trustee, with power to fix the trustee's remuneration. 8. That in consideration of this scheme and upon approval thereof by the court, and only in such case, the mortgagees under mortgages dated . . . [being mortgages of property belonging to the debtors] agree not to foreclose for a period of twelve months from the date of such approval, provided the same is obtained on or before the 31st day of October, 1904, and, in the event of the above-named trustee realising or attempting to realise the said properties, to assist him so far as they can to realise the same as far as possible in the interests of the unsecured creditors, subject nevertheless to the payment in full to the mortgagees of all moneys owing under their security. 9. That upon the approval by the court of this scheme, and only in such case, family creditors having claims amounting to £820, whilst reserving their rights to prove and vote at the meetings of creditors or upon this scheme, are prepared to postpone their claims to dividend until all other unsecured creditors have received 20s. in the pound.

The official receiver's report, dated Oct. 20, 1904, stated that, according to the debtors' joint statement of affairs, their joint liabilities to rank for dividend amounted to £5,369. Sixty-nine joint creditors had sent in proofs of debts amounting to £5,281, and several others were expected to send in proofs. The official receiver estimated that, exclusive of debts which the debtors considered were fully secured, the total debts which would rank for dividend would amount to £5,391, and he considered there were preferential debts amounting to £151. The statement of affairs estimated that the joint assets would produce £29,910 7s. 10d., and consisted of book debts estimated to produce £79 7s. 10d., and equities of redemption of various properties, nearly all of which were blocks of flats which had been erected or were in course of erection by the debtors, which were estimated at £29,831; but the official receiver considered there was no possibility of any such amount being realised. Each of the debtors stated that he had neither separate estate nor separate unsecured liabilities. The official receiver further reported.

"That the debtors' assets are not of a value equal to 10s. in the pound on the amount of unsecured liabilities; that the debtors have brought on their

failure by rash and hazardous speculation; and, with regard to the debtors' proposal, that it cannot be regarded as reasonable or as providing the security required by s. 3 (9) of the Bankruptcy Act, 1890—i.e., reasonable security for payment of not less than 7s. 6d. in the pound on all the unsecured debts provable against the debtors' estate."

The debtors' application for the approval of the scheme was supported by sixty-seven creditors, whose debts amounted to £5,315, out of seventy-eight, whose debts amounted to £5,505.

The registrar refused to approve of the scheme, on the grounds that the agreement by some of the creditors to postpone their claims for dividends conditionally, and by certain mortgagees to abstain from foreclosure for twelve months, brought the case within *Re Pilling, Ex parte Board of Trade* (1); and he also considered the scheme too speculative. The order refusing the approval stated that

"The court being satisfied that the case is not one in which the court would be required, if the debtors were adjudged bankrupt, to refuse an order of discharge, and being satisfied that facts have been proved which would justify the court in refusing, qualifying, or suspending an order of discharge, but that, having regard to the nature of such facts, and the court being of opinion that such scheme of arrangement was too speculative and not reasonable or calculated to benefit the general body of the creditors,"

the application to approve the scheme was refused. The debtors appealed.

The Bankruptcy Act, 1890, provided by s. 3 (9),

"If any facts are proved on proof of which the court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, the court shall refuse to approve the proposal, unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate."

Muir Mackenzie for the debtors.

Carrington for the creditors.

The Attorney-General (*Sir Robert Finlay*) and *S. G. Lushington*, for the official receiver, were not called on.

Dec. 19, 1904. **VAUGHAN WILLIAMS, L.J.**—I think that this appeal must be dismissed. I base my judgment on one point, and on one point only. [His Lordship read sub-s. (9) of s. 3 of the Bankruptcy Act, 1890, and continued:] In my judgment, in this scheme there is no such security as is there referred to. I am of opinion that this scheme is a very speculative scheme indeed, and that it does not provide reasonable security even for 7s. 6d. in the pound. I am quite aware that the learned registrar in his judgment said that, as there was a proposal to pay here 20s. in the pound, it may be he had not to decide what is the meaning of "unsecured debts probable against a debtor's estate" in sub-s. (9). But, in my judgment, we are bound to consider, amongst other matters, what sort of security is afforded to the creditors. Generally speaking, and especially where there is an estate which may require a considerable expenditure of money to realise it, the court would be reluctant to refuse to approve any scheme that was passed by the creditors unanimously, or practically unanimously, because primâ facie the creditors are the persons who are most interested and best able to judge whether a scheme is or is not for their benefit. That is the course the court would generally adopt in such a case. But it seems to me that it is always open to the court to consider whether the scheme is or is not for the benefit of the creditors, although, according to the general practice as I understand it, the court is very reluctant to overrule the wishes of the creditors in respect of an estate in the realisation of which they, and they alone, are interested. This case is obviously one to which, if the scheme had been for the payment of anything less than 20s. in the pound, sub-s. (9) of s. 3 of the Act of 1890 would necessarily

A have applied, and under these circumstances it seems to me that we ought to affirm the decision of the learned registrar and dismiss this appeal.

Other points are discussed in the judgment of the learned registrar, such as the effect of the conditional withdrawal of the claims of certain persons interested, mortgagees, and what are called "family creditors." It is not easy, to say the least, to get a scheme approved in a case in which the debtor himself is party B to this sort of conditional arrangement. The case of *Re Pilling, Ex parte Board of Trade* (1), makes it difficult to do so, but I do not go the length of saying that in no case would it be possible, if the court thought it had full disclosure of all the facts and all the negotiations, for a scheme to be approved. Therefore, for the reasons I gave, I think that this appeal must be dismissed.

C **ROMER, L.J.**—I also think that this scheme (if it can be properly called a scheme) is one that the court ought not to sanction. I say this for the reasons given by my Lord, and also because I think there is a good deal in what MR. REGISTRAR GIFFARD said at the end of his very careful judgment—namely,

> "What the creditors will risk is sufficiently clear. The whole of the assets will be put out of the reach of the court, while the debtors through their trustee D continue to carry on a speculation very like the speculation which the official receiver has already described as 'rash and hazardous,' and as contributing to bringing about their bankruptcy."

COZENS-HARDY, L.J.—I agree.

E Counsel for the official receiver, asked that an immediate adjudication of bankruptcy might be made against the debtors under s. 20 of the Bankruptcy Act, 1883.

VAUGHAN WILLIAMS, L.J.—We think that such an order ought to be made only in the most exceptional circumstances.

Solicitors: *T. Blanco White; Solicitor to Board of Trade.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

BISHOP OF CREDITON *v.* BISHOP OF EXETER

[CHANCERY DIVISION (Swinfen Eady, J.), July 14, 1905]

[Reported [1905] 2 Ch. 455; 74 L.J.Ch. 697; 93 L.T. 157; 54 W.R. 156]

B

Deed—Alteration—Validity—Alteration to carry out intentions of parties.

A deed conveying the advowson of a church was, in October, 1899, signed, sealed, and delivered by all the parties to it but the bishop of E. It was intended that the deed should bear the date upon which it was executed by the Bishop of E., and in the engrossment the day and month were left blank, but the words "eighteen hundred and ninety-nine" were written. The deed was sent to the Bishop of E. on Nov. 4, 1899. He executed it on Jan. 26, 1900, and the date of his execution was inserted in the deed, and "eighteen ninety-nine" altered to "nineteen hundred."

C

Held: the deed was valid, as the alteration was only to carry out the intention of the parties.

D

Notes. As to alteration of written contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 176–178; and for cases see 12 DIGEST (Repl.), 405–414.

Cases referred to:

(1) *Pigot's Case* (1614), 11 Co. Rep. 26 b; 77 E.R. 1177; sub nom. *Winchcombe* v. *Pigot*, 2 Bulst. 246; sub nom. *Winscombe* v. *Piggott*, 1 Roll. Rep. 39; sub nom. *Anon.*, Moore, K.B. 835; 12 Digest (Repl.) 405, *3134*.

E

(2) *Aldous* v. *Cornwell* (1868), L.R. 3 Q.B. 573; 9 B. & S. 607; 37 L.J.Q.B. 201; 16 W.R. 1045; 12 Digest (Repl.) 405, *3135*.

(3) *Hudson* v. *Revett* (1829), 5 Bing. 368; 2 Moo. & P. 663; 7 L.J.O.S.C.P. 145; 130 E.R. 1103; 12 Digest (Repl.) 407, *3145*.

(4) *Anon.* (1566), 3 Dyer, 261b; 73 E.R. 580; 17 Digest (Repl.) 358, *1643*.

F

Also referred to in argument:

Re Howgate and Osborn's Contract, [1902] 1 Ch. 451; 71 L.J.Ch. 279; 86 L.T. 180; 12 Digest (Repl.) 411, *3177*.

Adsetts v. *Hives* (1863), 33 Beav. 52; 2 New Rep. 474; 9 L.T. 110; 27 J.P. 691; 9 Jur.N.S. 1063; 11 W.R. 1092; 55 E.R. 286; 12 Digest (Repl.) 407, *3150*.

Doe d. Lewis v. *Bingham* (1821), 4 B. & Ald. 672; 106 E.R. 1082; 12 Digest (Repl.) 407, *3156*.

G

Action for a declaration.

It was desired to vest the advowson of a new parish in trustees. The instrument for effecting this purpose was signed, sealed, and delivered by all parties other than the Bishop of Exeter in October, 1899. In the engrossment the day and month were left blank, but the year "eighteen ninety-nine" was written. All parties intended the deed to bear the date of its execution by the Bishop of Exeter. The Bishop of Exeter executed it on Jan. 26, 1900, and the date was filled up and "nineteen hundred" written instead of "eighteen ninety-nine." The plaintiff asked for a declaration that the advowson was validly vested in him by the deed.

H

Austen-Cartmell for the plaintiff.

I

SWINFEN EADY, J.—In my judgment there is no doubt that the instrument was effective to vest the advowson in the plaintiff and the vicar. The instrument in question was in October 1899, signed, sealed, and delivered by all parties but the Bishop of Exeter. The allegation made in the statement of claim is not disputed, that it was the intention of all parties to execute an instrument to be dated the day of its execution by the bishop, and that the date was left blank for that purpose. In the engrossment are the words "eighteen hundred and ninety-nine." It was, perhaps, contemplated that the bishop would execute in

A that year, as the deed was sent to him on Nov. 4, 1899. The bishop executed it on Jan. 26, 1900, and the date of his execution was inserted in the deed. If the year had been left blank, no alteration would have been necessary beyond filling the blanks, but, as it was, "eighteen ninety-nine" was altered to "nineteen hundred." That was only technically an alteration, made to carry out the intention of all parties. *Pigot's Case* (1) only establishes that when any deed is altered in B a material point without the privity of the obligee it becomes void. In that case it was found as a fact the addition was made by a stranger without the privity of the plaintiff in a point not material, and judgment was given for the plaintiff. In the case (4) referred to in *Pigot's Case* (1), the alteration was made by the lessee. In *Aldous* v. *Cornwell* (2), LUSH, J., says (L.R. 3 Q.B. at p. 579):

C "This being the state of the authorities, we think we are not bound by the doctrine in *Pigot's Case* (1), or the authority cited for it (3 Dyer, 261b); and, not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice anyone destroys the validity of the note."

In other words, where the alteration is not material, *Pigot's Case* (1) is not an D authority that the deed is void. *Hudson* v. *Revett* (3) is not immaterial. The agreement was for the deed to take effect when the blanks were filled up. The plaintiff is entitled to the declaration he asks, that the advowson was effectually vested in the trustees by the deed.

Solicitors: *Ravenscroft, Woodward & Co.*

E [*Reported by* G. B. HAMILTON, ESQ., *Barrister-at-Law.*]

F

Re EASTERN INVESTMENT CO., LTD.

[CHANCERY DIVISION (Warrington, J.), December 13, 1904]

G [Reported [1905] 1 Ch. 352; 74 L.J.Ch. 281; 92 L.T. 359; 53 W.R. 186; 49 Sol. Jo. 119; 12 Mans. 27]

Company—Winding-up—Voluntary winding-up—Stay of proceedings—After registration of return, but within statutory three months—Need to keep company on foot for purposes of amalgamation—Companies Act, 1862, (*25 & 26 Vict., c.* 89), *ss.* 89, 138, 143.

H A company went into voluntary liquidation with a view to amalgamation with another company and made the necessary return. It was subsequently discovered that certain assets of the old company could not be transferred to the new company within the period of three months at the expiration of which time the old company would automatically cease to exist. Before the expiration of the three months application was made for an order to stay the proceedings in the winding-up.

I **Held:** the court had jurisdiction after the registration of the return but before the expiration of three months to make an order, in the matter of the voluntary winding-up of a company, to stay all proceedings in relation to the winding-up and so keep the company on foot.

Re Cookhaven Mining Co. (1) (1866), L.R. 3 Eq. 69, considered.

Notes. The Companies Act, 1862, ss. 89, 138, 143 have been repealed; see now the Companies Act, 1948, ss. 256 (1), 307 (1) (2), 290 (3) (4), respectively; 3 HALSBURY'S STATUTES (2nd Edn.), 662, 693, 683, 684.

As to the stay of winding-up proceedings, see 6 HALSBURY'S LAWS (3rd Edn.), 702; and for cases see 10 DIGEST (Repl.) 1105, 1106.

Cases referred to:

(1) *Re Crookhaven Mining Co.* (1866), L.R. 3 Eq. 69; 36 L.J.Ch. 226; 12 Jur.N.S. 872; 15 W.R. 28; sub nom. *Re Crinkhaven Co.*, 15 L.T. 169; 10 Digest (Repl.) 1102, *7614.*

(2) *Scottish Fluid Beef Co., Ltd.* v. *Auld* (1898), 25 R. (Ct. of Sess.) 1056; 10 Digest (Repl.) 1141, **3342.*

Motion for a postponement of the automatic dissolution of a company.

In April, 1903, an agreement was entered into with a view to the amalgamation of two companies, under which the assets of the Eastern Investment Co., Ltd., were to be transferred to a new company in consideration of certain fully paid-up shares in the new company. Among the assets to be transferred were certain interests and participations in mining claims in the Transvaal, which were entered upon the local registry in the names of trustees in trust for the persons equitably entitled (including the company) in various defined shares and proportions. In May, 1903, the company went into voluntary liquidation; the liquidator transferred some of the assets to the new company, and directed the persons in whose names the aforesaid mining claims were entered in the registry to hold the same in trust for the new company. The liquidators then made up the account required by s. 142 of the Companies Act, 1862, called a general meeting of the company in accordance with that section, and made the return to the Registrar of Joint Stock Companies under s. 143, with the result that the company would be "deemed to be dissolved" on Dec. 22, 1904. It was subsequently discovered that, in order to satisfy the revenue requirements of the Transvaal, it was necessary that the interests in the mining claims should first be transferred by the trustees to the old company, and then transferred by the old company to the new company, and there was not time to get this done before the dissolution of the old company on Dec. 22. The liquidator of the old company and the new company now applied by motion in the matter of the voluntary winding-up to extend the period of three months prescribed by s. 143 for the dissolution of the company, or for an order to stay proceedings in the winding-up.

By the Companies Act, 1862:

"Section 89. The court may at any time after an order has been made for winding-up a company, upon the application by motion of any creditor or contributory of the company, and upon proof to the satisfaction of the court that all proceedings in relation to such winding-up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit. . . . Section 138. Where a company is being wound-up voluntarily the liquidators or any contributory of the company may apply to the court in England, Ireland, or Scotland, or to the Lord Ordinary on the bills in Scotland in time of vacation, to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the court might exercise if the company were being wound-up by the court, and the court or Lord Ordinary in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the court thinks fit, or it may make such other order, interlocutor, or decree on such application as the court thinks fit. . . . Section 142. As soon as the affairs of the company are fully wound-up, the liquidators shall make up an account showing the manner in which such winding-up has been conducted, and the property of the company disposed of; and thereupon they shall call a general meeting of the company for the purpose of having the account laid before them and hearing any explanation that may be given by the liquidators; the meeting shall be called by

advertisement, specifying the time, place, and object of such meeting; and such advertisement shall be published one month at least previously to the meeting, as respects companies registered in England in the "London Gazette," and as respects companies registered in Scotland in the "Edinburgh Gazette," and as respects companies registered in Ireland in the "Dublin Gazette." Section 143. The liquidators shall make a return to the registrar of such meeting having been held, and of the date at which the same was held, and on the expiration of three months from the date of the registration of such return the company shall be deemed to be dissolved. If the liquidators make default in making such return to the registrar they shall incur a penalty not exceeding five pounds for every day during which such default continues."

Jessel for the motion.

WARRINGTON, J.—This is a somewhat peculiar application; it is an application, when amended as suggested in the course of the argument, by a contributory under s. 138 of the Companies Act, 1862, asking the court to exercise the power conferred upon it in a compulsory winding-up by s. 89, and to make an order staying all proceedings in relation to the winding-up of this company.

The circumstances under which the present application is made are somewhat unusual. It is admitted at the Bar, on the authority of *Scottish Fluid Beef Co.* v. *Auld* (2), that the court has no jurisdiction to stay the dissolution of a company which takes place automatically under s. 143 by extending the period of three months prescribed by that section, and this part of the motion has not been pressed; but the applicants ask for the alternative relief I have already mentioned—namely, a stay of all proceedings in the winding-up—suggesting that if all the proceedings in the winding-up are stayed, then the company necessarily continues to exist, and the operation of s. 143 will thus be prevented. There is no direct authority for this contention, but there is some authority in favour of the present application in *Re Crookhaven Mining Co.* (1). In that case the dissolution of the company had actually taken place when the order was made, though the petition asking for the order was presented before the expiration of the three months limited by s. 143, and LORD ROMILLY, M.R., in giving judgment says (L.R. 3 Eq. at p. 72):

> "At the time when this petition was presented, the court unquestionably had jurisdiction, under the Companies Act, to order the call to be made, and I am of opinion that the delay in the hearing of the petition, caused by the intervention of the Long Vacation, cannot affect the rights of the petitioner, and that he is entitled to stand in the same position as if the petition had been heard before the expiration of three months from June 4."

Pausing there for a moment, I think it clear that LORD ROMILLY must have considered that he had jurisdiction to make the order asked for at the time when the petition was presented (Aug. 31), and I think he must have considered that the dissolution of the company had not then taken place, because otherwise the order which was afterwards made would have been wrong. Then he goes on (ibid. at pp. 72, 73):

> "That being so, it is unnecessary that I should go into the question whether the 143rd section of the statute deprives the court of its jurisdiction over a company which, under the provisions of that section, is deemed to be dissolved; I am inclined to think that it was not the intention of the legislature, by any provision of this statute—which was intended to provide a less expensive and more speedy and direct method of winding-up companies—to fetter the jurisdiction of the court and compel parties to resort to more circuitous and expensive remedies. There must be an order for a call upon the holders of shares not fully paid up, for the purpose of adjusting the rights of the shareholders."

That is not a direct authority as to the effect of an order when it is made, but I think it is an authority entitling me to make the order I propose to make. When one looks at the wording of s. 89 of the Companies Act, 1862, the language is very strong; the words are:

"Upon proof to the satisfaction of the court that all proceedings in relation to such winding-up ought to be stayed."

then the court may

"make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit."

Those words seem to me to cover everything, and if the winding-up of this company is still in operation, as I think it is until the dissolution has taken effect by the expiration of the three months limited by s. 143, then, if I am at liberty to stay "all proceedings in relation to such winding-up," I think those words are wide enough to effect what counsel for the motion wants—namely, to keep the company on foot notwithstanding the expiration of the three months. I propose, therefore, to make this order: The court being satisfied that for the purpose of effecting the transfer of the assets of this company comprised in the agreement of April, 1903, to the new company all proceedings in relation to such winding-up ought to be stayed, direct the same to be stayed accordingly, with liberty to apply.

Solicitors: *Travers-Smith*; *Braithwaite & Co.*

[*Reported by* E. L. Hopkins, Esq., *Barrister-at-Law.*]

Re FRANCIS. BARRETT *v.* FISHER

[Chancery Division (Kekewich, J.), January 11, 1905]

[Reported 74 L.J.Ch. 198; 92 L.T. 77]

Will—Trustees appointed directors—Fees, capital or income.

Trustee—Profit from trust—Shares bequeathed on trust—Appointment of trustee as director in respect of holding—Right to retain director's fees.

Administration of Estates—Capital or income—Shares bequeathed on trust—Appointment of trustee as director in respect of holding—Director's fees—Accretion to capital of estate.

In the absence of a permissive provision in the trust instrument a trustee may not make a profit for himself as a result of his position as trustee.

Accordingly, where trustees held shares bequeathed to them in trust for a life tenant and remaindermen and were appointed directors of the company in respect of such holding, there being no provision in the will enabling them to retain their directors' fees for their own benefit,

Held: the fees belonged to the trust estate as capital to go to the remainderman as an accretion to the shares.

Noble v. *Cass* (1) (1828), 2 Sim. 343, applied.

Notes. Followed: *Re Macadam, Dallow* v. *Codd*, [1945] 2 All E.R. 664. Considered: *Re Gee, Wood* v. *Staples*, [1948] 1 All E.R. 498.

As to income and capital receipts in settlements, see 34 Halsbury's Laws (3rd Edn.) 623 et seq.; and for cases see 40 Digest (Repl.) 715 et seq.

Case referred to:

(1) *Noble* v. *Cass* (1828), 2 Sim. 343; 57 E.R. 817; 40 Digest (Repl.) 711, *2063*.

Also referred to in argument:

Earl of Cowley v. *Marquis of Wellesley* (1866), L.R. 1 Eq. 656; 35 Beav. 635; 14 L.T. 245; 14 W.R. 528; 55 E.R. 1043; 40 Digest (Repl.) 745, *2322*.

Bouch v. *Sproule* (1887), 12 App. Cas. 385; 56 L.J.Ch. 1037; 57 L.T. 345; 36 W.R. 193, H.L.; 40 Digest (Repl.) 725, *2152*.

Adjourned Summons taken out by the trustees of the will of Samuel William Francis, deceased, to determine whether remuneration received by them as directors of a limited company was to be accounted for by them and treated as income or as capital and an accretion to capital of the shares belonging to the trust estate. The summons originally came before the court on Dec. 1, 1904, upon the point whether the applicants were entitled to retain the remuneration paid to them as directors, when his Lordship decided that it belonged to the trust estate, and the summons, being amended so as to raise the present point, was ordered to go into the retained list.

On Dec. 30, 1899, a company was registered under the provisions of the Companies Acts, 1862 to 1898, in the name of "S. W. Francis & Co., Ltd.," for the purpose of taking over the business assets and liabilities of a revolving shutter maker which had for many years been carried on by the testator, Samuel W. Francis, in Gray's Inn Road, London. The capital of the company was £60,000, divided into preference and ordinary shares. By cl. 75 of the company's articles of association it was provided that the testator should be the governing director of the company until he resigned the office of director or died, and whilst he retained that office should exercise all powers vested in the board. By cl. 80:

> "When the said Samuel W. Francis ceases to be governing director, the company in general meeting may appoint any persons to be directors of the company, and may fix and determine the maximum and minimum number of directors, and the amount of their remuneration and qualification, and a general meeting shall forthwith be convened for the purpose. . . . The executors or administrators of a deceased holder of shares shall for the purposes of this clause be deemed to be the holders of any shares standing in the name of the deceased."

In consideration of his transfer to the company the testator had allotted to him the whole of the preference and ordinary shares with the exception of seven preference shares, and the same were standing in his name at the date of his death on April 12, 1904.

The testator's will, dated April 16, 1901, with two codicils, was duly proved by all three executors on May 16, 1904, in the Principal Registry. The shares held by the testator in S. W. Francis & Co., Ltd., were after his death transferred into the names of his executors. At an adjourned general meeting of the company held on May 5, 1904, it was resolved that the applicants should be appointed, in conjunction with the respondent Arthur Wells, directors of the company at a remuneration of £200 each per annum, except during the year from the date of their appointment until the company's ordinary general meeting in January, 1905, for which period they should receive £200 each. The respondent Frederick Fisher died on July 7, 1904. It was admitted that the company, which had since incorporation paid annual dividends, was earning an income upon its share capital. The applicant trustees having by the summons as issued asked that they might retain for their own use and benefit the remuneration received by them from time to time as directors of S. W. Francis & Co., Ltd., and the court having expressed an opinion unfavourable to the granting of their application, the summons was amended raising the present point. The applicants, who were engaged in business on their own account, had, especially Joseph F. Lake, since testator's death devoted considerable time and attention to the company's business.

H. Tindal Methold (*P. Ogden Lawrence*, *K.C.*, with him) for the trustees.

T. Tindal Methold for the infant children entitled in remainder.

D. Stewart-Smith, *K.C.*, and *C. Johnston Edwards* for the life tenants.

KEKEWICH, J.—This is a new point, and is not quite free from difficulty. The trustees hold a large number of shares which are part of the estate which is settled. The trustees hold these, which are their qualifying shares, and are elected directors of the company, and as directors they receive a certain remuneration. They are accountable for that to the estate, there being no provision in the will which enables them to make a profit for themselves, and the court not having been asked to accede to the trustees being directors. Therefore they are accountable. But are they to account for the amount received as capital or income? It seems to me that primâ facie it must be capital unless you can say that it is part of the rents and profits, or, we will say, income in some way. Counsel for the remaindermen has pointed out the simple case of a manor being devised to trustees who receive fines and heriots. They do not belong to the tenant for life because they are casual profits, but because they are rents and profits. The heriot or fine is irregular and uncertain, but still it is a profit which may be regarded as being annexed to the manor. Although they are not reserved in any deed, still they are part of the income, rents, and profits of the manor. But how can you say that these moneys which are paid to the trustees are in any sense rents and profits? They are a payment made to the trustees for their services. It has nothing to do with the income of the estate. It is paid annually. It might be paid half-yearly or quarterly. It might be paid at other intervals. There is no income in it. The character of the money is that of a remuneration to them for their services. It might be paid as a lump sum. I think this case of *Noble* v. *Cass* (1) illustrates this principle. The devise there stated was a devise of freeholds to trustees during the life of testatrix's niece, Ann Noble, upon trust to pay her the rents and profits thereof during her life for her separate use. During her life they recovered damages for breach of covenants in a lease granted by the testatrix and still subsisting, and it was held that they were trustees of the amount recovered for her. There was no duty to the remaindermen. The uses to the remaindermen were legal uses. That illustrates the principle that what trustees receive belongs to the estate of which they are trustees. I do not see any ground for saying that it belongs to the tenant for life because it is paid half-yearly or quarterly. This capital goes as an accretion to the shares.

Solicitors: *H. A. Graham & Wigley; Byfield & Son.*

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

A

SELLAR *v.* CHARLES BRIGHT & CO., LTD.

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Mathew, L.JJ.), June 14, 15, 1904]

B [Reported [1904] 2 K.B. 446; 73 L.J.K.B. 643; 91 L.T. 9; 52 W.R. 563; 20 T.L.R. 586; 48 Sol. Jo. 571]

Execution—Charging order—"Stock or shares"—Exclusion of debentures—Judgments Act, 1838 (1 *& 2 Vict., c.* 110), *s.* 14.

Debentures are not "stock or shares" within the meaning of s. 14 of the Judgments Act, 1838, and, therefore, the court has no jurisdiction under s. 14 C to make a charging order on debentures held by or on trust for the judgment debtor.

Notes. As to charging orders, see 16 HALSBURY'S LAWS (3rd Edn.) 93 et seq.; and for cases see 21 DIGEST 647 et seq. For the Judgments Act, 1838, s. 14, see 13 HALSBURY'S STATUTES (2nd Edn.) 366. As to the power of the court to enlarge the time appointed by the Rules of the Supreme Court for taking any proceedings, D see R.S.C., Ord. 64, r. 7.

Case referred to:

(1) *Re Bodman, Bodman* v. *Bodman*, [1891] 3 Ch. 135; 61 L.J.Ch. 31; 65 L.T. 522; 40 W.R. 60; 44 Digest 703, *5458*.

Appeal by the defendants from an order of PHILLIMORE, J., made at chambers. E On Nov. 28, 1901, the plaintiff recovered judgment against the defendants for £2,537.

On. Dec. 2nd, 1901, PHILLIMORE, J., made a charging order nisi which was made absolute on Dec. 20, 1901, by which six 5 per cent. debentures of £100 each of the Buenos Electric Tramways Co., Ltd., held by one Charles H. Bennett on behalf of the defendants, were charged with payment of the amount due on F the judgment. By a clerical error the word "debentures" was omitted from the charging order absolute, and on Nov. 18, 1903, on the plaintiff's application, PHILLIMORE, J., ordered the rectification of the charging order to include the word "debentures," and ordered that the defendants should have an extension of time for appealing from the original order of Dec. 20, 1901, the appeal to be limited to the corrected part of the order. The defendants appealed against the charging G order.

By the Judgments Act, 1838, s. 14,

"If any person against whom any judgment shall have been entered up in any of Her Majesty's superior courts at Westminster shall have any . . . stock or shares of or in any public company in England (whether incorporated or not) standing in his name in his own right, or in the name of any person in trust H for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock . . . or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon . . ."

A preliminary objection to the hearing of the appeal was taken by the plaintiff I on the ground that the appeal from the order of Dec. 20, 1901, was out of time, and PHILLIMORE, J., had no power to extend the time for appealing, as he purported to do by his order of Nov. 18, 1903. For the defendants it was submitted that the order of Nov. 18, 1903, was a valid order, and that if the Court of Appeal refused to hear the present appeal on the ground that it was out of time it would be overruling the order of Nov. 18, 1903, which was not before the court. Further, PHILLIMORE, J., would probably not have made the order of Nov. 18, 1903, amending the charging order, unless at the same time he had extended the time for appealing against the charging order. There was good ground for extending

the time for appealing, for, in effect, PHILLIMORE, J., had made the extension a condition of allowing the charging order to be amended.

SIR RICHARD HENN COLLINS, M.R., on this preliminary point, held that in the peculiar circumstances of the case the court ought now to grant an extension of time for appealing from the original charging order of Dec. 20, 1901, so far as it had been amended by the order of Nov. 18, 1903; but he could not assent to the proposition that a judge could impose on the Court of Appeal the obligation of hearing an appeal that was out of time.

STIRLING and **MATHEW, L.JJ.,** concurred.

On the substantive point it was contended for the defendants that there was no jurisdiction to make a charging order on debentures. R.S.C., Ord. 46, r. 1 provided that an order charging stock or shares might be made by a judge in accordance with ss. 14 and 15 of the Judgments Act, 1838. Debentures were not "stock or shares" within the meaning of those sections. The distinction between debentures and shares was clear and well defined. Shares were held by members of a company, but a debenture was merely an acknowledgment of a debt due from a company coupled with a charge on the assets of the company and a debenture holder was not a shareholder and took no part in the control or management of the company. In *Re Bodman, Bodman* v. *Bodman* (1), CHITTY, J., held that a bequest of all the testator's "shares" in a specified company did not pass debenture stock, and had pointed out the material differences between debenture stock and ordinary shares.

For the plaintiff it was submitted that the charging order was properly made on the debentures. The words "stock or shares" in s. 14 of the Act of 1838 were wide enough to include debentures. The object of that Act was to enable a judgment creditor to get satisfaction of his judgment out of property which could not be taken in execution in the ordinary way and it would defeat that object if a narrow construction were put on s. 14.

C. A. Bennett for the defendants.
Alan Macpherson for the plaintiff.

SIR RICHARD HENN COLLINS, M.R.—I think that it has been made quite clear by the argument that this charging order was wrongly made, and it cannot affect the debentures. Therefore the order of PHILLIMORE, J., so far as it relates to the debentures, was wrong and must be set aside.

STIRLING, L.J.—I agree.

MATHEW, L.J.—I agree.

Appeal allowed.

Solicitors: *Bennett & Chance*; *W. J. Hunter.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

SANDERSON v. COLLINS

[Court of Appeal (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.), February 11, 1904]

[Reported [1904] 1 K.B. 628; 73 L.J.K.B. 358; 90 L.T. 243; 20 T.L.R. 249; 48 Sol. Jo. 259; 52 W.R. 354]

Master and Servant—Liability of master for act of servant—Act by servant outside scope of authority—No negligence by master—Carriage lent to master while own carriage being repaired—Servant, without master's knowledge or consent, taking out carriage—Liability for damage to carriage.

The plaintiff, a coachbuilder, lent a carriage to the defendant while he was repairing the defendant's carriage. The defendant's coachman, without the knowledge or permission of the defendant, took out the carriage and went for a drive with some friends in the course of which he negligently drove into a tramcar and damaged the carriage. In an action by the plaintiff for damages,

Held: as the defendant had not personally been guilty of any negligence and as his coachman in taking out the carriage had acted outside the scope of his employment, the defendant was not liable to the plaintiff for the damage done to the carriage.

Coupé Co. v. *Maddick* (1), [1891] 2 Q.B. 413, distinguished.

Notes. Considered: *Aitchison* v. *Page Motors, Ltd.*, [1935] All E.R.Rep. 594. Referred to: *Cheshire* v. *Bailey*, [1905] 1 K.B. 237.

As to the obligations of the hirer under a contract of bailment, see 2 Halsbury's Laws (3rd Edn.) 125–127; and for cases see 3 Digest (Repl.) 98–100.

Case referred to:

(1) *Coupé Co.* v. *Maddick*, [1891] 2 Q.B. 413; 60 L.J.Q.B. 676; 65 L.T. 489; 50 J.P. 39, D.C.; 3 Digest (Repl.) 99, *265.*

Also referred to in argument:

Finucane v. *Small* (1795), 1 Esp. 315; 3 Digest (Repl.) 76, *148.*

Joel v. *Morison* (1834), 6 C. & P. 501, N.P.; 34 Digest 139, *1090.*

Mitchell v. *Crassweller* (1853), 13 C.B. 237; 22 L.J.C.P. 100; 20 L.T.O.S. 237; 17 Jur. 716; 1 W.R. 153; 138 E.R. 1189; 34 Digest 139, *1088.*

Storey v. *Ashton* (1869), L.R. 4 Q.B.D. 476; 10 B. & S. 337; 38 L.J.Q.B. 223; 33 J.P. 676; 17 W.R. 727; 34 Digest 140, *1093.*

Whatman v. *Pearson* (1868), L.R. 3 C.P. 422; sub nom. *Whitman* v. *Pearson*, 37 L.J.C.P. 156; 18 L.T. 290; 16 W.R. 649; 34 Digest 130, *1,000.*

Mears v. *London and South Western Rail. Co.* (1862), 11 C.B.N.S. 850; 31 L.J.C.P. 220; 6 L.T. 190; 142 E.R. 1029; 3 Digest (Repl.) 118, *383.*

Appeal by the defendant from a judgment of the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.) reversing the decision of the judge of Newcastle-upon-Tyne County Court.

The plaintiff was a coachbuilder and brought this action in the county court to recover the sum of £22 18s. 6d. for damage done to a four-wheeled dogcart which he had lent to the defendant. In June, 1902, the defendant had sent his dog-cart to the plaintiff to be repaired, and the plaintiff had lent a dogcart of his own to the defendant for his use during the time that the defendant's dogcart was being repaired. On June 30, 1902, the defendant was out driving in the dogcart that had been lent to him. On his return home at five o'clock in the afternoon, it was the duty of his coachman to put the dogcart into the coach-house and lock it up. The key of the coach-house was kept in the hall of the defendant's house. It did not appear clearly whether or not the dogcart was in fact locked up in the coach-house, but that night the defendant's coachman, without the defendant's knowledge or permission, took out the dogcart, put in the horse, and went out for a drive with some friends to see the bonfires that were being lit in honour of the

King's Coronation. Between eleven and twelve o'clock that night the coachman and his friends were all the worse for drink, and he negligently drove into a tramcar and damaged the dogcart.

The county court judge gave judgment for the defendant, distinguishing the present case from *Coupé Co.* v. *Maddick* (1).

The Divisional Court (LORD ALVERSTONE, C.J., WILLS and CHANNELL, JJ.) held (89 L.T. 42) that *Coupé Co.* v. *Maddick* (1) was indistinguishable, and they therefore reversed the decision of the county court judge and gave judgment for the plaintiff. The defendant appealed.

Manisty, K.C. (*Meynell* with him) for the defendant.
Robert Wallace, K.C., and *Mundahl* for the plaintiff.

SIR RICHARD HENN COLLINS, M.R.—This is a case of some interest, but it seems to me to be a clear one as soon as one gets to the principles which govern the law of bailment.

The defendant was the owner of a carriage which he intrusted to the plaintiff for repair, and during the time occupied by the repairs the plaintiff, as is very commonly done, lent to the defendant a carriage for use in the meantime. That was not an involuntary or a gratuitous bailment, but a bailment for mutual consideration. The duty of a bailee under such circumstances is well settled, and the law, as laid down by SIR WILLIAM JONES in his book on BAILMENTS, has had the sanction of many learned writers and judges. The bailee's duty is to take reasonable care—i.e., ordinary care—of the chattel which is the subject of the contract. That is the first principle, and there is no doubt about it. What happened in the case now before us? The defendant had had the dogcart out at three o'clock in the afternoon, and he used it till five o'clock. When he came back it was the duty of the servant to put the dogcart back in the coach-house, the key of which was usually kept in the hall of the defendant's house. Whether or not the dogcart was in fact put inside the coach-house on the afternoon in question is not quite clear. It may perhaps have been left outside. Later in the evening the defendant's servant took it out, contrary to orders and purely and solely for his own purposes, and went off "on a frolic of his own" to see the coronation bonfires. He and some friends he invited to come with him got drunk, and he negligently drove into a tramcar and damaged the dogcart. The dogcart was returned damaged to the plaintiff, who has consequently brought this action against the master of the servant.

The county court judge held that the act of the defendant's servant was not within the scope of his authority, and therefore could not be considered as the act of the defendant. He thus disconnected the defendant from the act of his servant, and, as he found that the defendant was not personally guilty of negligence, he held that the defendant was not liable to the plaintiff for the damage done to the dogcart. That decision was reversed by the Divisional Court chiefly on the authority of *Coupé Co.* v. *Maddick* (1), although CHANNELL, J., said that if the carriage got into the possession of somebody for whose driving the defendant was not responsible, primâ facie the carriage would not then be used for purposes contrary to the terms of the bailment, and he instanced the case of a burglar breaking into a stable and stealing the carriage as a case in which the bailee would not be liable unless he had been guilty of negligence in letting the burglar in. The defendant has appealed from the decision of the Divisional Court.

It seems to me that the first thing is to clear one's mind as to the facts of the relations existing between the defendant and his servant. The obligation of the defendant as bailee was only to take reasonable care of the thing bailed, and he is bound in that respect for an act of his servant if done in the course of his employment. But his obligation does not extend so as to cover the acts of a person who is not his servant, or the acts of his servant beyond the scope of his authority. If a burglar, or someone who was a stranger to the defendant, had taken the dogcart, and brought it back damaged, the defendant would not be liable,

if he was not guilty of negligence, because the act of the stranger was not the defendant's act. There would be no nexus between the defendant and the burglar. If the defendant's coach-house had been negligently left open so as to bring about the taking of the dogcart by the burglar, the defendant might be responsible on the ground of there having been a failure of due care on the part of his servant in leaving the coach-house open for which the defendant would be responsible. In the present case the dogcart was not taken out by a burglar, but, so far as the defendant was concerned, the act of the servant was, on the findings of the county court judge, the same as if it had been the act of a burglar—that is to say, it was the act of a person for whom the defendant was not responsible. The defendant had employed a competent servant and directed him to lock up the dogcart in the coach-house and give back the key. The defendant was not guilty of any negligence. The hypothetical case of a burglar taking out the dogcart is only an instance of something being done with the dogcart not under the mandate of the defendant, and, so far as concerns the defendant's liability here, is just the same as the case of an act done by the defendant's servant outside the scope of his authority. His servant was not a burglar, but he committed an act which broke the nexus between him and his master. The act therefore cannot be considered as an act done by the master—that is, it was not done by a person for whom he was responsible. Therefore, as there was no want of due care on the part of the defendant, I think that he is not liable in this action. That seems to me to be in accordance with the law as laid down in the old cases.

With regard to the opinion expressed by the learned judges in the Divisional Court, I think that there is no necessity for us to say whether we think that *Coupé Co.* v. *Maddick* (1) was rightly decided or not. The case seems to me to be clearly distinguishable from the present case. The fact which distinguishes it is a slight one, but it makes all the difference between the two cases. There the act of the servant was within the scope of his authority. His master after driving home in his carriage had told him to take it to his stable, which was 200 yards off. The coachman drove off, but, instead of going directly to the stable, he drove in another direction with a friend whom he picked up. He disobeyed the orders of his master in so doing, but he was driving the carriage under the express mandate of his master. That fact goes to the root of the decision in that case. I do not say whether the decision was a good one in law, but the case is distinguishable from the present case on those grounds. For these reasons I cannot agree with the decision of the court below, and I think that the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. I agree with all that my Lord has said, and I desire to add only a few words. It is admitted that no special agreement was entered into as to the defendant's obligations with regard to the dogcart when it was lent to him by the plaintff. Therefore the question is, What obligation is implied? In my opinion there was no implied obligation on the defendant to insure the safety of the dogcart. The bailment was an ordinary one made for the mutual benefit of the parties, and the obligation of the bailee in such a case is now well settled to be an obligation to take reasonable care of the chattel. The defendant is not liable unless the damage was caused by his own negligence or by the negligence of his servant in the course of his employment. It is clear that he was not personally guilty of any negligence, and that his servant was not acting in the course of his employment when he took out the dogcart and damaged it. That being so, the defendant is not liable in this action. As regards the authorities, my view is that *Coupé Co.* v. *Maddick* (1) is only supportable on the fact that there the servant was acting in the course of his employment. In so far as the court in that case may have been of opinion that a bailee is liable for damage done to the chattel through the negligence of his servant when acting outside the scope of his employment, I can only say that I think that they were wrong.

MATHEW, L.J.—I am of the same opinion. In the absence of want of reasonable care there was no liability on the defendant for what might happen to the dogcart. The cart was placed by the defendant for certain purposes in charge of his servant, and the defendant was responsible for the servant's negligence within the scope of his employment. No act of conversion of the dogcart, whether by a servant or by anyone else, was contemplated by the parties to the contract of bailment. The servant was guilty of a conversion of the dogcart, and, as there was no negligence on the part of the defendant, he is not responsible to the plaintiff. As to the authorities referred to, I agree with what my Lord has said.

Appeal allowed.

Solicitors: *Ernest A. Fuller*, for *Dickinson, Miller & Dickinson*, Newcastle-upon-Tyne; *Cree & Son*, for *Hugh Burns*, Newcastle-upon-Tyne.

[*Reported by* E. Manley-Smith, Esq., *Barrister-at-Law.*]

GWENDOLEN FREEHOLD LAND SOCIETY *v.* WICKS

[King's Bench Division (Kennedy and Darling, JJ.), June 20, 1904]

[Reported [1904] 2 K.B. 662; 73 L.J.K.B. 815; 91 L.T. 440; 53 W.R. 219; 20 T.L.R. 593; 48 Sol. Jo. 574]

Industrial and Provident Society—Debt due from member—Recovery in county court—Debt exceeding county court jurisdiction—Debtor no longer member of society—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict.*, *c.* 39), *s.* 23.

Section 23 of the Industrial and Provident Societies Act, 1893, provides: "All moneys payable by a member to a registered society shall be a debt due from such member to the society, and shall be recoverable as such either in the county court of the district in which the registered office of the society is situate, or in that of the district in which such member resides, at the option of the society."

Held: under s. 23, the society could bring an action in the county court to recover a sum in excess of the ordinary county court jurisdiction, incurred as a debt by a member to the society during his membership, although at the date of bringing the action the debtor had ceased to be a member of the society.

Notes. As to remedies for debts from members of industrial and provident societies, see 21 Halsbury's Laws (3rd Edn.) 53; and for cases see 28 Digest (Repl.) 469, 470. For the Industrial and Provident Societies Act, 1893, s. 23, see 12 Halsbury's Statutes (2nd Edn.) 888.

Appeal by the defendant from the Leicester County Court.

The action was brought by the Gwendolen Freehold Land Society, a society registered under the Industrial and Provident Societies Act, 1893, to recover from the defendant, a former member of the society, the sum of £136 11s. 11d., in respect of arrears and fines alleged to have become due to the society from the defendant while he was a member of the society. The plaintiff society was formed for the purpose of buying land and selling it in small allotments to the members of the society, the purchase money for such allotments being payable by the allottees by fortnightly contributions. Rule 32 of the rules of the society, which by s. 22 of the Act of 1893 were binding upon the society and all the members, provided that if any member should be in arrear in payment of his contributions to an amount

A equivalent to the contribution of three calendar months, the committee of the society might by resolution declare that such member was no longer a member of the society, and that each allotment in respect of which such arrears should have accrued was forfeited to the society. But nothing in the rule was to preclude the committee from compelling payment by any member of any arrears, notwithstanding such forfeiture. The defendant, being in arrear with his contributions in B respect of his allotments, was on Oct. 18, 1902, served with a notice requiring him to pay his arrears, and on Nov. 25, 1902, his arrears then being considerably in excess of the amount of his contributions for three months, the committee, in accordance with the above rule, passed a resolution declaring the defendant to be no longer a member of the society and his allotments to be forfeited.

On Feb. 16, 1904, the plaintiffs brought this action in the county court, under C s. 23 of the Act of 1893, to recover from the defendant the sum of £136 11s. 11d., a sum which exceeded the ordinary county court jurisdiction, for the amount of his contributions in arrear on Oct. 18, 1902, and interest thereon payable under the rules. The county court judge gave judgment for the plaintiffs for a sum of £95, and the defendant appealed.

D *Alec Neilson* for the defendant: The county court judge had no jurisdiction to entertain the action under s. 23 of the Act of 1893, because at the time it was brought the defendant was not a member of the society. Section 23 applies only where a person was a member of the society, both at the time when the arrears were incurred and when the action to recover the arrears was brought. The section provides that a registered society may sue for moneys payable by "a member" to E the society in the county court of the district in which "such member resides." The word "resides," being in the present tense, clearly points to the time at which the action is brought, and the word "member" shows that the person must be a member at the time the action is brought. The section does not apply to cases of debts due from past members.

A. Neilson for the defendant.

F *C. B. Marriott* for the plaintiffs.

KENNEDY, J.—I think the county court judge was right in this case. It has been contended for the defendant that, on the construction of s. 23 of the Act, the right of the county court judge to entertain the action in so far as it exceeded the ordinary county court jurisdiction depended upon whether at the time the action G was brought the defendant was still a member of the society. I do not think that the intention of the legislature was that this section should be so limited. I think the section must be read as applying to past members as well as present members.

DARLING, J.—I am of the same opinion.

Appeal dismissed.

H Solicitors: *Stileman & Neate*, for *Latham, New & French*, Melton Mowbray; *Bennett & Ferris*, for *Bray & Price*, Leicester.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

A

Re SCARR AND GENERAL ACCIDENT ASSURANCE CORPORATION

[KING'S BENCH DIVISION (Bray, J.), December 16, 21, 1904]

[Reported [1905] 1 K.B. 387; 92 L.T. 128; 74 L.J.K.B. 237; 21 T.L.R. 173]

B

Insurance—Accident insurance—"Accidental"—Policy insuring assured against bodily injury caused by "accidental means"—Exertion by assured in ejecting drunken man from premises where assured employed—Effect on weak heart.

A policy of insurance provided that the money due under the policy should be payable if "the assured shall sustain any bodily injury caused by violent, accidental, external, and visible means within the meaning of this policy . . . and such injury shall be the sole and immediate cause of death." The assured, who was apparently in good health and was able to discharge and was discharging the duties of his employment as a maltster's manager, attempted to eject a drunken man from the premises, using some physical exertion for that purpose. At the time of the occurrence his heart was in a weak and unhealthy condition, and the effect of the exertion was to make a greater demand on the heart, and to render it less capable of recovering its ordinary condition when the strain ceased. Immediately afterwards he went home and complained of a pain in the chest. Some hours after his heart began to dilate, and the dilatation of his heart caused his death a month afterwards. But for what happened on the day of the occurrence the assured might have lived for a considerable time. On a claim upon the policy,

C

D

E

Held: the injury was caused by the exertion of the assured in ejecting the drunken man, but, as this exertion was intentional in the sense that the assured intended to do what he did in ejecting the man, the injury was not caused by "accidental" means within the meaning of the policy, and, therefore, the claim failed.

F

Hamlyn v. *Crown Accidental Insurance Co., Ltd.* (1), [1893] 1 Q.B. 750, distinguished.

Notes. As to policies insuring against injury by accident, see 22 HALSBURY'S LAWS (3rd Edn.) 293 et seq.; and for cases see 29 DIGEST 398 et seq.

Cases referred to:

G

(1) *Hamlyn* v. *Crown Accidental Insurance Co., Ltd.*, [1893] 1 Q.B. 750; 62 L.J.Q.B. 409; 68 L.T. 701; 57 J.P. 663; 41 W.R. 531; 9 T.L.R. 427; 4 R. 407, C.A.; 29 Digest 401, *3177*.

(2) *Fetter* v. *Fidelity and Casualty Co.* (1903), 97 Am. St. Rep. 560.

(3) *Appel* v. *Aetna Life Assurance Corpn.* (1903), 86 App. Div. Rep. S.C.N.Y. 83.

H

(4) *Horsfall* v. *Pacific Mutual Insurance Co.* (1903), 98 Am. St. Rep. 846; 32 Wash. 132.

Also referred to in argument:

M'Kechnie's Trustees v. *Scottish Accident Insurance Co.* (1889), 17 R. (Ct. of Sess.) 6.

Feder v. *Iowa State Travelling Men's Association* (1899), 107 Iowa R. 538; 70 Am. St. Rep. 212.

I

Clidero v. *Scottish Accident Insurance Co.* (1892) 19 R. (Ct. of Sess.) 355; 29 Sc.L.R. 303; 29 Digest 401, *3179i*.

Isitt v. *Railway Passengers Assurance Co.* (1889), 22 Q.B.D. 504; 37 W.R. 477; sub nom. *Re Isitt and Railway Passengers Assurance Co.*, 58 L.J.Q.B. 191; 60 L.T. 297; 5 T.L.R. 194; 29 Digest 400, *3172*.

Special Case stated by an arbitrator as his award in an arbitration between the executrix of the assured, one Renforth Thomas Scarr, and the General Accident

Assurance Corpn., in which the executrix claimed the sum of £500, for which the deceased was insured with the corporation at the time of his death. The question was whether the money was recoverable under the policy.

The policy was an assurance against accident. It was effected on April 8, 1898, by the deceased, with the General Accident Assurance Corpn., Ltd. The policy provided that if at any time during the continuance of the policy the assured

> "shall sustain any bodily injury caused by violent, accidental, external, and visible means within the meaning of this policy and the conditions hereto, and such injury shall be the sole and immediate cause of death of the assured within three calendar months from the occurrence of the accident, then, within three calendar months after proof satisfactory to the directors of the corporation shall have been furnished of such death, and of the cause thereof and of the title of the party claiming, the funds and property of the corporation shall be liable to pay his legal representatives the sum of five hundred pounds."

The policy was subject to the conditions and notices endorsed thereon. Condition 4 provided that the policy did not extend to cover death

> "by the assured's own voluntary act . . . or arising from natural disease or weakness, or exhaustion consequent upon any disease, or any surgical operation or medical treatment, although accelerated by accident."

Condition 6 provided that if a dispute should arise whether the corporation were liable under the policy, or as to the amount of its liability, the matter should, if required by the corporation, be referred to arbitration.

The facts as stated in the Case were as follows. Mr. Scarr (the assured) was at the time of his death and had been in the employment of Messrs. Flinn, of Bishop's Stortford, as maltster's manager, and on April 8, 1898, he had effected a policy on his life with the corporation for the sum of £500. The policy was in full force and effect at the time of Mr. Scarr's death, and all premiums had been duly paid thereon, and Kate Scarr, as his personal representative, was entitled to receive the policy moneys, subject only to the question in dispute between the parties—namely, whether the death of Mr. Scarr, under the circumstances hereinafter stated, was a death rendering the corporation liable under the terms of the policy. Mr. Scarr was, at the time of the happening of the matters hereinafter stated, a stout, heavily-built man, aged fifty-three, but not of any abnormal size or weight. He was in the apparent enjoyment of good health, and was able to discharge and did discharge the duties of his employment (which involved a good deal of walking, ascending and descending upright iron ladders, and other outdoor exercise) without any complaint or heart trouble, nor was his wife or medical attendant or any one of his friends aware that his heart was in any way affected. His medical attendant had in fact in July, 1903, sounded and examined his heart without detecting anything wrong.

On Dec. 26, 1903, Mr. Scarr was at the malting premises where he was employed at about 9.30 to 9.45 a.m., being apparently in his usual state of health. There was upon the premises a man named Levy, who was more or less drunk, and the deceased attempted to eject him, using some physical exertion for that purpose by pushing or pulling in order to overcome the drunken man's passive resistance. The effect of this physical exertion was such that he immediately returned home and sent for a doctor, complaining of a pain in the region of his chest. No dilatation of the heart or other symptom of heart trouble could at that time be detected by stethoscope or any other examination, nor did a similar examination by another medical man some six hours later show any such symptom. The pain, however, continued, and, on a third stethoscope examination about 9.30 p.m. the same evening, it was found that his heart was seriously dilated, there being a "murmur" of all the valves, and that his pulse had gone up from 75 to 120. The condition of the deceased never afterwards improved, and on Feb. 25, 1904, he died. A post-mortem examination was made at which three medical men were present, who all

gave evidence before the arbitrator. Evidence was also given at considerable length by a medical expert of great experience in cases of heart disease, but who was not present at the post-mortem examination, and also by other witnesses as to the habits and physical condition of the deceased in his lifetime.

On the evidence above referred to, the arbitrator arrived at the following findings of fact relative to the death of the deceased:

"(a) The heart of the deceased was, on and prior to Dec. 26, 1903, in a weak and unhealthy condition—that is to say, there was some fatty degeneration and some hypertrophy or increased size. This condition had arisen progressively, and was of considerable standing. The effect of this condition was to diminish the elasticity and power of the tissue of the heart (which is chiefly muscular tissue), and to render it less capable of working under strain or of recuperating itself as such strain ceased. The condition of the heart above described was not readily discoverable by the stethoscope, and was consistent with fair capacity for the ordinary duties of the man's life. (b) The effect of the physical exertion used by the deceased on the morning of Dec. 26 was to make a call or demand on the heart to work harder and to pump blood at an increased rate. The effect of the increased work done by the heart under this strain was to produce pain in its muscular tissue, spoken of by the medical expert as muscular cramp. (c) The state of the muscular tissue of the heart described under (a) rendered it incapable of recuperating and recovering its ordinary condition, when the immediate demand or strain ceased, and the pain and irritable condition of the heart continued in consequence. After some hours the heart began to dilate by reason of this condition, and the dilatation so set up was the cause of death by rendering the valvular action of certain valves of the heart inefficient and imperfect. (d) Had it not been for the events which happened on Dec. 26 the deceased would not have died when he did, humanly speaking, and might have lived a considerable time."

It was contended on behalf of the personal representative of the deceased that his death resulted from accidental injury or strain to the heart, and that the corporation were liable on the policy, citing *Hamlyn* v. *Crown Accidental Insurance Co., Ltd.* (1). For the corporation it was contended: (i) That there had been no accident—that is, no "violent, accidental, external, and visible means" causing injury; (ii) that there had been no bodily injury; (iii) that, even assuming an injury resulting from an accident, it was not the sole and immediate cause of death; and (iv) that the corporation were in any event protected by the fourth condition of the policy. If the court should be of opinion that the corporation were liable on the above statement of fact, then judgment was to be entered for the personal representative of the deceased for £500 and her costs of the arbitration and award. If the court should be of opinion that the corporation were not liable, then judgment was to be entered for the corporation for their costs of the arbitration and award. Or in either case such other or further order should be made as the court should deem fit.

Herbert Smith (*W. J. Trevor Turton* with him) for the assured.
Robert Wallace, K.C. (*McGillivray* with him), for the insurers.

Cur. adv. vult.

Dec. 21, 1904. **BRAY, J.,** read the following judgment in which he stated the facts and continued: It seems to me that there was nothing accidental in the pushing and pulling of the drunken man, or the exercise of physical exertion in so doing. Scarr intended to do this. The drunken man offered only passive resistance. There was no blow. Then was the effect on the heart accidental? The demand or strain on the heart was the natural and direct consequence of the physical exertion, which I have necessarily assumed to be violent physical exertion. Then was the effect of this demand or strain on the heart accidental? It is true that Scarr did not foresee the effect; but this, in my opinion, cannot make it accidental if it was

the natural and direct consequence of a demand or strain on a heart in the condition described. The evidence shows that there was no intervening fortuitous cause. The injury to the heart, which I assume to be bodily injury, seems to me to have been caused by the violent exertion, and the violent exertion was intended and not accidental. There was no slip or fall or blow. He intended to push and pull, and he pushed and pulled.

Apart from authority I cannot find the means to be accidental. I proceed, therefore, to consider the authorities. The only English case that has any real bearing is *Hamlyn* v. *Crown Accidental Insurance Co., Ltd.* (1). In that case the words of the policy were practically the same as here. The plaintiff was stooping forward to pick up a marble dropped by a child as it rolled from him. He stood with his legs together, separated his knees, leaned forward and made a grab at the marble, and in doing so wrenched his knee. The contention of the plaintiff's counsel was that, as the plaintiff did not mean to get into a position in which he might wrench his knee, there was something accidental. The court held the contention sound. The plaintiff did not mean to wrench his knee, and that would not be the ordinary result of such an accident. SMITH, L.J., says it was accidental, for getting into the particular position in which the injury would happen was not done on purpose. I think I should have come to the same conclusion. It was as if a man walking stumbled and sprained his ankle. He did not intend to stumble. The stumbling was accidental, and not the necessary or likely result of walking. That would properly be called an accident. There was no weakness in the knee or other predisposing cause. Here, as I have said, Scarr intended to violently exert himself, and the injury to the heart followed as the natural consequence. He never got into any position which he did not intend. It seems to me very like the case of a man with a weak heart injuring it by running to catch a train. He intends to run. Nobody would call such an event an accident. No one would describe him as meeting with an accident. Nor would anyone in the present case speak of Scarr as having met with an accident. The question cannot, in my opinion, depend on whether or not Scarr knew he had a defective heart. If he knew that, he probably would not have tried to eject the drunken man, but that does not make the ejecting or the result accidental.

I was also referred to some American cases, which are always helpful. There was *Fetter* v. *Fidelity and Casualty Co.* (2). There the assured was endeavouring to close a window sash and used a pole. The end of the pole slipped, and the sudden release of its hold had the effect of throwing him against the edge of the table, which caused a rupture of the kidney. The cause was the slipping of the pole, which threw him on the table. The slipping of the pole and his falling on the edge of the table were plainly accidental. It turned out that he had cancer, but the cancer would not have killed him for some time. It was as if the injury to the heart had been produced by some accident such as his being thrown out of a cart. That case is, in my opinion, clearly distinguishable. *Appel* v. *Ætna Life Assurance Corpn.* (3) was a case where the assured died through an injury to the appendix brought on by a bicycle ride, one of the muscles used in riding having necessarily rubbed against the appendix, which was in an unnatural condition, and inflamed it. It was held that it was not an accident. Riding the bicycle was intentional, and there was no fall or collision. He rode where he chose and brought into play such muscles of the body as he willed. I think the case is very like the present, and it supports the view I have taken. *Horsfall* v. *Pacific Mutual Insurance Co.* (4) was a case where a man, accustomed to lift heavy weights, was lifting or assisting in lifting a weight of 350 lb. He had to stand on the top of a pile and reach below his feet in order to pick it up, and, by reason of his position, was at a disadvantage. He injured his heart, which was in a perfectly healthy condition, and died in consequence. It was held that his death was accidental. This, I think, may be justified by the fact that injury to the heart was not in his case the natural consequence of lifting the weight, but of the unintentional exertion which his position made necessary. It is at all events distinguishable on this ground.

In my opinion, there never was any accident here at all, and consequently the plaintiff fails in bringing the case within the terms of the policy. It is unnecessary for me to express any opinion upon the fourth condition, or on the other points raised by the company, further than by saying that I think the defendants might have a strong case on condition 4. There must be judgment for the company.

Judgment for insurers.

Solicitors: *Walker, Son & Field*, for *William Gee & Sons*, Bishop's Stortford; *Smiles & Co.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

R. *v.* CHANDRA DHARMA

[Court for Consideration of Crown Cases Reserved (Lord Alverstone, C.J., Kennedy, Lawrance, Phillimore and Channell, JJ.), March 18, 1905]

[Reported [1905] 2 K.B. 335; 74 L.J.K.B. 450; 92 L.T. 700; 69 J.P. 198; 53 W.R. 431; 21 T.L.R. 353; 49 Sol. Jo. 366]

Statute—Retrospective operation—Extension of period of limitation—Carnal knowledge of girl under 16*—Extension of time for prosecution—Criminal Law Amendment Act*, 1885 (48 *&* 49 *Vict., c.* 69), *s.* 5*—Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), *s.* 27.

On October 1, 1904, the Prevention of Cruelty to Children Act, 1904, came into operation, by s. 27 of which the time for commencing a prosecution under s. 5 (1) of the Criminal Law Amendment Act, 1885, was extended from three months to six months. The prisoner was convicted under the latter subsection of an offence which had been committed more than three months before the commencement of the prosecution, and before the coming into force of the Prevention of Cruelty to Children Act, 1904.

Held: section 27 related to procedure only, and was, therefore, retrospective, and the conviction must be upheld.

Notes. The Prevention of Cruelty to Children Act, 1904, s. 27, was repealed by the Statute Law Revision Act, 1927. The period of six months was increased to nine months by the Criminal Law Amendment Act, 1922, s. 2, and to twelve months by the Criminal Law Amendment Act, 1928, s. 1. The period is now fixed at twelve months by the Sexual Offences Act, 1956, s. 37 and Sched. 2 (10) (a).

Considered: *R.* v. *James and Midland Railway, Ex parte Bath Rural Council*, [1908] 1 K.B. 958. Applied: *Welby* v. *Parker*, [1916] 2 Ch. 1. Distinguished: *Langford Property Co.* v. *Pajzs*, [1943] 2 All E.R. 687. Referred to *D.P.P.* v. *Lamb*, [1941] 2 All E.R. 499; *London Fan and Motor Co.* v. *Silverman*, [1942] 1 All E.R. 307.

As to limitation of time for criminal proceedings, see 10 Halsbury's Laws (3rd Edn.) 340; and for cases see 42 Digest 699–700. For the Sexual Offences Act, 1956, see 36 Halsbury's Statutes (2nd Edn.) 215.

Case referred to:

(1) *The Ydun*, [1899] P. 236; 68 L.J.P. 101; 81 L.T. 10; 15 T.L.R. 361; 8 Asp.M.L.C. 551, C.A.; 42 Digest 699, *1156.*

Also referred to in argument:

Michell v. *Brown* (1858), 1 E. & E. 267; 28 L.J.M.C. 53; 32 L.T.O.S. 146; 23 J.P. 548; 5 Jur.N.S. 707; 7 W.R. 80; 120 E.R. 909; 42 Digest 767, *1935*.

Tuck & Sons v. *Priester* (1887), 19 Q.B.D. 629; 56 L.J.Q.B. 553; 52 J.P. 213; 36 W.R. 93; 3 T.L.R. 826, C.A.; 42 Digest 729, *1516*.

R. v. *Griffiths*, [1891] 2 Q.B. 145; 60 L.J.M.C. 93; 56 J.P. 87; 39 W.R. 719; 7 T.L.R. 478, C.C.R.; 42 Digest 732, *1534*.

Re Pulborough Parish School Board Election, *Bourke* v. *Nutt*, [1894] 1 Q.B. 725; 63 L.J.Q.B. 497; 70 L.T. 639; 58 J.P. 572; 42 W.R. 388; 10 T.L.R. 349; 38 Sol. Jo. 327; 1 Mans. 172; 9 R. 395, C.A.; 42 Digest 704, *1208*.

Case Stated by Mr. Commissioner Rentoul, K.C.

The prisoner Chandra Dharma was tried at the Central Criminal Court at the January Sessions, 1905, on the first count of an indictment charging him with unlawfully and carnally knowing a girl named Grace Killen upon July 15, 1904, when she was above the age of thirteen years and under the age of sixteen years, to wit, of the age of fourteen years and eleven months, contrary to the provisions of the Criminal Law Amendment Act, 1885, s. 5 (1), as amended by the Prevention of Cruelty to Children Act, 1904, s. 27, which came into operation on Oct. 1, 1904.

The prisoner was charged at the police court on December 27, 1904, and a warrant was granted upon that date. It was contended at the trial at the Central Criminal Court that the prisoner could not be convicted on the ground that, by the proviso to s. 5 of the Criminal Law Amendment Act, 1885, no prosecution could be commenced for an offence under sub-s. (1) of that section more than three months after the commission of the offence, and that the prosecution had been commenced on December 27, 1904, more than three months after the commission of the offence on July 15, 1904; further, that although by s. 27 of the Prevention of Cruelty to Children Act, 1904, the limit of time mentioned in the proviso to s. 5 of the Criminal Law Amendment Act, 1885, was extended to six months after the commission of the offence, the latter Act did not receive the Royal Assent until August 15, 1904, and by s. 33, sub-s. (3) of the Act did not come into operation until October 1, 1904, both of those dates being subsequent to the date of the offence charged; and that s. 27 of the Prevention of Cruelty to Children Act, 1904, was not retrospective. The learned commissioner overruled the objection and the prisoner was convicted.

Compton Smith (with him *C. W. Nicholson*) for the prisoner.
Hutton and *H. F. Dickens*, for the Crown, were not called upon.

LORD ALVERSTONE, C.J.—We have no doubt that the judgment in this case was correct. I think that the rule is clearly established that statutes which make alterations in procedure are retrospective. I think that the proposition is established in the case cited by Channell, J. (*The Ydun* (1)), and, if the action of a statute which shortens the period within which proceedings may be taken is retrospective, I see no reason why the action of a statute which lengthens that period should not also be retrospective. If a new right is given, or a new disability imposed, then, of course, the statute would not be retrospective. If it could fairly be argued that a new offence had been created or that the ingredients of the old offence were materially altered by the new statute, then I should consider that the statute was not retrospective. But here the offence is not altered; the only alteration effected by the statute is that the time within which a prosecution may be brought is extended.

KENNEDY, LAWRANCE, and **PHILLIMORE, JJ.,** concurred.

CHANNELL, J.—I have only a few words to add as a mere verbal criticism of the judgment of the Lord Chief Justice. The view which I take is that a

statute dealing with procedure applies to past Acts as well as future; it is not that the Act is retrospective.

Convictions affirmed.

Solicitors: *Coburn & Co.* and *Morton Phillips*; *Maugham*; *Kingsford, Dorman & Co.*, for *Kingsford, Arrowsmith & Co.*, Canterbury; *Walker & Terry*, Belper.

[*Reported by* A. A. Bethune, Esq., *Barrister-at-Law.*]

HADJI ALI AKBAR & SONS, LTD. *v.* ANGLO-ARABIAN AND PERSIAN STEAMSHIP CO., LTD.

[King's Bench Division (Bigham, J.), May 23, 31, 1906]

[Reported 95 L.T. 610; 22 T.L.R. 600; 10 Asp.M.L.C. 307; 11 Com. Cas. 219]

Shipping—Deviation—Effect on conditions in bill of lading limiting shipowner's liability—Consignment of cargo to London—Liberty to deviate and re-ship by another vessel—Abandonment of voyage—Effect on clause exempting shipowner from responsibility for damage by perils of the sea.

Among goods loaded on board a vessel in the Persian Gulf for carriage to London, Cardiff and the United States was a quantity of asafœtida consigned to the plaintiffs for carriage on deck to London. The bill of lading in respect of the asafœtida contained an exceptions clause freeing the shipowners from responsibility for damage caused by perils of the sea, and a clause giving them liberty to deviate and call at any port out of route and to substitute another vessel. Damage was caused to the asafœtida by sea water and instead of going to London the vessel proceeded only to Cardiff whence the owners shipped the asafœtida to London in another vessel. In an action by the consignees to recover damages on the ground that the shipowners had forfeited their right to rely on the exceptions clause by abandoning the voyage to London,

Held: the liberties were reasonable and their exercise did not defeat the object of the contract, namely the carriage of the goods to London; the owners were entitled to change the final destination from London to Cardiff and to ship the goods from there to London by another vessel; and they were, therefore, entitled to rely upon the exceptions clause as to damage by perils of the sea.

Notes. Considered: *G. H. Renton & Co.* v. *Palmyra Trading Corpn. of Panama*, [1956] 1 All E.R. 209. Referred to: *Morrison* v. *Shaw, Savill and Albion Co.*, [1916] 1 K.B. 747; *Frenkel* v. *MacAndrews & Co.* (1929), 17 Asp.M.L.C. 582.

As to effect of exceptions clauses in charterparties and bills of lading, see 35 Halsbury's Laws (3rd Edn.) 376. As to transhipment under bill of lading, see 35 Halsbury's Laws (3rd Edn.) 426–432; and for cases see 41 Digest 500–501.

Cases referred to in argument:

Leduc v. *Ward* (1888), 20 Q.B.D. 475; 57 L.J.Q.B. 379; 58 L.T. 908; 36 W.R. 537; 4 T.L.R. 313, C.A.; 41 Digest 485, *3172*.

Balian & Sons v. *Joly, Victoria & Co., Ltd.* (1890), 6 T.L.R. 345, C.A.; 41 Digest 488, *3189*.

Behn v. *Burness* (1863), 3 B. & S. 751; 2 New Rep. 184; 32 L.J.Q.B. 204; 8 L.T. 207; 9 Jur.N.S. 620; 11 W.R. 496; 1 Mar.L.C. 329; 122 E.R. 281, Ex. Ch.; 41 Digest 327, *1840*.

Rathbone Brothers & Co. v. *D. MacIver, Sons & Co.*, [1903] 2 K.B. 378; 72 L.J.K.B. 703; 89 L.T. 378; 52 W.R. 68; 19 T.L.R. 590; 47 Sol. Jo. 653; 9 Asp.M.L.C. 467; 8 Com. Cas. 303, C.A.; 41 Digest 445, *2794*.

Evans, Sons & Co. v. *Cunard Steamship Co., Ltd.* (1902), 18 T.L.R. 374; 41 Digest 486, *3175*.

Davis v. *Garrett* (1830), 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456; 41 Digest 488, *3188*.

Simon, Israel & Co. v. *Sedgewick*, [1893] 1 Q.B. 303; 62 L.J.Q.B. 163; 67 L.T. 785; 41 W.R. 163; 9 T.L.R. 104; 7 Asp.M.L.C. 245; 4 R. 128, C.A.; 29 Digest 145, *971*.

Borthwick v. *Elderslie Steamship Co.*, [1904] 1 K.B. 319; 73 L.J.K.B. 240; 90 L.T. 187; 52 W.R. 439; 20 T.L.R. 184; 9 Asp.M.L.C. 513; 9 Com. Cas. 126, C.A.; affirmed sub nom. *Elderslie Steamship Co.* v. *Borthwick*, [1905] A.C. 93; 74 L.J.K.B. 338; 92 L.T. 274; 53 W.R. 401; 21 T.L.R. 277; 10 Asp.M.L.C. 24; 10 Com. Cas. 109, H.L.; 41 Digest 446, *2800*.

Margetson v. *Glynn*, [1892] 1 Q.B. 337; 61 L.J.Q.B. 186; 66 L.T. 142; 8 T.L.R. 244; 7 Asp.M.L.C. 148, C.A.; affirmed sub nom. *Glynn* v. *Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 9 T.L.R. 437; 7 Asp.M.L.C. 366; 1 R. 193, H.L.; 41 Digest 311, *1715*.

Action in the commercial list before BIGHAM, J., sitting without a jury.

The plaintiffs claimed damages for breach of contract and breach of duty in or about the carriage of goods by sea.

The plaintiffs were consignees of 528 packages of asafœtida which were shipped under a bill of lading at Bandar Abbas, in the Persian Gulf, by the defendants steamer the *Arabistan* for London. The steamer took on board a quantity of other cargo, shipped at different ports in the Persian Gulf, some of which was destined for London, some for Cardiff, and some for the United States. She sailed from the Gulf at the end of November, 1905, bound, in the first instance, for London. On Dec. 13 she arrived at Port Said. She left that port on Dec. 14 making for Oran. Between Dec. 15 and 18 she encountered very bad weather, during which the asafœtida, which was carried on deck, was damaged by sea water. It is in respect of this damage that the plaintiffs sought to recover. On Dec. 19 the defendants, being then advised of the quantities of cargo on board the vessel for London and Cardiff respectively, determined to bring the vessel direct to Cardiff instead of London. They accordingly telegraphed from their head office in London to Oran to that effect. The vessel arrived at Oran on Dec. 23. There the master received the telegram, and, acting on the fresh instructions, he left Oran bound for Cardiff. His course until he got abreast of Finisterre was identical with the course to London, but at that point his course had to be altered in order to make for Cardiff. The vessel arrived at Cardiff in due course, and there it was found expedient in the ship's interest to tranship the London cargo into a small steamer (the *Emperor*) chartered by the defendants for the purpose, and so to bring it to its destination. The *Arabistan* then discharged her Cardiff cargo and proceeded to the United States. The damaged condition of the plaintiffs' goods was discovered on their delivery in London, and the present claim was made. One of the bills of lading provided:

> "Shipped, apparently in good order and condition by Syed Suleiman, on board the steamship *Arabistan*, . . . commander, or whoever else may be placed in command for the voyage, and bound, subject to the liberties hereafter mentioned, for London, the undermentioned goods with liberty, before or after shipment, to carry the same or any part thereof in craft for any part of the voyage, to transfer the same into craft to enable the said steamship to cross any bar, and to ship and re-ship the same at the sole risk of the owners thereof, to proceed to or call in any order for any purpose at any port or ports whatsoever, although in a contrary direction to or out of or beyond the ordinary route, all which ports shall be deemed to be included within the intended

voyage, to sail with or without pilots, to tow and assist vessels in all situations, and to deviate for any purpose, with liberty either before shipment, or at any period of the voyage, and so often as may be deemed expedient, at any port or place, to ship the whole or any part by any other steamship (whether belonging to the company or not), or tranship or land and store, or put into hulk or craft, for such time as may be deemed expedient, and thence re-ship on the said steamship or any other steamship (whether belonging to the company or not), and with liberty, in the event of the steamship putting back, or into any port, or otherwise being prevented by any cause from commencing or proceeding in the ordinary course of her voyage, to proceed under sail or in tow of any other vessel, or in any other manner. S. S 32 cases asafœtida; J. S. 56 cases asafœtida (88) eighty-eight only stated as being marked and numbered as herein indicated, on deck at shippers' risk not responsible for contents, and to be carried and delivered (subject to the exceptions, limitations, and conditions hereinafter mentioned) in like order and condition, from ship's tackles, where ship's responsibility shall cease, at the port of London, or so near thereunto as she may safely get, unto H. A. Akbar & Sons, or to his or their assigns. Freight and primage for the said goods to be paid in cash on arrival, without deduction, at 35s. per ton of 40 cwt., and to be considered earned, ship or goods lost or not lost. Average payable according to York-Antwerp Rules, 1890."

The following were the exceptions, limitations, and conditions above referred to:

"The ship is not liable for loss or damage occasioned by the act of God, perils of the sea, fire, enemies, pirates, robbers by land or sea, arrests and restraints of princes, rulers, port or other authorities, or people, breakage of shafts, collision, explosion, bursting or leakage of boilers or pipes, heat, steam, fire on board, in hulk, or craft, or on shore, wheresoever and whensoever occurring, jettison, barratry, accidents to or defects, latent on beginning of voyage or otherwise, in hull, tackle, boilers, machinery, equipment of ship, or craft, or their appurtenances, any act, error, neglect, or default whatsoever of pilots, master, or crew or other servant of the shipowner, in the management, stowage, or navigation of the ship or otherwise, or of any other ship or craft, detention, delay, or loss of any description arising from strikes, or locks-out, of officers, engineers, seamen, workmen, or labourers, or any circumstances beyond the shipowner's control, and all and every the dangers and accidents of the seas, rivers, canals, and land carriage, and of navigation of whatever nature or kind, are excepted. The ship is not liable for loss or damage arising from insufficient packing, torn, mended, chafed, weak, or fragile bags, bagging, cases, or wrappers, reasonable wear and tear of packages, inaccuracies, obliteration, indistinctness, or absence of marks, quality marks, portmarks, countermarks, numbers, address, or descriptions of goods shipped, leakage, breakage, pilferage, wastage, dust from coaling, discharging or loading on the voyage, rain, spray, sweat, rust, decay, effects of climate, land damage, vermin, evaporation, smell, leakage, or drainage, or contact with other goods. Fines and expenses, and losses by detention of ship or cargo caused by incorrect marking, or by absence, incompleteness, or incorrectness of description of contents or weight, or of any other particulars or certificates required by the authorities at the ports of loading or discharge or any intermediate port, upon either the packages or bills of lading or separately, shall be borne by the owners of the goods. The ship is not liable for loss of or any damage to any goods capable of being covered by insurance, nor for risks of lighterage to or from vessel or warehouse, nor of transhipment or storage of any kind, notwithstanding that cost of the same may be paid by the ship, nor for loss of or damage to goods under through bill of lading, where the damage is done whilst the goods are not in the actual possession of the shipowner, nor in any case for more than the invoice, or declared or known value of the goods, less charges and brokerage, whichever

shall be least. A clean receipt given by transhipment vessel or agents to exonerate the ship from all claims. Mate's receipts to be evidence of quantity of and of condition in which goods are received by this company from river steamers and craft. Any loss of or damage to goods for which the carrier is liable must be claimed against the company in whose custody they may be at time of accident, and no claim can be entertained unless written notice be given by consignee to steamer's agent before goods are taken delivery of and survey held within seven days of the goods being discharged. The goods, while waiting shipment and transhipment, and also as soon as they are discharged over the ship's side, shall be at the risk of the shippers or consignees. Should the ship for any cause whatever not call at the port for which goods have been shipped, the owners or agents of the ship are at liberty to forward the goods from any port at which they may call to their port of destination by any steamer or steamers, either of their own or any other line. Should the goods for any cause be forwarded by steamer of any other line, shippers and consignees are to be bound by all clauses and conditions of the usual bill of lading of such steamer."

Hamilton, *K.C.*, and *Chaytor* for the plaintiffs.
Scrutton, *K.C.*, and *Dawson Miller* for the defendants.

Cur. adv. vult.

BIGHAM, J.—This action is brought to recover damages for breach of a bill of lading contract to deliver goods in good order and condition. The defendants resist the claim on the ground that the damage was due to causes for which by the terms of the bill of lading they are not responsible—namely, perils of the sea. The plaintiffs, however, contend that in the circumstances the defendants are precluded from relying upon the exceptions in the bill of lading. They say that by altering the destination of the vessel at Oran and by transhipping the cargo into the *Emperor* at Cardiff the defendants broke the bill of lading contract, and thereby lost any right they might otherwise have had to rely on the exceptions contained in it.

The question turns upon the meaning of the bill of lading and upon the extent and effect of certain liberties reserved in it in favour of the shipowners. The document is described in its margin as the "homeward" bill of lading of the Anglo-Arabian and Persian Steamship Co., Ltd., and underneath this description is printed a long list of "consignees and agents" at different ports in England and the Continent of Europe, including London, Swansea, Cardiff, and many others. The document sufficiently indicates the kind of trade carried on by the defendants —namely, a trade from the Persian Gulf to different ports in the West. The margin also contains in writing particulars of the plaintiffs' shipment, showing that it consisted of a small parcel of goods on which the freight amounted to about £10. The body of the bill of lading contained the following passages:

"Shipped apparently in good order and condition by H. Mir Ahmed on board the steamship *Arabistan*, voyage 15 . . . and bound, subject to the liberties hereafter mentioned, for London, the undermentioned goods, with liberty . . . to proceed to or call in any order for any purpose at any port or ports whatsoever, although in a contrary direction to or out of or beyond the ordinary route, all which ports shall be deemed to be included within the intended voyage . . . and to deviate for any purpose, with liberty either before shipment or at any period of the voyage, and so often as may be deemed expedient, at any port or place, to ship the whole or any part by any other steamship (whether belonging to the company or not), or tranship or land and store . . . and thence reship on the said steamship or any other steamship (whether belonging to the company or not) 528 packages asafœtida on deck at shipper's risk . . . and to be carried and delivered (subject to the exceptions, limitations,

and conditions hereinafter mentioned) in like good order and condition, from ship's tackles, where ship's responsibility shall cease, at the port of London."

It is upon these so-called "liberties" that the defendants rely as justifying the change of destination at Oran and the transhipment of the plaintiff's goods into the *Emperor* at Cardiff.

I think the defendants are right. No doubt the object of the bill of lading contract is that the plaintiffs shall have their goods carried to London, and if the liberties were of such a kind that if put into operation they would defeat the object, it might be possible to disregard them in construing the document. They are, however, not of such a kind. It is to be remembered that the defendants' ships are general ships soliciting cargo in and about the Persian Gulf for carriage to different ports in the West. They may get much or little for this or that port, so little sometimes that, from a business point of view, it would be out of the question to send the ship there. Yet a bill of lading, such as the one sued on, would be issued to the shipper; he would, however, know quite well that if there happened to be little cargo on board for that port the ship would probably make for some other destination to which it would be more expedient to go, and would send forward his goods to their destination by transhipment. The shipper gets an advantage in this way, because, if the ship were bound by the contract to go to the port of destination of each particular parcel of goods carried, the rate of freight would necessarily be very high, so high, indeed, as frequently to prohibit trade. It is for these reasons that the liberties relied on are inserted in the bill of lading. Their meaning is plain. They are reasonable, and instead of defeating the object of the shipper, they enable that object to be attained in the cheapest, and possibly in the only, way. I am, therefore, of opinion that the defendants were justified in altering the first destination of the vessel from London to Cardiff and that by so doing they in no way forfeited their right to rely upon the exceptions as to the perils of the sea.

Among the excepted perils set out in the bill of lading is one numbered 16. It is as follows:

> "Should the ship for any cause whatever not call at the port for which goods have been shipped, the owners or agents of the ship are at liberty to forward the goods from any port at which they may call to their port of destination by any steamer or steamers, either of their own or any other line. Should the goods for any cause be forwarded by steamer of any other line, shippers and consignees are to be bound by all clauses and conditions of the usual bill of lading of such steamer."

Why this passage is included among the exceptions I do not know, but it is relied upon by the plaintiffs as limiting the shipowners' liberty of transhipment to a transhipment into a "liner" as distinguished from a small trading steamer such as the *Emperor*. I do not, however, think that the words "other line" are used here in any other sense than as meaning another steamer. Nor do I think that the passage has any relation to the liberties contained in the earlier part of the bill of lading, or that it can be read as cutting down or qualifying those liberties. In this case the damage done to the plaintiffs' goods was caused by an accident for which the defendants neither were by their contract nor have by their conduct made themselves responsible, and judgment must be in their favour, with costs.

Judgment for the defendants.

Solicitors: *Hollams, Sons, Coward & Hawksley*; *W. A. Crump & Son.*

[*Reported by* Trevor Turton, Esq., *Barrister-at-Law.*]

Re CRANE. ADAMS *v.* CRANE

[CHANCERY DIVISION (Swinfen Eady, J.), December 6, 19, 1907]

[Reported [1908] 1 Ch. 379; 77 L.J.Ch. 212; 98 L.T. 314]

Interest—Will—Legacy—Income of trust fund—Date of payment of interest.

A pecuniary legacy bears interest generally from the expiration of a year after the testator's death. There is an exception to the rule in case of legacies by persons in loco parentis to infant children.

A testator bequeathed a sum to be held on trust, the income to be paid to his widowed daughter-in-law during her widowhood, subject to the obligation of maintaining and educating her deceased husband's children while they were minors and unmarried.

Held: the legacy did not carry interest from the testator's death.

Raven v. *Waite* (1) (1818), (1 Swan 553) applied.

Notes. Distinguished: *Re Ramsay, Thorpe* v. *Ramsay*, [1917] 2 Ch. 64.

As to legacies to infants, see 16 HALSBURY'S LAWS (3rd Edn.) 324–327; and for cases see 23 DIGEST (Repl.) 464–466.

Cases referred to:

(1) *Raven* v. *Waite* (1818), 1 Swan. 553; 1 Wils. Ch. 204; 36 E.R. 502; 23 Digest (Repl.) 465, *5377.*

(2) *Leslie* v. *Leslie* (1835), L. & G. temp. Sugd. 1; 23 Digest (Repl.) 463, **1170.*

(3) *Pett* v. *Fellows* (1733), 1 Swan. 561; 36 E.R. 505, L.C.; 23 Digest (Repl.) 464, *5364.*

(4) *Re Richards* (1869), L.R. 8 Eq. 119; 23 Digest (Repl.) 464, *5358.*

Adjourned Summons as to interest on a legacy.

A testator by a codicil gave £8,000 to R. N. Hazeldine or other the trustee or trustees of the will of his late son Clifford conditional upon certain shares held by such trustee being transferred for a consideration of £3,000 to the testator or his executors within three months after his death. This transfer was made and the £8,000 paid within twelve months after the testator's death, but without any interest from the death. The £8,000 was to be held upon the trusts by the will of Clifford declared of residue—namely, to invest and pay the income to the widow during her widowhood, but subject to the obligation of maintaining and educating thereout such of Clifford's children as should be minors and unmarried. There were two infant children. This summons was taken out to determine whether the legacy of £8,000 carried interest from the testator's death.

Austen Cartmell for the executor.

Cann for the trustee of Clifford's will.

Whitmore Richards, Simpson, and *Ford* for the residuary legatees.

Cur. adv. vult.

Dec. 19, 1907. **SWINFEN EADY, J.** read the following judgment.—The question to be determined is whether the £8,000 trust legacy bequeathed by the second codicil to the defendant Robert Naylor Hazeldine carries interest from the death of the testator until payment. Interest from the testator's death is claimed upon the £8,000 upon the footing that, although not expressly given, an intention to give it in the shape of maintenance is fairly inferable. The income, however, of this legacy is not given to any infants for their maintenance, but to an adult person, subject to the obligation on her part of maintaining and educating the infants, and I am not aware of any case in which, under such circumstances, interest has been allowed.

In *Leslie* v. *Leslie* (2), which followed *Pett* v. *Fellows* (3), interest from the death was allowed to infant grandnephews, because the fund was expressed to be given "for the use and support of the younger children." And so in *Re Richards*

(4) interest was allowed from the death to certain infant grand-nephews of the testator to whom the testator was not in loco parentis, because the will empowered the executors to apply all or any part of the expectant share of any children or the income thereof towards his or her education or otherwise for his or her benefit during minority. In all these cases, however, the beneficiaries were infants, and the ground upon which interest was allowed was that the testator had impliedly directed that interest should be payable from his death, otherwise there would not be any fund for maintenance. This rule, however, has not been extended to the case of adults. In *Raven* v. *Waite* (1) a sum was bequeathed to trustees upon trust to apply the interest towards the maintenance and support of Frances Raven (the wife of testator's nephew John Raven, from whom she was living separate) and the maintenance, education, and bringing up of her children until the youngest should attain twenty-one, and after that event to pay the income to Frances Raven so long as she remained the wife or widow of her present husband, with a direction that, in case of her death or marriage before that event, the trustees should take the children under their sole care and management, and apply the interest towards the maintenance, education, and bringing up of the children until the youngest should attain twenty-one. The bill was filed by Frances Raven to establish her claim to interest on the £1,600 from the testator's death; but SIR THOMAS PLUMER, M.R., dismissed the bill. He said that all the cases in which an exception had been admitted to the rule against allowing interest before one year from the testator's death had been cases of infants; that no case had been produced in which the exception ever was extended to a legacy in favour of an adult, though cases innumerable must have occurred of legacies to persons aged and decrepit, objects of the testator's bounty during his life. The Master of the Rolls added (1 Swan. at pp. 559, 560):

> "It is then insisted that this is a provision for the joint benefit of an adult parent and her infant children; and that the exception in favour of the infants must prevail. But the gift here is to the mother, to enable her to maintain herself and her children, and the legacy is payable to her during her life: after her death, indeed, the trustees are to apply it for the maintenance of the children, but the mother is the primary object of the testator's bounty. Such a gift cannot form an exception to the rule."

I, therefore, decide that the legacy of £8,000 does not carry interest for the period between the testator's death and the dates upon which the instalments of the legacy were paid.

Solicitors: *Taylor, Hoare & Pilcher*, for *Dent & Adams*, Wolverhampton; *Woodcock, Ryland & Parker*, for *Waterhouse & Son*, Wolverhampton; *Shelton, Walker & Bikker*; *Robins, Hay, Waters & Hay*.

[*Reported by* G. B. HAMILTON, ESQ., *Barrister-at-Law.*]

Re GRANT, BULCRAIG & CO.

[Chancery Division (Farwell, J.), November 24, 28, 1905]

[Reported [1906] 1 Ch. 124; 75 L.J.Ch. 106; 93 L.T. 760; 54 W.R. 165; 22 T.L.R. 96; 50 Sol. Jo. 96]

Costs—Taxation—Review—Power of taxing master to vary bill—Introduction of fresh item—Correction of arithmetical error—Alteration in bill—Solicitors Act, 1843 (6 *& 7 Vict., c.* 73), *s.* 37.

When a bill of costs has been delivered by a solicitor to his client, the client is entitled to have that bill taxed as it stands and the taxing master cannot allow it to be varied, save as to some detail which is not the subject of taxation and of which the client is as well able as the solicitor to test the accuracy. Thus a taxing master cannot leave in a bill an item not properly chargeable to cover work which the solicitor has done but for which he has forgotten to charge, which would amount to his altering the bill by introducing a fresh item. The taxing master may, however, correct an error in casting, because that is a matter not of taxation, but of arithmetic, and the client was as competent as the solicitor to discover the error.

Costs—Taxation—Review—Deposit on presentation of bankruptcy petition—Bankruptcy Rules, 1886, *rr.* 112 (i), 147.

The deposit paid on presentation of a bankruptcy petition is an item properly chargeable by a solicitor in his bill of costs.

Notes. The Solicitors Act, 1843, s. 37, has been repealed; see now the Solicitors Act, 1957, s. 69, 37 Halsbury's Statutes (2nd Edn.), 1111. The Bankruptcy Rules, 1886, have been repealed. See now the Bankruptcy Rules, 1952 (S.I. 1952 No. 2113) r. 146, 3 Halsbury's Statutory Instruments, Title, Bankruptcy.

Referred to: *Re Louch*, [1930] All E.R.Rep. 711.

As to delivery of a bill of costs, see 36 Halsbury's Laws (3rd Edn.) 130–139; and for cases see 42 Digest, 149–157.

Cases referred to:

(1) *Re Carven* (1845), 8 Beav. 436; 14 L.J.Ch. 372; 50 E.R. 171; 42 Digest 157, *1576*.

(2) *Re Heather* (1870), 5 Ch. App. 694; 39 L.J.Ch. 781; 18 W.R. 1079, L.J.; 42 Digest 158, *1588*.

(3) *Re Thompson* (1885), 30 Ch.D. 441; 55 L.J.Ch. 138; 53 L.T. 479; 34 W.R. 112, C.A.; 42 Digest 159, *1594*.

(4) *Re Walters* (1843), 9 Beav. 299; 1 New Pract. Cas. 288; 5 L.T.O.S. 342; 50 E.R. 359; 42 Digest 158, *1587*.

(5) *Re Whalley* (1855), 20 Beav. 576; 52 E.R. 726; 42 Digest 158, *1585*.

(6) *Williams* v. *Barber* (1813), 4 Taunt. 806; 128 E.R. 548; 28 Digest 145, *1437*.

(7) *Re Buckwell and Berkeley*, [1902] 2 Ch. 596; 71 L.J.Ch. 713; 87 L.T. 215; 51 W.R. 21; 46 Sol. Jo. 687, C.A.; 42 Digest 155, *1544*.

(8) *Re Kingdon and Wilson*, [1902] 2 Ch. 242; 71 L.J.Ch. 604; 86 L.T. 639; 50 W.R. 533; 18 T.L.R. 588; 46 Sol. Jo. 502, C.A.; 42 Digest 155, *1551*.

Also referred in argument:

Re Wells (1845), 8 Beav. 416; 14 L.J.Ch. 215; 5 L.T.O.S. 19; 9 Jur. 820; 50 E.R. 163; 42 Digest 157, *1577*.

Re Carthew, Re Paull (1884), 27 Ch.D. 485; 54 L.J.Ch. 134; 51 L.T. 435; 32 W.R. 940; 28 Sol. Jo. 709, C.A.; 42 Digest 161, *1646*.

Re Remnant (1849), 11 Beav. 603; 18 L.J.Ch. 374; 14 L.T.O.S. 265; 50 E.R. 949; 42 Digest 154, *1533*.

Chessum & Sons v. *Gordon*, [1901] 1 K.B. 694; 70 L.J.K.B. 394; 84 L.T. 137; 49 W.R. 309; 45 Sol. Jo. 293, C.A.; Digest (Practice) 475, *1556*.

Application to review the taxing master's decision as to certain items in bills of costs.

Grant, Bulcraig & Co. had acted as solicitor for a Mr. Croft in certain matters, and in December 1904, Mr. Croft obtained the common order under the Solicitors Act, 1843, to tax three bills of costs of £110 3s. 8d., £16 3s. 10d., and £7 14s. 6d. delivered to him; the order provided that, if more than one-sixth was taxed off the bills, the solicitors were to pay the costs of taxation; but that if less than one-sixth was taxed off, then Mr. Croft was to pay these costs. The three bills as delivered amounted in all to £134 12s., but the bill for £7 14s. 6d. was in reality only for £6 14s. 6d., an error having been made in casting up the items. The taxing master had treated this as a clerical error, and reduced the bill to £6 14s. 6d. The three bills as dealt with by the taxing master amounted, therefore, to £133 12s. Of this he had taxed off £22 4s. 6d. and had certified that he had taxed and settled the bills at £111 7s. 6d., which sum entitled the solicitors to the costs of taxation.

In arriving at this result he had overruled three objections taken on behalf of Mr. Croft. The first of these was as to an item of 3s. 4d. This was held to be not properly chargeable, but the solicitors had failed to charge an item of 4s. 6d. which they might properly have charged; and the taxing master had allowed the item of 3s. 4d. to stand in the bill to cover the work done and not charged for. The second objection was as to the correction which the taxing master had allowed in the bill for £7 14s. 6d., by correcting the clerical error and treating it as a bill for £6 14s. 6d. only. The third objection was as to an item of £5, being the deposit paid into the Bankruptcy Court on the presentation of a bankruptcy petition. It had been contended on behalf of Mr. Croft that this was not an item properly chargeable in a bill of costs, but that it should be taxed off the solicitors' bill and carried into their cash account. The taxing master had, however, allowed it to stand in the bill of costs on the ground that the deposit was a payment made by the solicitors in pursuance of their professional duty, and properly chargeable as a professional disbursement in their bill of costs.

Ashton Cross for Mr. Croft.
Cozens-Hardy for the solicitors.

Cur. adv. vult.

Nov. 28, 1905. **FARWELL, J.,** read the following judgment.—This is a summons to disallow three items allowed by the taxing master. The taxation is under the Solicitors Act, 1843, and by an order, dated Dec. 8, 1904, the taxing master was ordered to tax and settle the bills of fees, charges, and disbursements, amounting respectively to £110 3s. 8d., £16 13s. 10d., and £7 14s. 6d., and the order contained the usual provision, in accordance with the Act, that, if one-sixth be taxed off, the solicitors were to pay the costs of taxation. The three items in dispute are 3s. 4d., £1 and £5, and I am told that the costs of taxation will probably depend on the allowance or disallowance of any one of these.

There is an unbroken line of authorities since the passing of the Act which establishes that, for the purposes of taxation under the Act, and the costs thereof, the solicitor is bound by the bill that he has delivered. In *Re Carven* (1), Lord Langdale, M.R., says that (8 Beav. at p. 438):

> "if a solicitor has delivered his bill, he is bound by it, and the taxation must be on that bill; he is not entitled as of course to reduce his demand, or to reserve the power of delivering a bill containing other charges."

Another general rule was recognised and approved by the Court of Appeal in *Re Heather* (2); and again in *Re Thompson* (3) where Cotton, L.J., says (30 Ch.D. at p. 448):

> "Now, it has been well establshed that, when a solicitor sends in his bill, he gives the client to whom he sends it in a right to have that bill taxed. . . . The rule has been carried so far that even when objections have been made to

particular items of a bill delivered, and the solicitors have, with the assent of the client, taken back the bill for the purpose of reconsideration and have struck out certain items, the court has held that the bill to be taxed must be the bill as it was originally sent in and not the bill as amended."

Nor has the taxing master any power to add or strike out items, his functions, as defined by the order, are to tax and settle. To tax is to deal seriatim with each item by way of allowance or disallowance. To settle is finally to ascertain the amounts (if any) recoverable.

The only way in which the solicitor can add or strike out items, or increase amounts, is by special application to the court, as was done in *Re Walters* (4) and *Re Whalley* (5); but such alteration is not allowed to affect the costs of taxation of the original bill, it is merely to prevent the solicitor from losing charges which he is entitled to make, but has overlooked; in neither case is he allowed to diminish the amount of his charges. The reason for the rule is stated by COTTON, L.J., in *Re Thompson* (3) (30 Ch.D., at p. 448):

> "That rule was laid down to prevent any attempt being made by solicitors to impose on clients, who did not know what the proper charges were, by sending in a bill which would not stand taxation and then, when taxation was insisted on or threatened, sending in another bill which they knew could stand taxation."

The solicitor is treated strictly because he is dealing with his client in a matter in which the solicitor is an expert and the client is not, but the reasoning has no application to details which are not the subject of taxation and the accuracy of which the client is as well able to test as the solicitor; such matters become mere matters of evidence, and the taxing master may allow the solicitor to correct blunders therein if, in his discretion, he thinks proper to do so. Thus, in *Williams* v. *Barber* (6) it was held that a mistake in the dates (e.g. Trinity Vacation instead of Hilary) did not vitiate a bill so as to support a motion for a new trial on the ground that the plaintiff had not delivered a correct bill such as was required by the statute then in force. By parity of reasoning, I think that the taxing master might tax an item although the date was wrongly given and might allow the error to be corrected if he finds that he can do so without injustice to the client.

The principles that I have stated dispose of the first two items. The first is: "3s. 4d. for attending and drawing up order and copies." This is admittedly not chargeable at all; but the solicitor might have charged 4s. 6d. for notice of application and copies to file and service, and omitted to do so. The taxing master, to quote his own words,

> "has left the 3s. 4d. item, which is not strictly chargeable, to cover the work done in respect of the above named."

In other words, he has disallowed the item as charged and has altered the bill by substituting another item. In my opinion, he cannot do this, and the summons succeeds in respect of this 3s. 4d. The second item is an error in casting. The bill delivered is for £7 14s. 6d., but the items amount only to £6 14s. 6d. The taxing master has corrected the casting, and I am of opinion that he was right in so doing. This is not taxation, but arithmetic, and the client was as competent to add up a row of figures as the solicitor. It is objected that the order mentions £7 14s. 6d. as the amount of the bill to be taxed, but this is only for the purpose of identifying the bill. If necessary, I should have no difficulty in amending this error under the slip order. The last item is £5, the deposit paid under r. 147 of the Bankruptcy Rules, 1886. It was contended on the authority of *Re Buckwell and Berkeley* (7) and *Re Kingdon and Wilson* (8) that this sum ought to have been included in the solicitors' cash account and not in the bill of costs. The taxing master disallowed the objection, and there was a dispute before me on the

question whether he had stated that it was the settled practice to insert such deposit in the bill of costs, although this is not the reason given for his decision.

I, accordingly, reserved my judgment in order that I might communicate with the senior taxing master, because in matters of this sort, where no principle of justice is involved, I should be slow to disturb the settled practice, even although such practice should appear inconsistent with decisions in cases that appear analogous. The taxing master informs me, after inquiry amongst his brother taxing masters, that there is no settled practice in the Chancery Taxing Office, but he refers me to r. 112 (1) of the Bankruptcy Rules and the scale of costs thereunder, and I find in the latter the following:

"Attending official receiver with deposit, 6s. 8d. The amount of the deposit is to be charged in the petitioning creditor's bill of costs."

I hold, therefore, that this £5 was rightly inserted in the bill of costs and that the client's objection thereto fails. The result is that the applicant succeeds on the 3s. 4d. and fails on the £1 and the £5—i.e., he succeeds on one and fails in two of his three objections. I, accordingly, give him one-third and order him to pay two-thirds of the costs of this application. In other words, there will be a set-off of the costs, and he will pay the solicitors one-third of the costs of this application.

Solicitors: *Cohen & Co.*; *Grant, Bulcraig & Co.*

[*Reported by* H. C. Garsia, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL FOR CANADA *v.* CAIN
ATTORNEY-GENERAL FOR CANADA *v.* GILHULA

[Privy Council (Lord Macnaghten, Lord Dunedin, Lord Atkinson, Sir Arthur Wilson and Sir H. E. Taschereau), July 6, 27, 1906]

[Reported [1906] A.C. 542; 75 L.J.P.C. 81; 95 L.T. 314; 22 T.L.R. 757; C.R. [1906] A.C. 92.]

Canada—Dominion Legislation—Power to expel aliens—Alian Labour Act, 1897 (60 *& 61 Vict., c.* 11), *s.* 6, *as amended.*

The Crown possessing power to expel an alien from the Dominion of Canada, or to deport him to the country whence he entered the Dominion, the Canadian Alien Labour Act (60 & 61 Vict., c. 11), s. 6, as amended, which was assented to by the Crown, **held** to be intra vires the Dominion Parliament and to give the Dominion government power to impose such extra-territorial constraint as was necessary to enable it to expel aliens from Canada.

Notes. Considered: *R.* v. *Brinkley* (1907), 14 O.L.R. 434; *Trenholm* v. *McCarthy*, [1930] 1 D.L.R. 674. Applied: *R.* v. *Jawala Singh*, [1938] 4 D.L.R. 381. Considered: *British Coal Corpn.* v. *R.*, [1935] All E.R.Rep. 139; *Netz* v. *Ede*, [1946] 1 All E.R. 628; *R.* v. *Bottrill, Ex parte Kuechenmeister*, [1946] 2 All E.R. 434; *De Marigny* v. *Langlais*, [1947] B.R. 741. Approved: *Re Persons of Japanese Race*, [1946] S.C.R. 700. Applied: *R.* v. *Secretary of State for Foreign Affairs and Secretary of State for the Colonies, Ex parte Greenberg*, [1947] 2 All E.R. 550. Approved: *McKee* v. *McKee*, [1950] S.C.R. 700; *Chan* v. *McFarlane* (1962), 31 D.L.R. (2d.) 551. Referred to: *R.* v. *Home Secretary, Ex parte Chateau Thierry*, [1916–17] All E.R.Rep. 523; *Johnstone* v. *Pedlar*, [1921] All E.R.Rep. 176; *Croft* v. *Dunphy*, [1932] All E.R.Rep 154; *Co-operative*

Committee on Japanese Canadians v. *A.-G. for Canada*, [1947] A.C. 87; *Zabrovsky* v. *General Officer Commanding Palestine*, [1947] A.C. 246.

As to the extent of legislative power of a dominion parliament, see 5 HALSBURY'S LAWS (3rd Edn.) 474–476; and for cases see 8 DIGEST (Repl.) 708 et seq.

Cases referred to:

(1) *Macleod* v. *A.-G. for New South Wales*, [1891] A.C. 455; 60 L.J.P.C. 55; 65 L.T. 321; 7 T.L.R. 703; 17 Cox, C.C. 341, P.C.; 8 Digest (Repl.) 700, *89*.

(2) *St. Catherine's Milling and Lumber Co.* v. *R.* (1888), 14 App. Cas. 46; 58 L.J.P.C. 54; 60 L.T. 191; 5 T.L.R. 125, P.C.; 8 Digest (Repl.) 780, *437*.

(3) *Campbell* v. *Hall* (1774), 1 Cowp. 204; Loggr. 655; 20 Stat. Tr. 239; 98 E.R. 1045; 8 Digest (Repl.) 685, *6*.

(4) *Re Adam* (1837), 1 Moo.P.C.C. 460; 3 State Tr.N.S. 1284; 12 E.R. 889, P.C.; 8 Digest (Repl.) 769, *375*.

(5) *Donegani* v. *Donegani* (1835), 3 Knapp. 63; 3 State Tr.N.S. 1282; 12 E.R. 571, P.C.; 8 Digest (Repl.) 769, *370*.

(6) *Cameron* v. *Kyte* (1835), 3 Knapp. 332; 3 State Tr.N.S. 607; 12 E.R. 678, P.C.; 8 Digest (Repl.) 689, *27*.

(7) *Jephson* v. *Riera* (1835), 3 Knapp. 130; 3 State Tr.N.S. 591; 12 E.R. 598, P.C.; 8 Digest (Repl.) 769, *360*.

(8) *Musgrove* v. *Chun Telong Toy*, [1891] A.C. 272; 60 L.J.P.C. 28; 64 L.T. 378; 7 T.L.R. 378, P.C.; 2 Digest (Repl.) 180, *98*.

(9) *Hodge* v. *R.* (1883), 9 App. Cas. 117; 53 L.J.P.C. 1; 50 L.T. 301, P.C.; 8 Digest (Repl.) 703, *113*.

Also referred to in argument:

Riel v. *R.* (1885), 10 App. Cas. 675; 55 L.J.P.C. 28; sub nom. *R.* v. *Riel*, 54 L.T 339; 16 Cox, C.C. 48, P.C.; 8 Digest (Repl.) 704, *120*.

R. v. *Brierly* (1887), 14 O.R. 525; 8 Digest (Repl.) 719, **213*.

Appeals from orders of ANGLIN, J., (reported 10 O.L.R. 469), discharging the respondents from custody.

The question for decision was whether the provisions of s. 6 of the Dominion statute, 60 & 61 Vict., c. 11 (as amended by 61 Vict., c. 2, and 1 Edw. 7, c. 13), were ultra vires, or were within the legislative powers of the Dominion Parliament. On May 23, 1905, the appellant issued two warrants under the provisions of these Acts addressed to the Commissioner of Dominion Police, or any police constable within Canada (as to one warrant), to take into custody the respondent Everett E. Cain, then residing at St. Thomas in the province of Ontario, and to return him to the United States of America, and (as to the other warrant) to take into custody the respondent James Raymond Gilhula, then residing at St. Thomas aforesaid, and to return him to the United States of America. The warrants were issued by the appellant in exercise of the authority given to him by s. 6 of 60 & 61 Vict., c. 11, intituled "An Act to restrict the importation and employment of aliens." The respondents were arrested, whereupon they each applied to the High Court of Justice for the Province of Ontario for a writ of habeas corpus which was granted. On the returns of the writs, the respondents moved for discharge from custody and orders so discharging them were made by ANGLIN, J., solely on the ground that the Act 60 & 61 Vict., c. 11, as amended, was ultra vires the Canadian Parliament.

By the Alien Labour Act (60 & 61 Vict., c. 11), as amended:

"Section 1. From and after the passing of this Act it shall be unlawful for any person, company, partnership, or corporation, in any manner to prepay the transportation, or in any way to assist or encourage the importation or immigration of an alien or foreigner into Canada, under contract or agreement, parole or special, express or implied, made previous to the importation of such alien or foreigner, to perform labour or service of any kind in

Canada. . . . Section 6. The Attorney-General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person, partnership, company, or corporation, violating s. 1 of this Act. . . . Section 9. This Act shall apply only to the importation or immigration of such persons as reside in or are citizens of such foreign countries as have enacted and retained in force, or as enact and retain in force, laws or ordinances applying to Canada, of a character similar to this Act."

Shepley, K.C., and *Newcombe, K.C.* (both of the Canadian Bar), appeared for the appellant.

J. A. Robinson, H. J. Duncan, and *E. C. Cattanach* (all of the Canadian Bar) for the respondents.

July 27, 1906. **LORD ATKINSON.**—The question for decision in this case is whether s. 6 of the Dominion statute 60 & 61 Vict., c. 11 (styled in the respondents' Case "The Alien Labour Act"), as amended by 1 Edw. 7, c. 13, s. 13, is, or is not, ultra vires of the Dominion legislature. In the events which have happened, the question has, in this instance, become more or less an academic one, inasmuch as the two persons arrested under the Attorney-General's warrant granted under the authority of s. 6 were, on June 17, 1905, discharged from custody by order of ANGLIN, J., and, a year having, therefore, elapsed since the date of their entry into Canada, they cannot be re-arrested. Section 9 of 60 & 61 Vict., c. 11, has been amended by 61 Vict., c. 2, and ss. 1, 6 and 9 of the Alien Labour Act, as amended, are in the terms following: [HIS LORDSHIP read the sections of the Act, and continued:] The validity of s. 6 was impeached on several grounds, and was held to transcend the powers of the Dominion Parliament, inasmuch as it purported to authorise the Attorney-General or his delegate to deprive persons against whom it was to be enforced of their liberty without the territorial limits of Canada, and, on this point alone, the decision of the case turned. It was conceded in argument before their Lordships, on the principle of law laid down by this Board in *MacLeod* v. *A.-G. for New South Wales* (1), that the statute must, if possible, be construed as merely intending to authorise the deportation of the alien across the seas to the country whence he came if he was imported into Canada by sea, or if he entered from an adjoining country, to authorise his expulsion from Canada across the Canadian frontier into that adjoining country. The judgment of the learned judge was, in effect, based on the practical impossibility of expelling an alien from Canada into an adjoining country without such an exercise of extra-territorial constraint of his person by the Canadian officer as the Dominion Parliament could not authorise. No special significance was attached to the word "return." The reasoning of the judgment would apply with equal force if the word used had been "expel" or "deport" instead of "return."

In 1763, Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any previous time been held or acquired by the Crown of France were ceded to Great Britain: *St. Catherine's Milling and Lumber Co.* v. *R.* (2). On that event, the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and, save so far as it has since parted with these powers by legislation, royal proclamation, or voluntary grant, it is still possessed of them. One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from that Sate, at pleasure, even a friendly

A alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: VATTEL LAW OF NATIONS, bk. 1, s. 231; bk. 2, s. 125. The Imperial government might delegate those powers to the governor or the government of one of the colonies, either by royal proclamation which has the force of a statute (*Campbell* v. *Hall* (3)), or by a statute of the Imperial Parliament, or by the statute of a local Parliament B to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them. The following cases establish these propositions: *Re Adam* (4) (1 Moo, P.C.C. at pp. 472–476); *Donegani* v. *Donegani* (5) (3 Knapp. at p. 88); *Cameron* v. *Kyte* (6) (3 Knapp. at p. 343); C *Jephson* v. *Riera* (7). But as it is conceded that, by the law of nations, the supreme power in every State has the right to make laws for the exclusion or expulsion of aliens, and to enforce those laws, it necessarily follows that the State has the power to do those things which must be done in the very act of expulsion, if the right to expel is to be exercised effectively at all, notwithstanding the fact that constraint on the person of the alien outside the boundaries of the State or the D commission of a trespass by the State officer on the territories of its neighbour in the manner pointed out by ANGLIN, J., in his judgment should thereby result. Accordingly, it was in *Re Adam* (4) definitely decided that the Crown had power to remove a foreigner by force from the island of Mauritius, though, of course, the removal in that case would necessarily involve an imprisonment of the alien outside British territory, in the ship on board of which he would be put while it E traversed the high seas.

The question, therefore, for decision in this case resolves itself into this: Has the Act 60 & 61 Vict., c. 11, assented to by the Crown, clothed the Dominion government with the power the Crown itself theretofore undoubtedly possessed to expel an alien from the Dominion, or to deport him to the country whence he entered the Dominion? If it has, then the fact that extra-territorial constraint F must necessarily be exercised in effecting the expulsion cannot invalidate the warrant directing expulsion issued under the provisions of the statute which authorises the expulsion. It has already been decided in *Musgrove* v. *Chun Telong Toy* (8), that the government of the colony of Victoria by virtue of the powers with which it was invested to make laws for the peace, order, and good government of the colony, had authority to pass a law preventing aliens from entering G the colony of Victoria. On the authority of this case, s. 1 of the above-mentioned statute would be intra vires of the Dominion Parliament. The enforcement of the provisions of this section no doubt would not involve extra-territorial constraint, but it would involve the exercise of sovereign powers closely allied to the power of expulsion and based on the same principles.

The power of expulsion is, in truth, but the complement of the power of H exclusion. If entry be prohibited, it would seem to follow that the government which has the power to exclude should have the power to expel the alien who enters in opposition to its laws. In *Hodge* v. *R.* (9) (9 App. Cas. at p. 132), it was decided that a colonial legislature has within the limits prescribed by the statute which created it

I "an authority as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow."

If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial government could itself have imposed the constraint for a similar purpose had the statute never been passed.

Their Lordships, therefore, think that the decision of ANGLIN, J., was wrong, and that the appeals should be allowed, and will so humbly advise His Majesty. Having regard to the arrangement as to costs made with the Attorney-General at the hearing of the petition for special leave to appeal, and to all the circumstances of the case, their Lordships direct the appellant to pay the costs of the respondents as between solicitor and client.

Appeals allowed.

Solicitors: *Charles Russell & Co.*; *Blake & Redden.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

POLSUE AND ALFIERI, LTD. *v.* RUSHMER

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Robertson and Lord Atkinson), March 7, 11, 1907]

[Reported [1907] A.C. 121; 76 L.J.Ch. 365; 96 L.T. 510; 23 T.L.R. 362; 51 Sol. Jo. 324]

Nuisance—Noise—Need to prove increase of noise over existing noise—Consideration of character of neighbourhood.

In an action by a householder for an injunction against a neighbour to restrain him from carrying on a noisy business, regard must be had to the character of the locality and the noises already existing and whether a serious addition to that noise has been made.

Decision of the COURT OF APPEAL, [1906] 1 Ch. 234, affirmed.

Notes. Applied: *Bosworth-Smith* v. *Gwynnes* (1920), 89 L.J.Ch. 368. Referred to: *Heath* v. *Brighton Corpn.* (1908), 98 L.T. 718.

As to nuisance between neighbouring properties, see 28 HALSBURY'S LAWS (3rd Edn.) 131 et seq.; and for cases see 36 DIGEST (Repl.) 281 et seq.

Case referred to:

(1) *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 28 Digest (Repl.) 889, *1181.*

Also referred to in argument:

St. Helen's Smelting Co. v. *Tipping* (1865), 11 H.L.Cas. 642; 35 L.J.Q.B. 66; 12 L.T. 776; 29 J.P. 579; 11 Jur.N.S. 785; 13 W.R. 1083; 11 E.R. 1483, H.L.; 36 Digest (Repl.) 263, *127.*

Appeal from a decision of the Court of Appeal (VAUGHAN WILLIAMS, STIRLING, COZENS-HARDY, L.JJ.), reported [1906] 1 Ch. 234, affirming a judgment of WARRINGTON, J.

The appellants were printers, and, in September, 1904, became tenants of the basement and ground floor of No. 10, Wine Office Court, near Fleet Street, in the city of London. The adjoining house, No. 8, Gough Square, was occupied by the respondent, a dairyman. He carried on his business as a milk dealer in a shop on the ground floor, and he and some of his family used the rest of the building as a dwelling-house. The appellants placed in the basement of No. 10, Wine Office Court, a "flat-bed" printing machine, and used it in the course of their business, sometimes working all night. The machine was of the most modern type, was almost noiseless when running, and was stated to have the advantage of being quite free from vibration. It was driven by a belt from an electric

motor, to which a supply of electricity was supplied by a local company. The machine rested on a concrete floor 9 in. thick, to which the machine was firmly bolted. It was usually run at a speed throwing off 1,440 impressions per hour, and WARRINGTON, J., found as a fact that it had been carefully and properly worked, and held that the day work of the appellants did not constitute a nuisance, but that the night work caused serious disturbance amounting to a legal nuisance to the respondent. He granted the respondent an injunction restraining the appellants from conducting their business at night so to be a nuisance in respect of noise to the respondent.

Buckmaster, K.C., F. Hinde, and *G. H. Couch* for the appellants.
H. Terrell, K.C., and *C. L. Coote* for the respondent.

LORD LOREBURN, L.C.—This appeal has been presented to your Lordships with great fairness and propriety, but to my mind it is a hopeless appeal. There is no question of law that I can see in the case at all. WARRINGTON, J., laid down the law quite soundly, and it is not disputed that he did so.

The law of nuisance undoubtedly is elastic, as was stated by LORD HALSBURY, L.C., in *Colls* v. *Home and Colonial Stores Ltd.* (1). He said ([1904] A.C. at p. 185):

> "What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action."

Accordingly, this is a question of fact. It is said, indeed, by counsel for the appellants that WARRINGTON, J., did not carry out his law in the way in which he approached the facts. I cannot see that it is so. There was evidence sufficient to show that, taking into consideration the character of the locality and the noises there prevailing, yet a serious addition had been caused by the appellants. In my opinion, that was quite sufficient to warrant the conclusion arrived at by the learned judge and the Court of Appeal. I agree with COZENS-HARDY, L.J., when he says ([1906] 1 Ch. at p. 250):

> "It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam hammer is of the most modern approved pattern, and is reasonably worked."

I think that this appeal wholly fails, and that it ought to be dismissed with costs.

LORD MACNAGHTEN, LORD JAMES OF HEREFORD, LORD ROBERTSON and **LORD ATKINSON** concurred.

Appeal dismissed.

Solicitors: *M. W. Stikeman*; *H. E. Griffith.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

MOORE *v.* BISHOP OF OXFORD

[PRIVY COUNCIL (The Earl of Halsbury, L.C., Lord Macnaghten, Lord James of Hereford, Lord Davey, Lord Lindley, Lord Robertson, and Ecclesiastical Assessors (The Archbishop of Canterbury, the Bishop of Southwell and the Bishop of Ripon), March 16, 17, 1904]

[Reported [1904] A.C. 283; 73 L.J.P.C. 43; 90 L.T. 425]

Ecclesiastical Law—Offence—Clergyman—Swearing and ribaldry—Clergy Discipline Act, 1892 (55 & 56 *Vict.*, *c.* 32).

Habitual swearing and ribaldry by a clergyman is an offence within the meaning of the words "immoral conduct or immoral habit" in s. 2 of the Clergy Discipline Act, 1892, but the occasional use of language of that character is not such an offence.

Notes. Distinguished: *Bishop of Ely* v. *Close*, [1913] P. 184. Referred to: *Wakeford* v. *Bishop of Lincoln*, [1921] 1 A.C. 813.

As to ecclesiastical offences and discipline, see 13 HALSBURY'S LAWS (3rd Edn.) 214 et seq; and for cases see 19 DIGEST (Repl.) 356 et seq. For the Clergy Discipline Act, 1892, s. 2, see 7 HALSBURY'S STATUTES (2nd Edn.) 273.

Appeal by a beneficed clergyman in the Diocese of Oxford from a decision of the Consistory Court of the diocese convicting him under the Clergy Discipline Act, 1892, in respect of alleged immoral intercourse with a woman of the name of Johnson, and of an immoral habit of swearing and ribaldry.

Duke, *K.C.*, and *Cecil Walsh* appeared for the appellant.
Acland, *K.C.*, and *Snagge* for the respondent.

THE EARL OF HALSBURY, L.C.—Their Lordships are of opinion that the main charge in this case has broken down. The statements of the only witness who is relied on for the purpose of proving the charge are, in the opinion of their Lordships, uncorroborated by any conduct, act, or proof, and their Lordships are unable to concur with the Consistory Court in thinking that there is any corroboration by the correspondence or otherwise in favour of the accusation which has been made. Apart from any technical rule on the subject, it would be a most dangerous thing for any court to allow an accusation of this sort to prevail when there is no corroboration; and probably no court would be induced to do so. In those circumstances their Lordships think it impossible to confirm the finding that the evidence of the witness, uncorroborated as it is, and discredited by her own version of the transaction, can be accepted as conclusive against the appellant clergyman whom she accuses.

With regard to the other charge, of having been "habitually guilty of swearing and ribaldry," there is a body of evidence relating to three or four occasions, which undoubtedly establishes (as the court below has found) that, on those occasions, language was used which certainly could not be defended, the use of which would be disgraceful to anybody, whether clergyman or layman. But the question on this part of the case is, whether the appellant was, or was not, guilty of the charge made—and properly made—in pursuance of the Clergy Discipline Act, 1892, s. 2, which speaks of a clergyman

> "alleged to have been guilty of any immoral act, immoral conduct, or immoral habit,"

the words "immoral habit" being the words contained in the charge. Where on occasions of considerable provocation words are used, however discreditable and disgraceful to the person who used them—and certainly no words could be too severe in condemnation of language such as that found to have been used by the appellant, even allowing for exaggeration in the views of some of the witnesses who used such words themselves, and attributed them to the appellant—

yet the question would still remain whether or not, the clergyman having been proved in circumstances of provocation to have used such words on three or four occasions in the course of three years, it is true to say that he is guilty of the offence contemplated by the statute. The use of language of that sort can hardly be described as an "immoral act" in the sense in which that term is used in the Clergy Discipline Act, 1892. Immoral conduct and immoral habit are probably the same thing. What is charged—and in their Lordships' opinion properly charged in accordance with the statute—is that the appellant has

> "during the past five years been guilty of offences against the laws ecclesiastical (being offences against morality within the meaning of the Clergy Discipline Act, 1892) in that he had habitually been guilty of swearing and ribaldry."

Their Lordships certainly do not mean to give any countenance to the supposed innocence of the use of such words, even on special occasions of extraordinary provocation. As has been already said, no words are too severe to condemn such language. But the view which their Lordships entertain is that the offence contemplated by the statute—namely, of being habitually guilty of swearing and ribaldry—is not made out. Even although the appellant may have sometimes used such language, it is not established that he has been habitually guilty of such conduct. The evidence is spread over a period of three years, and the suggestion on the appellant's behalf is that objectionable language was only used on rare occasions of great provocation.

Under these circumstances their Lordships are of opinion that the appeal ought to be allowed with respect to both charges. It is satisfactory to their Lordships to find that the views which they entertain are shared by the most reverend and right reverend prelates who have been good enough to give them their assistance on this occasion. Their Lordships desire to add that they entirely concur in the observation of the learned counsel for the appellant that, under the circumstances, the respondent could not have taken any other course in this case than that which he has pursued.

The result, therefore, is that their Lordships will humbly advise His Majesty to allow the appeal, but, under the circumstances, their Lordships feel that it is not a case in which costs should be given, and there will, therefore, be no order as to costs on either side, either before this Board or in the court below.

Appeal allowed.

Solicitors: *Bryant & Hall*, for *A. Walsh*, Oxford; *Mallam & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

KEENE *v.* THOMAS

[King's Bench Division (Lord Alverstone, C.J., Kennedy and Ridley, JJ.), October 25, 1904]

[Reported [1905] 1 K.B. 136; 74 L.J.K.B. 21; 92 L.T. 19; 53 W.R. 336; 21 T.L.R. 2; 48 Sol. Jo. 815]

Lien—Repairer's lien—Goods subject to hire-purchase agreement—Agreement by hirer to keep and preserve goods from injury—Goods sent for repair—Lien as against owner on goods for cost of repairs.

The plaintiff let a dogcart under a hire-purchase agreement to R., who thereby agreed "to keep and preserve the said dogcart from injury." R. sent the dogcart to the defendant to be repaired. R. being in arrears with his instalments, the plaintiff brought an action to recover the dogcart, but the defendant claimed a lien on it for the cost of the repairs.

Held: R. had authority to send the dogcart to be repaired, and, therefore, the defendant had a lien not only against him but also against the plaintiff.

Dictum of Collins, J., in *Singer Manufacturing Co.* v. *London and South Western Rail. Co.* (1), [1894] 1 Q.D. at p. 837, applied.

Buxton v. *Baughan* (2), (1834), 6 C. & P. 674, distinguished.

Notes. Considered: *Jowitt* v. *Union Cold Storage Co.*, [1913] 3 K.B. 1; *Cassils* v. *Holden Wood Bleaching Co.* (1914), 84 L.J.K.B. 834. Applied: *Green* v. *All Motors*, [1917] 1 K.B. 625. Explained: *Pennington* v. *Reliance Motor Works*, [1922] All E.R.Rep. 466. Considered: *Bowmaker, Ltd.* v. *Wycombe Motors, Ltd.*, [1946] 2 All E.R. 113. Referred to: *Albermarle Supply Co.* v. *Hind*, [1927] All E.R.Rep. 401.

As to a repairer's lien in respect of goods under a hire-purchase agreement, see 19 Halsbury's Laws (3rd Edn.) 563; and for cases see 26 Digest (Repl.) 669.

Cases referred to:

(1) *Singer Manufacturing Co.* v. *London and South Western Rail. Co.* [1894] 1 Q.B. 833; 63 L.J.Q.B. 411; 70 L.T. 172; 42 W.R. 347; 10 T.L.R. 246; 38 Sol. Jo. 238; 10 R. 152, D.C.; 8 Digest (Repl.) 161, *1034*.

(2) *Buxton* v. *Baughan* (1834), 6 C. & P. 674, N.P.; 32 Digest 220, *48*.

Also referred to in argument:

Proudfoot v. *Hart* (1890), 25 Q.B.D. 42; 59 L.J.Q.B. 389; 63 L.T. 171; 55 J.P. 20; 38 W.R. 730; 6 T.L.R. 305, C.A.; 31 Digest (Repl.) 359, *4900*.

Jacob v. *Down*, [1900] 2 Ch. 156; 69 L.J.Ch. 493; 83 L.T. 191; 64 J.P. 552; 48 WR. 441; 44 Sol. Jo. 378; 31 Digest (Repl.) 540, *6635*.

Weldon v. *Gould* (1801), 3 Esp. 268, N.P.; 32 Digest 240, *247*.

Appeal from His Honour Judge Gye, sitting at the Newport County Court, Isle of Wight.

In June, 1903, the plaintiff, by a hire-purchase agreement, let a dogcart to one Robertson. By the agreement, the cart was to remain the property of the plaintiff unless and until the sum of £18 should have been paid to the plaintiff in monthly instalments of £1, and the plaintiff was to be at liberty to re-take possession of the cart and terminate the hiring should Robertson fail to pay the instalments when they became due. Robertson agreed to pay the instalments and "to keep and preserve the said dogcart from injury (damage by fire included)." In November, 1903, Robertson became in arrears with his instalments, and he paid no instalment in respect of the hire of the cart after that date, but notice was not served on him by the plaintiff to terminate the agreement until May, 1904. At some time after Robertson became in arrears with his instalments, but before the date of the notice terminating the agreement, Robertson sent the cart to the defendant, a coachbuilder, for the purpose of having certain repairs done to it. Robertson having failed to pay the defendant for the repairs to the cart executed by him, the

defendant claimed a lien on the cart and refused to deliver it up to the plaintiff until he had been paid the amount due to him for the work done to the cart. The plaintiff brought an action against the defendant claiming the return of the dogcart, or its value. The county court judge held that the agreement between the plaintiff and Robertson contemplated repairs being done, and that there must be taken to be an implied agreement between them that Robertson should have reasonable repairs to the cart done by a coachbuilder, if necessary, and that, in such circumstances, the defendant had a lien for his charge against the plaintiff; and he gave judgment for the defendant. The plaintiff appealed.

S. H. Emanuel for the plaintiff.
E. Grimwood Mears for the defendant.

LORD ALVERSTONE, C.J.—This case raises an important point, and I am somewhat surprised that no direct authority on the point in question can be found. I have come to the conclusion that the decision of the county court judge was right. It seems to me that the point in the case is whether Robertson had authority from the plaintiff to make the agreement with the defendant for the repair of the cart, as stated by ALDERSON, B., in *Buxton* v. *Baughan* (2). The agreement between the plaintiff and Robertson provides that Robertson should keep and preserve the dogcart from injury, and, although there might be cases in which Robertson would not be responsible under this clause of the agreement, I do not think that that clause is to be construed by the exact responsibility of Robertson as hirer of the cart. It seems to me that the clause gives authority to Robertson to keep the cart in a proper condition, and, if necessary, to have necessary repairs done by a coachbuilder, as it cannot be supposed that it was intended that Robertson would do the necessary repairs with his own hands.

I think that *Buxton* v. *Baughan* (2), which has been relied on by the plaintiff, is not a case in his favour. To start with, the facts there were not the same, and ALDERSON, B., said (6 C. & P. at pp. 675, 676):

> "If you trust your goods into a man's possession, and he makes a bargain about them without your authority, you are not bound by that bargain and may reclaim the goods. . . . A man has no right to keep my property, and charge for the standing of it, unless there was a previous bargain between him and me, or between him and some agent authorised by me";

and he held there on the facts that there was no such authority. It seems to me that the principle laid down by COLLINS, J., in *Singer Manufacturing Co.* v. *London and South-Western Rail. Co.* (1) goes a long way to support the judgment I am now delivering, and the proposition that the hirer may use the hired chattel for all reasonable purposes. The principle as there stated by COLLINS, J., is ([1894] 1 Q.B. at p. 837):

> "I think in this case the lien may also be rested on another ground; and that is, that the person who deposited this machine was, as between himself and the owner of it, entitled to the possession of it at the time he deposited it. He was entitled to it under a contract of hire, which gave him the right to use it, I presume, for all reasonable purposes incident to such a contract, and among them, I take it, he acquired the right to take the machine with him if he travelled, and to deposit it in a cloak-room if he required to do so. In the course of that reasonable user of the machine, and before the contract of bailment was determined, he gave rights to the railway company in respect of the custody of it. I think those rights must be good against the owners of the machine."

Without desiring to say that that principle should be enforced in every case, it seems to me that, where the hirer of a chattel has undertaken to preserve it, and, having, therefore, a duty to repair, has employed a person to do necessary

repairs, he has created a lien not only against himself, but against the person who has authorised him to preserve such chattel.

KENNEDY and **RIDLEY, JJ.**, concurred.

Appeal dismissed.

Solicitors: *P. J. Nichols*, for *Hallett & Martin*, Southampton; *Speechly & Co.*, for *Lamport, Bassitt & Hiscock*, Southampton.

[*Reported by* W. de B. Herbert, Esq., *Barrister-at-Law.*]

BRITISH EQUITABLE ASSURANCE CO., LTD. *v.* BAILY

[House of Lords (Lord Macnaghten, Lord Robertson and Lord Lindley), November 28, December 15, 1905]

[Reported [1906] A.C. 35; 75 L.J.Ch. 73; 94 L.T. 1; 22 T.L.R. 152; 13 Mans. 13]

Insurance—Life assurance—Prospectus—Statement that profits divided among policy holders without deduction—Amendment of rules to provide for deduction for reserve—Rights of policy holder.

An assurance company was constituted by a deed of settlement, which provided that the profits were to be divided in manner directed by the byelaws, and that the company should have power to alter such byelaws. Byelaws were made which provided that the profits should be divided among the policy-holders. The respondent effected a policy on his own life with the company on the faith of a statement in a prospectus of the company that the entire profits were divided among the policy-holders without any deduction for a reserve fund. The proposal form which he signed contained an undertaking to "conform to and abide by" the rules and regulations of the company in all respects, and the policy issued to him contained a covenant by the company to pay the sum assured, and all such other sums as might be added to such amount, "according to their practice for the time being." After distributing the entire profits for many years the company proposed to change the byelaw and empower the directors to transfer part of the profits into a reserve fund and distribute the balance among the policy-holders. In an action for an injunction to restrain the company from applying the profits otherwise than for the benefit of the policy-holders,

Held: the statement in the prospectus was no more than an accurate statement of the position at the time it was issued and did not constitute a collateral contract limiting the powers of the company to alter its byelaws.

Notes. Applied: *British Murac Syndicate* v. *Alperton Rubber Co.*, [1914–15] All E.R.Rep. 346. Considered: *Jacobs* v. *Batavia and General Plantations Trust*, [1924] 2 Ch. 329; *Southern Foundries (1926) Ltd.* v. *Shirlaw*, [1940] 2 All E.R. 445; *Sun Life Assurance Co. of Canada* v. *Jervis*, [1943] 2 All E.R. 425. Referred to: *Woodling* v. *Monmouthshire and South Wales Mutual Indemnity Society, Ltd.*, [1939] 4 All E.R. 570.

As to contracts of companies in general, see 6 Halsbury's Laws (3rd Edn.) 430 et seq.; and for cases see 10 Digest (Repl.) 1147 et seq.

Case referred to in argument:

Pepe v. *City and Suburban Permanent Building Society*, [1893] 2 Ch. 311; 62 L.J.Ch. 501; 68 L.T. 846; 41 W.R. 548; 37 Sol. Jo. 355; 3 R. 471; 7 Digest (Repl.) 481, *22*.

Appeal from a decision of the Court of Appeal (WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.), reported [1904] 1 Ch. 374, who had affirmed a decision of KEKEWICH, J., in an action brought by the respondent (on behalf of himself and of all other participating policy-holders in the appellant company), as plaintiff, against the appellant company, as defendant, which company was, at the date of the writ in this action, a company registered with unlimited liability under s. 209 of the Companies Act, 1862, but it had lately been re-registered under the Companies Acts, 1862 to 1900, with limited liability.

The question was, whether, having regard to the contractual relations between the company and the participating policy-holders, the company was at liberty to alter the provisions of byelaw No. 4 of 1854 in such manner as to vary the rights of those policy-holders under that byelaw? The appellants contended that the company was at liberty to do so under the contracts between them and the respondent.

The company was constituted under a deed of settlement, dated July 15, 1854. At an extraordinary general meeting of the company, held on Dec. 6, 1854, certain byelaws were made, among which were the following:

"(2) That in the beginning of January and July in each year a calculation shall be made of interest upon the amount paid up in respect of each share in the company at the rate of £7 per cent. per annum up to the next preceding Dec. 31 and June 30 respectively, and such interest shall, at some time in the months of January and July, to be fixed by the directors for that purpose, be payable to the holders of the shares out of the profits of the company, only at the company's chief offices for the time being, but every shareholder shall be entitled to receive interest only from the time of the actual payment of the amount so paid up, notwithstanding the payment by any shareholder of interest for the time any call was in arrear. (3) That in the month of January in the year 1858, and in every subsequent third year, a general valuation and calculation shall be made of the whole assets and liabilities of the company, and, after carrying forward such portions (if any) of the expenses of establishing the company as the directors shall consider equitable, the net profits of the company's business shall be ascertained by the actuary under the direction of the board of directors. (4) That in the month of January in the respective years last aforesaid a calculation shall be made by the actuary of the profits that have arisen in the departments of business in which the assured are to be entitled to participate in profits, and in such calculation a fair proportion of the interest hereinbefore directed to be paid, and of the other expenses of the company, shall be charged upon such last-mentioned departments, and the profits so ascertained to have arisen from the said last-mentioned departments of business shall be set apart and divided amongst the policy-holders in such departments by the actuary under the superintendence of the directors, and the remainder of the profits of the company shall be divided amongst the shareholders according to the amount of shares held by each and be paid to them along with the next half-yearly dividend."

In April and May, 1903, it was proposed, under the provisions of s. 1 of the Companies (Memorandum of Association) Act, 1890, [repealed] to alter the constitution of the company by registering it with limited liability and substituting a memorandum and articles of association for the deed of settlement, and a petition was prepared for the confirmation of the proposed alteration by the court, and at the same time it was proposed to carry into effect a scheme to enable the reduced rate of 3¼ per cent. to be used in the calculations at the quinquennial valuations. For this purpose it was proposed to carry a very large sum, which represented accumulated profits belonging to the shareholders, to the credit of the life assurance fund. The proposed articles of association contained (inter alia) the following clauses:

"103. Unless and until otherwise determined by the company in general meeting, there shall, on every valuation of the assets and liabilities of the life assurance branch of the company's business, be carried to the credit of a capital call account a sum equal to 5 per cent. of the divisible profits of such life assurance branch, until the sums so carried to the credit of such account shall amount to £37,500, and there shall on every valuation of the assets and liabilities of the other branches of the company's business be carried to the credit of the members' profits account one-half of the divisible profits of such other branches. Subject as aforesaid and to the provisions of art. 104, and unless and until otherwise determined by the company in general meeting, the divisible profits of the whole of the company's business shall be carried to the credit of the life assurance branch, and to such fund thereof as the directors shall determine. 104. Unless and until otherwise determined by the company in general meeting, there shall be paid to the members out of the profits of the company a fixed annual dividend of 2s. 6d. per share, and on the valuation in the year 1904, and in every subsequent fifth year, there shall be carried to the credit of the members' profits account a bonus equal to 5 per cent. of the divisible profits of the life assurance branch of the business in the quinquennium ending in such year."

The articles of association containing the above-recited articles were adopted by special resolution of the company, duly passed and confirmed at extraordinary general meetings of the company held on April 3, 1903, and May 1, 1903.

The respondent claimed (i) an injunction to restrain the company from paying, applying, or disposing of any part of the profits derived, or to be derived, by the company from its business in connection with participating policies to or for the benefit of any person, or for any purpose other than to or for the benefit of the holders of participating policies; and (ii) a declaration that the company were not entitled to pay, apply, or dispose of such profits in any manner save to or for the benefit of the said holders of participating policies. The respondent's contention was that the scheme was in contravention of the terms upon which he and others effected policies in the company and would result in a large diminution of the fund available for bonuses.

Levett, K.C., and *Whinney* for the appellants.
P. O. Lawrence, K.C., and *Gatey* appeared for the respondent.

Their Lordships took time for consideration.

Dec. 15, 1905. **LORD MACNAGHTEN.**—This case raises a question between an insurance company and the holders of participating policies in the company's office. At the suit of a plaintiff suing in a representative character, KEKEWICH, J., declared that the company ought to continue to distribute the entire profits coming from the participating branch of its business, after making certain deductions, which it is not necessary to specify, among the holders of participating policies. The Court of Appeal has affirmed that order. The judgment of the court was delivered by COZENS-HARDY, L.J. The ground of the decision is expressed in a single sentence ([1904] 1 Ch. at p. 385):

"A company cannot by altering its articles justify a breach of contract."

No one, I should think, would be inclined to dispute the proposition. But, with all deference, that is not the question. The simple question is, What was the contract between the parties?

The distribution of profits in this company is governed by a byelaw duly passed in accordance with the provisions of its deed of settlement made in 1854, when the company was completely registered under the Acts then in force. The deed of settlement contains a clear and distinct provision empowering an extraordinary general meeting to make byelaws for the government of the company, subject to a proviso that such byelaws shall not be valid until confirmed by a subsequent

A extraordinary meeting. It was under this article that the byelaw relating to the allocation of profits in favour of participating policy-holders was made. There is a subsequent article declaring that

> "the provisions of the deed of settlement and any byelaw of the company may be altered, repealed, or suspended by a byelaw or byelaws, but not otherwise."

B The respondent's proposal for insurance was made on a printed form in which the proposer expressly agreed to

> "conform to and abide by the deed of settlement and byelaws, rules, and regulations of the company in all respects."

The proposal was accepted. A policy which refers to the proposal was executed.

C It provides for the payment of the sum assured and

> "all such other sums, if any, as the company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being."

The conditions indorsed on the policy provide that the corporate funds, property,

D and effects of the company as mentioned in the policy, after satisfying all prior claims and charges

> "according to the provisions of the deed of settlement and the byelaws of the company for the time being."

shall alone be liable for the payment of the moneys payable under the policy.

E If there were nothing more it would be absurd to suggest a doubt as to the right of the company to alter its byelaws in accordance with the provisions of the deed of settlement, however long the practice of the company as to the application of profits might have continued undisturbed. It appears, however, that this company, like all other insurance companies, has been in the habit of publishing a series of tables applicable to participating policies and other policies

F issued by the office. As usual those tables are prefaced by an attractive prospectus enlarging on the peculiar and extraordinary advantages offered to those who are willing to insure in the office. The prospectus, under the head of "Mutual Life Assurance Department," points out the objections to ordinary mutual societies—objections, as it seems to me, mainly, if not entirely, applicable to such societies at starting. It then states that in the British Equitable Assurance Co., which is

G not a mutual office any more than any other proprietary office which grants participating policies, these defects are avoided. Then follows the statement:

> "The current expenses of working the company are assessed rateably on the premiums received in the mutual life assurance department [that is, the participating department] and the general premiums and the entire profits made by the company in the mutual department, after deducting the expenses,

H are divided among the policy-holders."

It was stated on behalf of the respondent, and admitted by the company, that the respondent insured in the company in reliance upon the statement contained in the prospectus, and was induced thereby to apply to the company for the grant of the policy in question, and

> I "accepted such policy on the faith thereof, and would not have done so in the absence of such statement."

It is not clear, to my mind, what is meant by this allegation and admission. Probably it means no more than that the respondent was attracted to this particular office by its prospectus. The statement in the prospectus was an accurate statement of the position of affairs at the time when the prospectus was brought to the notice of the respondent. It will be observed that the prospectus does not purport to give an assurance of any sort that the allocating of profits would never be altered, or to indicate that the system then in use, and the practice

existing at the time were essential features, or fundamental conditions of the constitution of the company. Nobody, I should imagine, would effect an insurance in the belief that the laws and regulations of the office which he selects are immutable. What an insurer relies on is the character and reputation of the company, and the certainty that no office which hopes to keep its business would think of altering the distribution of its profits to the prejudice of its policy-holders. Such a step would ruin the most flourishing company. It would be suicide.

I am at a loss to understand how the Court of Appeal came to the conclusion that the statements in this prospectus constituted a collateral contract, or are to be treated as incorporated in the contract of insurance, and so limiting the powers of the company in the full and free exercise of which the respondent bound himself to acquiesce. I have not troubled your Lordships by referring to changes in the constitution of the company consequent upon the Act of 1862, or to the proposal now on foot to substitute a memorandum and articles of association for the deed of settlement and byelaws of the company. The question would, I think, be precisely the same if the proposal were to alter the byelaws under the provisions of the deed of settlement. I move your Lordships that the appeal be allowed, and the action dismissed with costs both here and below.

LORD ROBERTSON.—The appellants are an assurance company carrying on the business of assurance in its various departments. Among other branches of their business they issue life policies, the holders of which participate in the profits of the business. The respondent holds one of those policies. He is not a member of the company, and holds no relation to it other than that of a policy-holder. At the time when the respondent's policy was issued—namely, in 1886—the whole of the profits made in this branch, which is called the Mutual and Participating Branch, were divided among the policy-holders in that branch. In 1903 a change was made by altering one byelaw under a power given by another byelaw, and now there is first taken out of the profits provision for a reserve fund, and what is distributed among the policyholders is the balance, instead of, as formerly, the whole of those profits. That this change was made in the interests of the company as an institution, and was a matter of sound finance, is not in dispute. That it was competent to the company in terms of its institution, and regularly done, is also not in dispute; and it is therefore unnecessary to go through the various provisions in the deed of settlement and byelaws. The case of the respondent is that, standing as he does outside the company, his contractual rights as a policy-holder have been violated by the change. The order which he has sought and obtained is a declaration that the appellants ought to continue to distribute the entire profits coming from the mutual and participating branch.

The whole question in the case is: Did the appellant company contract with the respondent to the effect of depriving themselves of the right which they had under their constitution of making this change? It seems to me not merely that they did not, but that, as part of the contract, the respondent bound himself to take only such profits as should be declared according to the rules of the company as they existed at each declaration of profits. The policy itself, to which one naturally first looks for the contract, gives no countenance to the respondent's claim, and, on the contrary, limits his rights to the amount assured and

> "all such other sums, if any, as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being."

When we turn to the proposal we find that the respondent signed a declaration that

> "I agree to conform to and abide by the deed of settlement, and byelaws, rules, and regulations of the company in all respects."

The only express reference to profits contained in the proposal is in the eleventh question,

A "If in the Mutual Department are any profits which may be declared to be appropriated by way of addition to the policy, or reduction from the future premiums, or making the policy payable during lifetime?"

The answer was, "By way of addition." The third question is, "Sum to be assured and for what term?" and the answer is, "£400 payable under table A." Table A is all figures except the following words at the top: "Annual premiums B to assure a sum of money at death, with profits in addition," and at the bottom, "The entire profits divided triennially." I have now stated everything bearing on the subject that is to be found in the policy, the proposal, and the only document referred to in these instruments—namely, Table A.

These seem to me to constitute the contract, and they negative the respondent's C case and establish that of the appellants. But the Court of Appeal and the learned judge whose judgment they affirmed have felt themselves entitled to decide the case, not on those documents, but on the prospectus which was shown to the respondent before he made his proposal. The theory of KEKEWICH, J., was that there was a "collateral contract," while the learned Lords Justices justify the introduction of the prospectus on the somewhat singular ground that, inasmuch D as Table A, which is referred to in the proposal, is to be found in the prospectus, therefore you are entitled to read the rest of the prospectus relating to mutual policies as incorporated in the contract. I am unable to agree in this. We are not here in an action for damages, or for rescission of the contract, and I do not feel entitled when the respondent in his proposal refers to Table A to hold him as incorporating all the rest, or part of the rest, of the print in which that table E is to be found. The passages in the prospectus on which the Court of Appeal proceed contain a description of the system as de facto existing at the time. But it seems to me that the respondent, so far from binding the appellant company to perpetuate that system, has placed himself in the hands of the company to the extent of binding himself to "abide by"—those are the words of the proposal—their rules. There is nothing repugnant or unreasonable in his thus F following the fortunes of the company, and this is what he has done. For these reasons I think that the judgments appealed against ought to be reversed.

LORD LINDLEY.—This appeal turns entirely on the contracts entered into between the insurance company and its participating policy-holders represented by the respondent. The contracts are contained in the policies issued to them. It is contended that the applications for these policies were based on the faith of G prospectuses containing statements and holding out inducements which preclude the company from making alterations in the mode of applying their profits without the consent of the policy-holders. If these gentlemen were seeking to rescind or rectify their contracts on the ground of fraud or mistake, or were suing for damages occasioned by fraudulent misrepresentations, it would be legitimate to refer to the statements in the prospectuses on the faith of which they became H policy-holders. But the complaining policy-holders are not doing anything of this sort, and the prospectuses not being referred to in the policies cannot, in my opinion, be legitimately referred to in order to construe the contracts into which the policy-holder have been induced to enter. These contracts are to be found in the policies themselves. By each policy the company agree to pay to the executors of the assured a fixed sum out of the funds of the company,

I "and all such other sums, if any, as this company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being. Provided always, that this policy is made subject to the conditions and regulations hereon indorsed."

That is the contract between the parties, but the endorsed conditions and regulations are part of it, and the fifth is important. The company was formed as long ago as 1854, and the object of the fifth regulation is to limit the liability of the members of the company. But the regulation throws light on the position

of the policy-holders and on what they claim under their policies. The fifth endorsed condition or regulation in effect provides that the funds of the company, A

> "after satisfying prior claims and charges according to the provisions of the deed of settlement and byelaws of the company for the time being, shall alone be liable for the payment of the moneys payable under the policy, and that no shareholder, member, director, or other officer of the company shall be liable to any demand in respect of the policy beyond or otherwise than out of the payment in the manner and at the times provided for by the deed of settlement and the then byelaws of the company of the amount thus remaining unpaid of the shares held by him." B

The reference to the deed of settlement and byelaws for the time being is all important; for the byelaws determine how the profits of the company are to be C disposed of, and those byelaws are subject to alteration from time to time by an extraordinary meeting of the shareholders of the company (see cll. 9, 24, 56 of the deed of settlement). The policy-holders are not shareholders and have no voice in making or altering byelaws; but the sum payable under any policy in addition to the fixed sum mentioned in it is made by the policy itself to depend upon what the directors may have ordered to be added to such sum, and that D depends upon their practice for the time being. The practice of the directors in its turn depends on how the profits are to be ascertained and divided in accordance with the byelaws, which may be altered from time to time as above pointed out.

I am quite unable to adopt the view taken by the courts below as to the inability of the company to alter their byelaws as they have done and, inter alia, to make a sinking fund without the consent of the policy-holders. I can find E no contract to that effect. A collateral contract so wholly opposed to the contracts contained in the policies is not, in my opinion, established by the evidence in the case. Of course, the powers of altering byelaws, like other powers, must be exercised bona fide, and having regard to the purposes for which they are created and to the rights of persons affected by them. A byelaw to the effect that no creditor or policy-holder should be paid what was due to him would, in my F opinion, be clearly void as an illegal excess of power. But in this case it is conceded that the alteration contemplated and sought to be restrained is fair, honest, and businesslike, and will, in the opinion of the directors and shareholders of the company, be beneficial as well to the policy-holders as to the shareholders. The sole question is whether such an alteration infringes the rights of the policy-holders. In my opinion is clearly does not. I am of opinion that the appeal G should be allowed, and that the action should be dismissed, and that the respondent should pay the costs of the action and of the appeals both here and below.

Appeal allowed.

Solicitors: *H. Gover & Son.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

ANDREWS *v.* MITCHELL

[House of Lords (The Earl of Halsbury, L.C., Lord Davey, Lord James of Hereford and Lord Robertson), May 13, 16, 1904]

B [Reported [1905] A.C. 78; 74 L.J.K.B. 333; 91 L.T. 537]

Friendly Society—Dispute between society and member—Arbitration—Matter of substance—Need for strict observance of rules—Friendly Societies Act, 1896, (59 & 60 *Vict.*, *c.* 25) *s.* 68.

The Friendly Societies Act, 1896, does not give to the domestic tribunals of such societies absolute power to pronounce decisions which shall be exempt C from examination in courts of law. To be protected from review, a decision must be given in accordance with the rules of the society.

Thus where the arbitration committee of a friendly society proceeded to expel a member summarily without first giving him written notice of the charge against him as provided by the rules,

Held: as the omission to give written notice of the charge was a matter of D substance which went to the root of the jurisdiction, the committee had no jurisdiction to entertain the charge and the court could intervene to declare the decision null and void.

Notes. Distinguished: *Catt* v. *Wood*, [1910] A.C. 404. Applied: *Wayman* v. *Perseverance Lodge of Cambridgeshire Order of United Brethren Friendly Society*, [1917] 1 K.B. 677. Distinguished: *Judson* v. *Ellesmere Port Ex-Servicemen's* E *Club, Ltd.*, [1948] 1 All E.R. 844. Applied: *Barnard* v. *National Dock Labour Board*, [1953] 1 All E.R. 1113. Referred to: *Cox* v. *Hutchinson*, [1910] 1 Ch. 513; *Re Enoch and Zaretzky, Bock & Co.*, [1910] 1 K.B. 327; *Heard* v. *Pickthorne*, [1913] 3 K.B. 299; *Vine* v. *National Dock Labour Board*, [1956] 3 All E.R. 939.

As to disputes of friendly societies, see 18 Halsbury's Laws (3rd Edn.) 64 et seq.; and for cases see 25 Digest 321 et seq. For the Friendly Societies Act, 1896, s. 68, F see 10 Halsbury's Statutes (2nd Edn.) 563.

Case referred to:

(1) *Palliser* v. *Dale*, [1897] 1 Q.B. 257; 66 L.J.Q.B. 236; 76 L.T. 14; 45 W.R. 291; 13 T.L.R. 147, C.A.; 25 Digest 323, *251*.

Also referred to in argument:

G *Willis* v. *Wells*, [1892] 2 Q.B. 225; 61 L.J.Q.B. 606; 67 L.T. 316; 56 J.P. 775; 41 W.R. 64; 36 Sol. Jo. 594; sub nom. *Willis* v. *New Union Society*, 8 T.L.R. 653, D.C.; 25 Digest 323, *250*.

Bache v. *Billingham*, [1894] 1 Q.B. 107; 63 L.J.M.C. 1; 69 L.T. 648; 58 J.P. 181; 42 W.R. 217; 9 R. 79, C.A.; 25 Digest 325, *265*.

Prentice v. *London* (1875), L.R. 10 C.P. 679; 44 L.J.C.P. 353; 33 L.T. 251; H 39 J.P. 711; 7 Digest (Repl.) 525, *297*.

Appeal from a decision of the Court of Appeal (Sir Richard Henn Collins, M.R., Stirling and Mathew, L.JJ.) affirming a decision of the King's Bench Division (Lord Alverstone, C.J., Wills and Channell, JJ.), who had affirmed a decision of Darling, J., at chambers refusing to issue a writ of prohibition to the judge of Carmarthenshire County Court at Llanelly.

I The action was brought by the respondent against the appellants, who were trustees of a friendly society, for damages for his wrongful expulsion from the society. The appellants contended that by the provisions of s. 68 of the Friendly Societies Act, 1896, the decision of a committee of the society expelling the respondent was final, and that the court had no jurisdiction to hear the case. The learned county court judge held, on the authority of *Palliser* v. *Dale* (1), that he had jurisdiction to hear the case. A writ of prohibition was then moved for, and refused, as above mentioned, the judge to whom the application was made, and the Divisional Court, and the Court of Appeal holding that the case

was governed by the decision in *Palliser* v. *Dale* (1). The respondent had been summoned before an arbitration committee of the society to answer a charge of malingering while in receipt of sick pay. At the hearing before the committee a charge of fraud was made against him, and he was summarily expelled from the society.

Section 68 of the Friendly Societies Act, 1896, provides that

> "every dispute between a member . . . and the society . . . shall be decided in manner directed by the rules of the society . . . and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law, or restrainable by injunction."

A. T. Lawrence, K.C., and *J. Leslie* for the appellants.
S. T. Evans, K.C., and *Ivor Bowen* for the respondent.

THE EARL OF HALSBURY, L.C.—In this case I feel, as I have no doubt that all your Lordships do, the extreme inconvenience of allowing disputes between friendly societies and their members to come into a court of law. I feel very strongly the force of what counsel for the appellants said—namely, that we must not insist upon a minute observance of the regularity of forms amongst persons who naturally, by their education and opportunities, cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form, without any interference with the substance of their decisions. I should be anxious myself, as I have no doubt that all your Lordships would be, to give every effect to their decisions. On the other hand, there are some principles of justice which it is impossible to disregard, and, after giving every credit to the desire on the part of this arbitration court to do justice, I think it manifest that they proceeded far too hastily in this case; and, without imputing to them any prejudice or any desire to do wrong, I think that the mode in which the whole question was raised, and was disposed of, was so slipshod and irregular that it might lead to injustice. It is quite possible that if the case, instead of being disposed of in the summary way in which it was disposed of, had been considered by them somewhat more maturely, and not while their minds were inflamed against the conduct of the respondent, they might not have taken the extreme measure which they did take. At all events, treating it as a question raised in a court of law, we cannot say that this charge was a charge which was ever made against the respondent. It came up in the course of the investigation, and they then and there proceeded to deal with it in his absence, and to pronounce a verdict upon it, not having heard him except in the summary way alleged by themselves. He had been told to retire, and he was called in, not for the purpose of further investigation, not for the purpose of hearing what he had to say upon the matter, but simply to be told that the result of the investigation was that he was expelled.

That appears to me to be a course of procedure which, as a matter of substance, it is impossible to support. When one looks at what the course of procedure must necessarily be to justify expulsion, it is pointed out that there is a rule which certainly does justify expulsion, but with the express proviso that the charge has been made as provided by the rules. In this case the charge was never made as provided by the rules, and, if no power is given under the rules to expel a member except upon a charge made and tried according to the rules, there is no power to expel in a case like this. It seems to me that under these circumstances it would be undesirable to go into the questions which were raised in *Palliser* v. *Dale* (1) because, in my opinion, this most important principle ought to be brought home to the minds of these courts, presided over as they are by comparatively uneducated men, that some of these forms are matters of substance, and that they must summon a man, and give him time to consider what he has got to do, and give him the charge against him in writing. These are all matters of substance, and not mere matters of form. They are the foundation of the

subsequent litigation between the parties, and, if they were neglected in this case, it appears to me that there was no jurisdiction to entertain the charge at that time. It is a remarkable thing that when the secretary wrote to inform the respondent of his expulsion, he put into his letter that which shows clearly enough what in his mind was necessary in order to establish the charge, because he states in plain terms that the charge was made against the respondent by an officer by the direction of an arbitration committee, and that it was investigated, and that he was found guilty. I do not impute to the secretary any intention of writing what was false when he wrote that, but it was inaccurate. It shows, however, that he knew what the regular course of procedure ought to have been, but he did not pursue it. The result, in my opinion, is that the arbitration committee had no jurisdiction to entertain this question, and under those circumstances I think that the county court had jurisdiction to do what it did, and therefore this appeal must be dismissed, and I move your Lordships accordingly.

LORD DAVEY.—I desire to associate myself, if I may properly do so, with the observations which were made by the Lord Chancellor at the commencement of his judgment as to the importance of upholding these domestic tribunals of friendly societies, and not lightly interfering with the decisions given by them, and also of not expecting from them that minute and exact observance of regulations which one would expect in the ordinary courts of law. But this is not, in my opinion, a question of irregularity or informality; it is a question of substance. It is a serious thing to expel a man from a society of which he has been a member, and to which he has paid his subscriptions, for a long period of years; and although such a power is necessary for the due administration and harmonious and proper working of the society, and a power for that purpose is therefore properly given by the rules, it ought always to be exercised in accordance with the conditions imposed by the rules. I need not repeat what has been said pointing out that in this case the rules expressly provide that expulsion shall only take place on a charge properly made according to the rules. It is not contended that this charge was properly made according to the rules, but it is said that it may be regarded as a mere informality which might be set right. But it was an informality which went to the root of the jurisdiction, and the omission to follow the directions of the rules for preferring charges has had the unfortunate effect of making the resolution which was come to for the expulsion of the respondent, in my opinion, altogether invalid, and null and void. Therefore I think that the county court was properly appealed to to set aside that resolution.

LORD JAMES OF HEREFORD.—I concur.

LORD ROBERTSON.—I entirely agree in what has been said by my noble and learned friends. The Act of 1896 has not given carte blanche to the tribunals of these societies to pronounce decisions which shall be exempt from examination in courts of law. The decisions protected from review are constitutional decisions —decisions pronounced according to the rules which are, as we know, registered under the Friendly Societies Acts. The rules required written notice of a charge, such as the one with which we are dealing here. In proceedings involving the grave issue of expulsion, the importance of this safeguard stands out as salient. What happened in this case shows what may take place if this rule be disregarded. This respondent, called upon to answer a minor accusation, is, on the trial of that charge, then and there accused of another and graver charge, and then and there expelled. This invasion of his rights most clearly transcends the class of irregularities, and calls for the intervention of the court.

Appeal dismissed.

Solicitors: *Shaw, Tremellen & Co.*, for *S. Ward*, Dudley; *Purkis & Co.*, for *H. J. King*, Wilton, Salisbury.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

YORKSHIRE MINERS' ASSOCIATION AND OTHERS *v.* HOWDEN

[House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Robertson and Lord Lindley), February 2, 3, 6, April 14, 1905] B

[Reported [1905] A.C. 256; 74 L.J.K.B. 511; 92 L.T. 701; 53 W.R. 667; 21 T.L.R. 431]

Trade Union—Action by member against union—Competency—Enforcement of agreement for application of funds—Action to restrain misapplication—Trade Union Act, 1871 (34 & 35 *Vict.*, *c.* 31), *s.* 4 (3). C

A member of a trade union registered under the Trade Union Act, 1871, brought an action to restrain the union from paying strike pay to certain members of the union in contravention, he alleged, of the rules of the union.

Held (Lord Davey and Lord James of Hereford dissenting): the action was not instituted with the object of directly enforcing an agreement for the application of the funds of the union to provide benefits to members within s. 4 (3) (a) D of the Trade Union Act, 1871, but was one which the court had jurisdiction to entertain.

Per the Earl of Halsbury: I cannot escape from the reasoning of Fry, J., in *Wolfe* v. *Matthews* (1) (1882), 21 Ch.D. 194, that an order to prevent the payment of money to some person other than the plaintiff is not the enforcement of an agreement, or it is an indirect enforcement. E

Per Lord Macnaghten: The action was not instituted to enforce an agreement within s. 4 (3) (a). It was simply an application to the court to determine the true construction of certain rules which, the plaintiff contended, had been misconstrued by the union.

Per Lord Lindley: It appears to me to be competent for any member who has a beneficial interest in the funds of the union to sue to prevent their F application to purposes not warranted by the rules.

Notes. Applied: *Osborne* v. *Amalgamated Society of Railway Servants*, [1911–13] All E.R.Rep. 102; *Sansom* v. *London and Provincial Union of Licensed Vehicle Workers* (1920), 36 T.L.R. 666. Considered: *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite*, *General Union of Operative Carpenters and Joiners* v. *Ashley*, [1922] All E.R.Rep. 53. Referred to: *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600; *Mullett* v. *United French Polishers' London Society* (1904), 91 L.T. 133; *Denaby and Cadeby Main Collieries, Ltd.* v. *Yorkshire Miners' Association*, post p. 616; *Steele* v. *South Wales Miners' Federation*, [1907] 1 K.B. 361; *Cope* v. *Crossingham*, [1908–10] All E.R.Rep. 900; *Baker* v. *Ingall*, [1911–13] H All E.R.Rep. 727; *Oram* v. *Hutt*, [1911–13] All E.R.Rep. 376; *Kelly* v. *National Society of Operative Printers' Assistants*, [1914–15] All E.R.Rep. 576; *Valentine* v. *Hyde*, [1919] 2 Ch. 129; *Cotter* v. *National Union of Seamen*, [1929] All E.R.Rep. 342; *Miller* v. *Amalgamated Engineering Union*, [1938] 2 All E.R. 517.

As to agreements unenforceable against a trade union, see 32 Halsbury's Laws (2nd Edn.) 476–483; and for cases see 43 Digest 105–109. For Trade Union Act, I 1871, see 25 Halsbury's Statutes (2nd Edn.) 1244.

Cases referred to:

(1) *Wolfe* v. *Matthews* (1882), 21 Ch.D. 194; 51 L.J.Ch. 833; 47 L.T. 158; 30 W.R. 838; 43 Digest 107, *1123*.

(2) *Rigby* v. *Connol* (1880), 14 Ch.D. 482; 49 L.J.Ch. 328; 42 L.T. 139; 28 W.R. 650; 43 Digest 98, *1035*.

(3) *Simpson* v. *Westminster Palace Hotel Co.* (1860), 8 H.L.Cas. 712; 2 L.T. 707; 6 Jur.N.S. 985; 11 E.R. 608, H.L.; 28 Digest (Repl.) 835, *761*.

(4) *Lumley* v. *Wagner* (1852), 1 De G.M. & G. 604; 21 L.J.Ch. 898; 19 L.T.O.S. 264; 16 Jur. 871; 42 E.R. 687, L.C.; 28 Digest (Repl.) 829, *726.*

(5) *Duke* v. *Littleboy* (1880), 49 L.J.Ch. 802; 43 L.T. 216; 28 W.R. 977; 43 Digest 105, *1095.*

(6) *Chamberlain's Wharf, Ltd.* v. *Smith*, [1900] 2 Ch. 605; 69 L.J.Ch. 783; 83 L.T. 238; 49 W.R. 91; 16 T.L.R. 514; 44 Sol. Jo. 643, C.A.; 43 Digest 99, *1036.*

(7) *M'Laren* v. *Miller* (*or Amalgamated Society of Railway Servants for Scotland* v. *Motherwell Branch of the Society*) (1880), 7 R. (Ct. of Sess.) 867; 43 Digest 107, *1123ii.*

(8) *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, [1901] 1 K.B. 170, C.A.; reversed, [1901] A.C. 426; 70 L.J.K.B. 905; 85 L.T. 147; 65 J.P. 596; 50 W.R. 44; 17 T.L.R. 698; 45 Sol. Jo. 690, H.L.; 43 Digest 127, *1295.*

(9) *Stevens* v. *Chown*, *Stevens* v. *Clark*, [1901] 1 Ch. 894; 70 L.J.Ch. 741; 84 L.T. 796; 65 J.P. 470; 49 W.R. 460; 17 T.L.R. 313; 28 Digest (Repl.) 746, *49.*

Also referred to in argument:

Auld v. *Glasgow Working Men's Building Society* (1887), 12 App. Cas. 197; 56 L.J.P.C. 57; 56 L.T. 776; 35 W.R. 632; 3 T.L.R. 378, H.L.; 7 Digest (Repl.) 480, *13.*

Strick v. *Swansea Tin-Plate Co.* (1887), 36 Ch.D. 558; 57 L.J.Ch. 438; 57 L.T. 392; 35 W.R. 831; 43 Digest 109, *1143.*

Swaine v. *Wilson* (1889), 24 Q.B.D. 252; 59 L.J.Q.B. 76; 62 L.T. 309; 54 J.P. 484; 38 W.R. 261; 6 T.L.R. 121, C.A.; 43 Digest 91, *950.*

Crocker v. *Knight*. [1892] 1 Q.B. 702; 61 L.J.Q.B. 466; 66 L.T. 596; 56 J.P. 420; 40 W.R. 353; 8 T.L.R. 412, C.A.; 43 Digest 106, *1111.*

Lane v. *Newdigate* (1804), 10 Ves. 192; 32 E.R. 818, L.C.; 28 Digest (Repl.) 775, *265.*

Blakemore v. *Glamorganshire Canal Navigation Co.* (1832), 1 My. & K. 154; 2 L.J.Ch. 95; 39 E.R. 639, L.C.; 28 Digest (Repl.) 751, *83.*

Fothergill v. *Rowland* (1873), L.R. 17 Eq. 132; 43 L.J.Ch. 252; 29 L.T. 414; 38 J.P. 244; 22 W.R. 42; 28 Digest (Repl.) 821, *665.*

Jackson v. *Normanby Brick Co.*, [1899] 1 Ch. 438; 68 L.J.Ch. 407; 80 L.T. 482; 43 Sol. Jo. 436, C.A.; 28 Digest (Repl.) 775, *270.*

Mogul Steamship Co. v. *McGregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 43 Digest 10, *51.*

Hilton v. *Eckersley* (1856), 6 E. & B. 47; 25 L.J.Q.B. 199; 26 L.T.O.S. 314; 20 J.P. 196; 2 Jur.N.S. 587; 4 W.R. 326; 119 E.R. 789, Ex. Ch.; 43 Digest 10, *50.*

Appeal by the defendants in the action from a decision of the Court of Appeal (Vaughan Williams, Stirling, and Mathew, L.JJ.), reported [1903] 1 K.B. 308, upon an appeal by the defendants from an order made by Grantham, J., in an action tried by him with a jury.

The action was brought by the plaintiff (the present respondent) as a member of the appellant association, against the association and certain officers thereof to restrain the association, its officials, agents, and servants from misapplying the funds of the union or dealing with them contrary to the rules of the association. The litigation arose out of disputes between the colliers of the Denaby and Cadeby Collieries Co. and their employers in 1902, the result of which was a strike or lock-out. While the men were out of employment strike pay was given to them by the appellant association, in contravention, as the respondent contended, of the rules of the union. The association alleged that the action was, under the Trade Union Act, 1871, s. 4 (3), not maintainable by a member of a union, as that Act prohibited a member from directly enforcing any agreement for the application

of the funds of a trade union. GRANTHAM, J., entered judgment for the plaintiff and that decision was affirmed by the Court of Appeal. The Association appealed to the HOUSE OF LORDS. A

Rufus Isaacs, K.C., *Danckwerts*, K.C., and *Compston* for the appellants.
Lush, K.C., *Waddy*, and *H. W. Wilberforce* for the respondent.

Their Lordships took time for consideration. B

April 14, 1905. The following opinions were read.

THE EARL OF HALSBURY, L.C.—In this case the plaintiff, a member of the Yorkshire Miners' Association, a trade union registered under the Trade Union Act, 1871, complains that the funds of that society are being diverted from their proper object, and seeks by injunction to prevent that misapplication. C It appears to me that the sole question in this case is whether the plaintiff is at liberty to bring the action, or whether the action is one which is prohibited by the provision in s. 4 (3) (a) of the Act of 1871, which provides that nothing in the Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of (inter alia) any agreement for the application of the funds of a trade union to provide D benefits to members. But for the differences of judicial opinion which have arisen upon the construction of this provision it would have been, to my mind, enough to say that this action does not seek directly to enforce any one of the agreements referred to in the statute or to seek damages for their breach; but, inasmuch as the question has been raised and argued at great length, I do not feel at liberty to dispose of it in so summary a manner. E

The question is not a new one. It was raised twenty-three years ago before FRY, J., in *Wolfe* v. *Matthews* (1), and, in my judgment, rightly decided. FRY, J., says upon the exact question which is here in debate (21 Ch.D. at p. 196):

> "An order that the defendants should pay money to the plaintiffs would be a direct enforcement of an agreement for the application of the funds, but all that is sought here is to prevent the payment of the money to somebody else. F Either that is no enforcement of an agreement at all or it is an indirect enforcement."

I cannot escape from this reasoning, nor do I see any inconsistency between that decision and the case before SIR GEORGE JESSEL, M.R. (*Rigby* v. *Connol* (2)); and a long line of judicial decisions has recognised the distinction which the G learned judge himself pointed out between that case and the decision given by SIR GEORGE JESSEL, M.R. I am bound, however, to say if that decision ever came up for review I think that it would have to be considered whether it does not strike the word "direct" out of the statute. I do not think that if this provision is out of the way the plaintiff's claim can be seriously contested. That the proposed use of the funds which he seeks to restrain is a flagrant violation H of their own rules seems to me to be proved, and the language and object of s. 4 of the Act seems to me not at all what the argument on the other side assumes it to be. That argument seems to assume that the object of the enactment was to keep trade unions out of the jurisdiction of the court altogether.

I do not think that it does anything of the kind. It recites with great care what the courts are not to interfere with, and that exemption from their juris- I diction is very precisely limited. It seems to me that it would have been a very colourable concession to the trade unions if the legislature had left their funds, which under the arrangement made constituted a trust for particular purposes, without any protection against those entrusted with the distribution of their funds. That the court should not interfere with their distribution according to their own rules when such distribution was within the purposes of the trust is one thing, but that there should be no recourse to the courts where it is threatened to divert them is another matter. What can be the object of

registering, as is required by s. 13 of the Act, the purposes for which the funds are available? The trustees are the persons in whom the property is vested. What is there to prevent the operation of the ordinary law which protects trust property from being diverted from its proper objects? Of course, there is nothing except the section to which I have referred; and surely that section cannot mean that, because the preservation of the property in trust is one that indirectly will benefit the beneficiaries, therefore it is a suit for enforcing one of the recited agreements which certainly in their terms are inapplicable. I therefore move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN.—I cannot help thinking that if the plaintiff had only taken the trouble to indicate in his writ or in a statement of claim the ground of his complaint, and if, instead of laying his case before a jury, he had resorted to a tribunal more familiar with the subject, and perhaps better fitted to deal with it, some confusion and a good deal of delay and expense would have been avoided. The case in itself, when understood, is, I think, simple enough. Was the matter of which the plaintiff, as a member of the Yorkshire Miners' Association, complains, beyond the powers of the association? Was the plaintiff in his isolated position—one member of the association standing alone—entitled to sue? Is the fact that the association is a registered trade union a bar to relief in such an action? These, I think, are the only questions to be considered, and there is only one of them, as it seems to me, that gives rise to any difficulty.

The Trades Union Act, 1871, s. 14, requires that the rules of every registered trade union shall contain provisions in respect of the several matters mentioned in Sched. 1 to the Act. Among those matters are included (para. 2) "the whole of the objects for which the trade union is established," and "the purposes for which the funds thereof shall be applicable." The rules of the Yorkshire Miners' Association as registered set forth in plain and distinct language the objects of the association and the purposes for which its funds may be applied. Clause 3 (j) declares that the whole of the moneys received by the association shall be applied in carrying out the objects specified in the preceding subsections in accordance with the rules. In an earlier clause (cl. 1) there is an express direction that the funds of the association shall not be appropriated to any other use. It is, therefore, beyond the powers of the association to apply its funds, or any part of them, to any purpose not authorised by its rules. Was, then, the payment of strike money in the present case authorised by the rules of the association? On this point your Lordships did not think it necessary to call upon the respondent. The question is fully discussed and completely disposed of by the opinions of the learned lords justices in the Court of Appeal, and I have nothing to add to what they said. Then, if the action of the association, which was challenged by the plaintiff, was beyond the powers of the association, it seems clear, apart, of course, from any objection arising under the Act of 1871, that in an unincorporated society like this any single member suing alone would have a right to resist it, and to call upon the court to interpose by injunction. That was established in this House in *Simpson* v. *Westminster Palace Hotel Co.* (3) and is, I apprehend, beyond question.

So far it is all plain sailing. The difficulty, such as it is, is found in the Act of 1871. But the difficulty, if I may presume to say so, is, I think, not so much in the language of the Act as in the language of the learned judges who have expounded it. The commentaries are in fault rather than the text. The Act of 1871 relieves trade unions from consequences which would otherwise result from the purposes of the union being in restraint of trade. That circumstance by itself is not to render void or voidable any agreement or trust. But, on the other hand, this concession to modern ideas is not to make all trade union contracts enforceable at law. Nothing in the Act (s. 4) is to "enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of" any of the several agreements which the

enactment goes on to specify. The first question that arises on this part of the enactment is: What is the meaning of the expression "directly enforcing"? I cannot think that the legislature intended to strike at proceedings for directly enforcing certain agreements, leaving untouched and unaffected all proceedings (other than actions for damages) designed to enforce those particular agreements indirectly. To forbid direct action in language that suggests that the object of the action so forbidden may be attained by a side wind seems to me somewhat of a novelty in legislation. I venture to think that the word "directly" is only put in to give point to the antithesis between proceedings to enforce agreements directly and proceedings to recover damages for breach of contract which tend, though indirectly, to give force and strength to the agreement for breach of which an action may be brought. However, I need not dwell on this point, for it seems to me that for the present purpose the result must be the same whatever meaning or effect may be attached to the expression "directly."

The agreements which the court is not at liberty to deal with are arranged under five headings or classes. The first class comprises a set of agreements with which it would be obviously inexpedient or impossible for the court to deal. In the second class is included "any agreement for the payment by any person of any subscription or penalty to a trade union." One would expect to find next some such clause as this—"any agreement for the payment to any member of any benefit assured by the rules of the trade union"—following the language of para. 2 of Sched. 1 to the Act. If that had been the language we should have had a clause pointing to a personal benefit conferred on a member, which is what VAUGHAN WILLIAMS, L.J., takes s. 4 (3) (a) to be. It no doubt includes that, but I think it goes much further. The words are: "3. Any agreement for the application of the funds of a trade union—(a) to provide benefits to members." At first sight it is not very easy to see why the clause took this shape. I cannot help thinking that it comes from the apprehension which the leaders of the workmen then felt of the extreme danger to their combination which might result from any attempt to separate the funds of the union, distinguishing between those collected or intended for benevolent purposes and those collected or intended for ordinary trade purposes.

Then I come to the question: What was the "object" of the present litigation? Was it to enforce an agreement for the application of the funds of the union to provide benefits to members? I should say certainly not. The object of the litigation was to obtain an authoritative decision that the action of the union which was challenged by the plaintiff was not authorised by the rules of the union. The decision might take the form of a declaration or the form of an injunction, or both combined. But the decision, whatever form it might take, would be the end of the litigation. No administration or application of the funds of the union was sought or desired. The object of the litigation was simply to prevent misapplication of the funds of the union, not to administer those funds, or to apply them for the purpose of providing benefits to members.

I am aware that in expressing this view I am dissenting from the opinion of SIR GEORGE JESSEL, M.R., in *Rigby* v. *Connol* (2). In that case, after referring to s. 4 (3) (a) of the Act of 1871, which is quoted inaccurately by the learned judge, or it may be by the reporter, his Lordship makes the following observation (14 Ch.D. at pp. 490, 491):

> "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that if I decide in favour of the plaintiff I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation. It seems to me that is directly enforcing that agreement, in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less."

There, I think, the learned judge departs rather widely from the language of the enactment. If the Act had said that no court should enforce an agreement to provide benefits for members, there would have been an end of the matter. But the Act does not say that, nor, I think, anything like it. It is not every trade union agreement that the court is forbidden to enforce. The effect of SIR GEORGE JESSEL, M.R.'s observations in conjunction with the cases of unenforceable contracts specified in the Act make trade union agreements one and all alike unenforceable. There is really nothing left. The Act, however, proposes only to strike at certain agreements, leaving, at least apparently, the jurisdiction of the court untouched as to everything else. In making these remarks I do not wish to be understood as expressing any doubt as to the correctness of the actual decision in *Rigby* v. *Connol* (2). The proceedings which the plaintiff has instituted in the present case do not, I think, involve the administration of the funds of the Yorkshire Miners' Association collected for benevolent purposes or the application of those funds to provide benefits to members. Nor was the litigation, as it seems to me, instituted with that object. It was simply an application to the court to determine the true construction of certain rules which had been, as the plaintiff contended, misconstrued by the executive of the association. I need hardly point out how disastrous it might be to the funds of this union, and to trade unions generally, if there were no means of preventing the managers and masters of the union from diverting its funds from their legitimate and authorised purposes.

One word as to the form of the order under appeal. I think it is most objectionable, and I trust that it will not form a precedent. I would suggest that the order might go in the following terms:

> "Declare that the payment of strike pay to the financial members of the Yorkshire Miners' Association in pursuance of the resolution of the council of the said association passed on July 24 and confirmed on Aug. 11, 1902, was in contravention of the rules of the association, and that the said resolution purporting to authorise such payment was ultra vires and illegal."

I think, and I may add that the Lord Chancellor agrees with me in thinking that the order should be varied by prohibiting directly and in terms the diversion of the funds of the union to the particular purpose which the court holds to be unauthorised. This proposed variation, if your Lordships should accept it, would, of course, make no difference in the costs of the action, which, I think, should be borne by the appellants both here and below.

LORD DAVEY.—The plaintiff in this action is an individual member of a trade union registered under the provisions of the Trade Union Act, 1871, and he sued the association, the general treasurer, and the two treasurers of the branches concerned for an injunction to restrain them from misapplying the funds of the union and dealing with the same contrary to the rules of the said association and the provisions contained therein. The misapplication complained of is the payment of strike pay to certain members of the union who were on strike under circumstances which did not entitle them, according to the rules of the union, to the receipt of that benefit.

I have come to the opinion that this action cannot be maintained by the plaintiff. The question turns on the proper construction to be put on the language of s. 4 of the Act of 1871. By s. 3 of that Act it is enacted that the purposes of any trade union shall not by reason merely that they are in restraint of trade be unlawful so as to render void or voidable any agreement or trust. The language is not quite accurate; but I think that the meaning and effect is to enable such actions to be brought on any agreement or trust affecting the union, or the rights of the members inter se, as might have been brought if the purposes of the union were free from the objection that they are in restraint of trade. By s. 4, however, it is enacted that nothing in the Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely (inter alia):

"(3) Any agreement for the application of the funds of a trade union (a) to provide benefits to members" A

This is subject to a proviso that nothing in the section is to be deemed to constitute any of the before-mentioned agreements unlawful. By s. 8 all the real and personal property of the trade union is vested in trustees, and by s. 9 the trustees or any other officer of the trade union who may be authorised to do so by the rules thereof are empowered to bring or defend any action, suit, prosecution, or complaint B in any court of law or equity touching or concerning the property, right, or claim to property of the trade union. It is not denied that this action could not be maintained under the common law.

The question, therefore, comes to be whether it is authorised by the provisions of s. 3 of the Act, as qualified by the provisions of s. 4. I assent to the very just observation made by counsel for the respondent in the course of his able C argument that one should endeavour to give a meaning to every word in a statutory enactment, and I will endeavour to do so in construing the words of the section in question. I am of opinion that "an agreement for the application of the funds of a trade union to provide benefits to members" means an agreement to the benefit of which the members as such are entitled, and not merely a particular agreement with the individual who sues. Such an agreement is to be found in the rules D by which the association is governed. These rules, in fact, form the social contract between the members, and every person on becoming a member accedes to them and is bound by them, and, on the other hand, is entitled to whatever benefits are thereby secured for members. The particular rules in this case are those numbered 64 and 65, which prescribe the conditions under which a member may become entitled to what I have called "strike pay." Rule 3 (j) prescribes E that

"the whole of the moneys received by this association shall be applied to carrying out the foregoing objects according to rules."

But, even if there were not this rule, I should be of opinion that rr. 64 and 65 are exclusive, or (in other words) that, according to their true construction, they F mean that strike pay shall not be given except under the prescribed conditions as well as that it may be given under those conditions. And I think that the negative stipulation is just as truly and as much part of the agreement for application of the funds to provide benefit to members as the affirmative stipulation.

The next question is: What is "the object" of this proceeding? I am of opinion that this must be discovered from a consideration of the relief sought, G the grounds upon which it is sought, and the right of action of the plaintiff which entitles him to that relief. I do not think that any court is entitled to look outside the proceedings themselves and consider what were the motives of the plaintiff, or those who are promoting the action, or the ulterior purposes or consequences which they hope to attain by means of the action. Such an inquiry would, in my opinion, be wholly inadmissible in applying this section. I cannot doubt that the H object of this action is to enforce what I have called the negative stipulation in the agreement, and that it is in fact and in truth for specific performance of the agreement. In *Lumley* v. *Wagner* (4) Lord St. Leonards, L.C., could not compel Miss Wagner to sing for Mr. Lumley, but he could prevent her from singing elsewhere in breach of her agreement. Is it doubtful that the court was thereby directly enforcing the performance of the agreement in the only manner I in which it could be enforced by a court of equity? The words are not, I will observe, "to enforce the application or distribution," but to enforce an agreement for those purposes. This is an action for compelling the council and other officers of the union to observe and govern themselves by the terms of the agreement contained in the rules, and I am at a loss to understand what right of action the plaintiff had except on the allegation that the payments sought to be restrained were contrary to the rules. This writ, in fact, is properly framed on that hypothesis.

A It is, of course, easy to say that the action is in one aspect for the execution of a trust and not for enforcing the agreement. The association not being an incorporated body, the appointment of trustees and the powers given to them are the machinery provided by the Act for carrying out its purposes. The trustees, however, have no powers of management. No complaint is made against them, and they were not even originally defendants to the action. They were only added in B the Court of Appeal with the intention of getting over a technical defect, whether effectually or not I will discuss presently. The real defendants are the association itself and its executive officers representing the majority of the members opposed to the views of the plaintiff, and the only injunction asked for by the writ was against them. I cannot regard the trustees when added to the record otherwise than as merely formal and passive defendants, and I do not think that the C addition of the names of the trustees to the record has had the effect of converting the action into a trust action, which it clearly was not as the action was originally framed. The trust is but the machinery devised for securing the performance of the agreement and the other purposes of the association, and, if you are entitled to treat an action like the present one as one for the execution of a trust and not for the direct enforcement of the agreement, there is no conceivable case (at D least I cannot think of one) coming within the description in s. 4 (3) (a) of which you might not say the same, and the enactment would become quite inoperative. The form of the action would not affect the substance of it, but in this case the form expresses the substance.

It will be clear from what I have said that, in my opinion, the object of this action is that of directly enforcing the agreement in the rules. I wish to E give full force and effect to that word "directly," and I think that it means this: Where the primary object of the action is to enforce the agreement, and the right of the plaintiff to maintain the action is founded on his right to have the rules observed, I think that the action must be deemed to be one for directly enforcing the agreement. But where the right of action is of a different character, and the construction and effect of the rules (if it comes in at all) only F comes in as evidence in support of the particular relief claimed, I think that the action would not be one for "directly" enforcing the agreement. I will illustrate my meaning thus. I am disposed to think that the trustees might have maintained this action against the original defendants under the powers given to them by s. 9 of the Act, and this is an answer to an argument of counsel that, if the appellants were right, the members of the association were without remedy to G prevent a diversion of their funds. In this union the trustees must be members, but it is not necessary under the Act that they should be so. They would sue as owners of the property of which they are the statutory owners and guardians. In an action to recover or protect the property of the union the construction or effect of the rules might not come into question at all, as, for instance, where the action was against a treasurer or other executive officer who set up a claim to H the ownership of the property or money in question, or threatened to deal with it as his own. In other cases the rules might be material, but only as evidence in support of the claim. In such cases I think the object of the action might properly be described as only indirectly for enforcing the agreement.

It is a satisfaction to me to know that the opinion which I have come to has I the support of SIR GEORGE JESSEL, M.R., in *Rigby* v. *Connol* (2) and DENMAN, J., in *Duke* v. *Littleboy* (5). In *Rigby* v. *Connol* (2) the plaintiff alleged that he had been wrongfully expelled from a trade union, and claimed a declaration that he was entitled to participate in the enjoyment of the property and effects of the trade union and in its rights, privileges, and benefits, and for an injunction to restrain the defendants from excluding him. SIR GEORGE JESSEL, M.R., dismissed the action. In his judgment the learned judge said (14 Ch.D. at pp. 490, 491):

> "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that, if I decide in favour of the plaintiff,

I directly enforce that agreement because I declare him entitled to participate in the property of the union, and the only property they have is their fines and subscriptions, and I restrain the society from preventing that participation. It seems to me that it is directly enforcing that agreement, in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less."

After pointing out that the rules contained stipulations in restraint of trade, he added (ibid. at p. 491):

"If nothing in the Act, therefore, will assist the plaintiff, he must still be in the position of a member of an illegal association coming to a court of justice to assist him to enforce his rights under that illegal association. If that is so, it is impossible for me, and I do not think it ever was intended by the legislature, looking to the terms of the Act of Parliament, to enable the courts to interfere on behalf of the members of these societies for the purpose of getting relief inter se with respect to rights and liabilities contrary to the Act."

I cannot myself see any distinction in principle between an injunction to restrain the exclusion of the plaintiff from a right to participation in the property, and one to restrain the removal or diversion of the property in which he claims a right to participate. *Rigby* v. *Connol* (2) has been followed by the Court of Appeal in *Chamberlain's Wharf, Ltd.* v. *Smith* (6).

In *Duke* v. *Littleboy* (5) the action was by the executive council of a trade union association against the executive officers and trustees of a branch of the society for an injunction to restrain the defendants from dividing funds belonging to the central society among members of the branch contrary to the rules. The central executive had refused to sanction a strike by members of the branch. It was attempted to distinguish the case from *Rigby* v. *Connol* (2) on the same grounds as have been argued before your Lordships. Denman, J., held that it was too great a refinement when you looked at the true object and the words of the Act, and he concluded his judgment in these words (49 L.J.Ch. at p. 804):

"'[*Rigby* v. *Connol* (2)] was an application to restore a member. This is to prevent funds being dealt with in any other manner except according to the rules, and I think it would be frittering away the meaning of this clause if I were to put any other construction upon it than that this is a proceeding to directly enforce an agreement for the application of the funds of a trade union to provide benefits for members."

On the other hand, *Wolfe* v. *Matthews* (1) is relied on by the respondent and has been followed in the courts below. In that case the plaintiffs sued, on behalf of themselves and other members of a trade society, to restrain the defendants from carrying out an amalgamation with another society, and pleaded that the defendants intended, unless restrained by injunction, to pay money out of the funds to the amalgamating society. Fry, J., held that the judgment of Sir George Jessel, M.R., did not apply to the case. He said (21 Ch.D. at pp. 196, 197):

"An order that the defendants should pay money to the plaintiffs would be a direct enforcement of an agreement for the application of the funds, but all that is sought here is to prevent the payment of the moneys to somebody else. Either that is no enforcement of an agreement at all, or it is an indirect enforcement. To take a simple case, if there is a contract by A. to pay £100 to B., that contract is directly enforced by a judgment of the court directing A. to pay to B.; and the contract is only indirectly enforced, if at all, by a judgment restraining A. from paying the money to someone else. It is only by a stretch of language that such an order can be said to enforce A.'s contract; the utmost that can be said is that it is then more than likely that A. will pay to B."

I never differ from FRY, J., without great hesitation, but in this case I must frankly say that I do not follow his reasoning. Of course, a creditor cannot restrain his debtor from disposing of his money until he has recovered judgment and issued execution. But if the learned judge means by his illustration an earmarked bag of sovereigns which A. has contracted to deliver to B. and no one else, I take the liberty of saying that an action to restrain A. from delivering it to a third person would clearly be one for directly enforcing the agreement, and that seems to me to be the only way of making the illustration relevant to the case then before the court. The learned judge cannot have meant that an order for payment to the plaintiffs was the only mode of directly enforcing the agreement, and he appears to me to ignore the existence of the agreement that benefits should be given to members according to the rules, and not otherwise. It is not, however, stated in the report that the amalgamation complained of was alleged to be ultra vires, and it may be that the action was founded only on the allegation that the amalgamation would be prejudicial to the plaintiffs by diminishing the funds applicable for their benefit. If so, the learned judge's reasoning is intelligible, and his illustration would be relevant. But in that case the decision would be wholly irrelevant to the question now before your Lordships. In the Scottish case of *M'Laren* v. *Miller* (7) it appears from the statement of the case to have been on a closed record, but one of the learned judges speaks as if the interdict granted was only to keep things in statu quo until the rights of the parties should be ascertained. It was, however, an action by trustees under s. 9 to which, I think, different considerations may apply. If and so far as it is a decision against the opinion which I have already expressed on the construction of the Act, I think that it was wrongly decided.

I gather from STIRLING, L.J.'s judgment in the present case that he also felt some difficulty as to the respondent's right to maintain this action. But he thought that the analogy of the procedure in the Chancery Division, by which a shareholder is allowed to sue for his individual interest where the company refuses to sue to restrain the commission of an act which is ultra vires the company, ought to be applied to trade unions. I have some doubt whether, having regard to the wide language in which the objects of the society are stated in r. 3, and the power of the members to alter the rules, the acts complained of were ultra vires the association or more than a breach of the regulations which the majority of the members might condone. But I will assume the former view to be the correct one. The suggestion of the learned lord justice might in that case get over an objection that the trustees were the proper plaintiffs, but it does not touch the present point, and you are brought back to the point from which I started, whether an action by an individual shareholder to restrain a breach of the agreement contained in the rules respecting benefits to members is not such an action as is described in s. 4 (3) (a) of the Act. In my opinion, the appeal should be allowed, and the action dismissed with costs here and below.

LORD JAMES OF HEREFORD.—I have entertained considerable doubt as to the decision that should be arrived at in this case, but in the result I have come to the conclusion that the appellants are entitled to succeed in their appeal.

The first question to be determined is whether s. 4 of the Trade Union Act, 1871, prevented the action under discussion from being brought. That Act amounted to a very charter of legal existence. Before the passing of it trade unions had no legal recognition. The Act effected it, but at the same time did not afford access to the public legal tribunals for all purposes. For some purposes the trade unions were left to determine their own differences, and so s. 4 provided:

> "Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements: . . . (3) An agreement for the application of the funds of a trade union (a) to provide benefits to members, or (b) to furnish contributions."

MATHEW, L.J., in his judgment, terms this section "a remarkable relic of prejudice." It was rather the result of great legislative timidity. If the legalisation of trade unions could no longer be resisted, a modified legalisation only, the legislature said, should be conferred upon them. The courts of law should not be called upon to enforce certain rights of members among each other. Trade unionists must manage their own internal affairs as best they could among themselves. Now your Lordships have to determine whether the plaintiff's action was duly brought before the court, or whether it comes within the prohibition contained in s. 4 of the Act of 1871.

We must first ascertain the purposes for which the action was instituted. The record affords us but little assistance. Save the writ there are no pleadings. But from the writ we gather that the action was brought by the plaintiff as a member of a registered trade union against that union and its officers for the purpose of restraining them by injunction from misapplying the funds of the association contrary to its rules and the provisions contained therein. But the plaintiff, on his evidence given at the trial before GRANTHAM, J., stated that he had brought the action because, being entitled to the benefit of the funds of the trade union, he desired to protect them and have them used in a right way, and according to the rules of the association. The plaintiff also based his claim for an injunction on the ground that the defendants wrongly applied the funds of the association and intended to apply them in making payments to members of the union who had struck work, and that such strike was contrary to the rules of the association. In order to sustain the case the plaintiff had to rely upon the rules of the union. These rules form the constitution of the association, and by these terms all the members of it are bound. Both the member's contribution and the benefits which he is to receive are contributed by, and dealt with, under these rules—of which Nos. 2, 3, 62 and 64 are the principal in relation to this case.

Rule 2 states: "These rules shall be for the government of the association and the protection of the members." Rule 3 sets out the objects for which the union was established: (a) to raise funds for mutual help; (c) to secure the fines and wages bargained for by the members, and to protect members when unjustly dealt with by the masters or managers; (g) to provide a weekly allowance for the support of members and their families who may be locked out or on strike; (h) an allowance to all full members, half members, and members' wives at death who are financially on the books; (j) the whole of the moneys received by the association shall be applied to carrying out the foregoing objects, subject to the rules. Then rr. 64 and 65 provide for the conditions under which a strike may be constituted and carried on. These rules appear to me to constitute an agreement between the members of the union to the effect that it shall be carried on in accordance with the terms and conditions set out in such rules.

It now remains to be determined whether the suit is a legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members. In substance the plaintiff is seeking to prevent the defendants from breaking the rules of the union—that is, from breaking the agreement created by those rules. He bases his right to interfere upon the fact that he is entitled to participate in the distribution of the funds according to the rules. VAUGHAN WILLIAMS, L.J., says:

> "The plaintiff does not claim a right to participate in the funds. There is no question as to his right to participate. He claims only a right to restrain misapplication of the funds."

I do not think that this is correct. It is true that the plaintiff does not claim any immediate payment of money to him. But he does claim a right to participate in the union funds under circumstances that may arise, and it is to protect such right of full participation that he has brought this action. His whole contention is that if the defendants continue improperly to expend the funds for strike purposes he (the plaintiff) might be prevented from fully participating in them

A according to his right under the agreement contained in the rules. In order to secure the maintenance of the fund the plaintiff has no other weapon than the enforcement of the agreement. If he were to say: Give me so much money under the rules, it is admitted that that would be an enforcement of the agreement; equally so, I think, if he says: Put so much money by to protect my rights within the rules. Then, if he says: Stop spending money in breach of the rules so that B you may not deprive me of my rights, is he not equally enforcing the agreement? It cannot, I think, be said that in order to bring the action within s. 4 the claim must necessarily be for money to be at once paid to the plaintiff, and if this be not the extent of the limitation I think that the present action comes within the true and correct reading of the section. I do not forget that the word "directly" is to be found in s. 4 of the Act, and that effect has to be given to it. But this C action appears to me to seek "directly" to enforce an agreement. The assertions on which the action is based are certainly direct. "I, the plaintiff, and you, the defendants, have entered into an agreement. You are about to break that agreement, I seek to prevent you and I do so by asking the court to enforce it."

Your Lordships' attention has already been called to the authorities bearing upon this case. On the one hand, the judgments of SIR GEORGE JESSEL, M.R., D in *Rigby* v. *Connol* (2) (when the plaintiff sought to restrain the trade union from expelling him), followed by that of DENMAN, J., in *Duke* v. *Littleboy* (5) are cited in support of the defendants' contention, while the plaintiff can rely upon the judgment of FRY, J., in *Wolfe* v. *Matthews* (1), and upon the judgment in the Scottish case of *M'Laren* v. *Miller* (7). In my opinion, the judgment of SIR GEORGE JESSEL, M.R., which has been recognised by the Court of Appeal in E *Chamberlain's Wharf, Ltd.* v. *Smith* (6), bears directly upon the question now before your Lordships. That learned judge said (14 Ch.D. at pp. 490, 491):

> "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that if I decide in favour of the plaintiff I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their fines F and subscriptions, and I restrain the society from preventing that participation. It seems to me that it is directly enforcing the agreement; in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less."

In my opinion, there is no valid distinction between a suit to prevent the plaintiff G from being deprived of participation in the funds by excluding him from membership and a suit to prevent his being deprived of such participation by virtue of the funds being wrongly taken away and wrongfully applied to other purposes. For these reasons I have arrived at the conclusion that this action comes within s. 4 of the Act of 1871, and cannot be maintained. This view renders it unnecessary that I should deal with other points raised in the case. My decision is thus in H favour of the allowance of the appeal.

LORD ROBERTSON.—I am of opinion that the judgment appealed against is right. My construction of the statute is that adopted by the Court of Appeal, and I cannot usefully add to what has been said by the learned judges there, and in this House, in support of that view.

I **LORD LINDLEY.**—Before the Trade Union Act, 1871, was passed trade unions were unincorporated societies, not recognised as legal, and in that sense, at least, they were held to be illegal on the ground that their objects were to restrain freedom of trade, and were against public policy. Neither courts of law nor courts of equity would recognise or enforce the rules of such societies, or the trusts on which their funds were held. By the Act in question trade unions were freed from the illegality which was the consequence of being regarded as against public policy (s. 2). Their rules and trusts can no longer be treated as invalid by reason of their being in restraint of trade (s. 3). They may be illegal, or unenforceable

on some other ground; and, if they are, the Act of 1871 does not in any way legalise them or affect them. But the Act of 1871 does more for trade unions than remove the consequences of being regarded as illegal societies; it allows them, to a great extent, to manage their own affairs free from the control of the ordinary courts of the country (s. 4), and enables them to register themselves under a name (ss. 13 and 14 and Sched. 1), and to obtain summary redress against their officials in case of misconduct (s. 12). Further, it enables them to hold property by trustees (s. 8) and enables the trustees to sue and be sued in respect of such property (s. 9).

One thing, however, the Act of 1871 did not do. It did not incorporate trade unions even when registered under the Act with a name. A trade union holds property by trustees; but, as it is not incorporated, there is no one legal person or entity in whom the beneficial interest in the property of a trade union is vested. The beneficiaries are its members collectively and severally. This is plain from s. 8, which vests the property of every registered trade union in trustees for the use and benefit of such trade union, and the members thereof. A trade union is, and its name is only a convenient designation for, an unincorporated society of individuals, and this observation must not be lost sight of on the present occasion. Prior to the decision of this House in *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* (8) it was doubtful whether a registered trade union could sue or be sued in its registered name. The House decided that it could be so sued in an action for damages committed by its agents. But care was taken in that case to point out that a trade union is not an incorporated society, although it may be sued in its registered name. The Trade Union Act, 1871, contains a carefully framed scheme to enable trade unions to acquire and to hold, through the medium of trustees, funds for the benefit of their members, who, as already observed, are expressly mentioned in s. 8. Unless something can be found in the Act to the contrary, the natural legal inference would be that the ordinary equitable machinery for preserving the trust property, and for executing the trusts on which it is held, would be available for the members. Upon this point there is a valuable recent decision by FARWELL, J.—*Stevens* v. *Chown* (9)—where the older authorities will be found.

But it is said that s. 4 of the Act of 1871 expressly excludes the jurisdiction of the courts from interfering in this case. I confess that I cannot adopt that conclusion. Before turning to the section, let me remind your Lordships of what the object of this action really is, and what the judgment appealed from really does. The action is not to enforce a contract between the plaintiff and the defendants; its object is to vindicate a right of property. All trusts except those created by statute or by will, may be said to be created by a contract between the parties to the instrument creating them. But those trusts can be enforced in equity by any person entitled to the benefit of them. A suit by a cestui que trust against his trustee is not what is usually understood as a proceeding to enforce an agreement; if it were, the suit could only be maintained by some person who was a party to the agreement creating the trust. But, further, the object of this action is not to distribute funds held in trust for the members of the trade union, nor to obtain payment of any money out of them, nor in any way to administer those funds. The plaintiff, who is a member of the trade union, and is beneficially interested in its funds, complains that those who have control of them threaten and intend to apply them to purposes not authorised by the rules of the association; and the whole object of the action is to obtain an injunction to restrain that intended misapplication of the funds. The order appealed from does this, and, when properly understood, does no more. Owing to the absence of pleadings, and to the fact that the order was drawn up by someone not accustomed to the forms used in the Chancery Division, the order is not in terms directed to the specific misapplication which it is sought to restrain, but is in quite general terms. But this is of no real importance when once the true object of the action is understood. The order is not a first step to ulterior

proceedings with a view to administration. The action is at an end, except as regards this appeal, and any breach of the injunction granted.

Such being the object of the action, and the effect of the order appealed from, let us see what there is in s. 4 of the Act which excludes the jurisdiction of the court to entertain the action. The words are:

> "Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements."

Pausing here for a moment, the words just quoted suggest the following observations. The section extends not only to courts of law, but also to courts of equity; secondly, the section does not prohibit any court from exercising in any case any jurisdiction which it could have exercised before the Act passed; the section simply prevents any court from extending its jurisdiction, and interfering in cases in which the Act would authorise interference if it were not for the direct prohibition contained in the section; and, thirdly, no legal proceeding which might be taken if the section did not prohibit it is prohibited, except a legal proceeding instituted with the object of directly enforcing, or recovering damages for the breach of, the specified agreements. The word "directly" is important, and limits the application of the section. Legal proceedings for other purposes than those specified are not prohibited, although they may indirectly affect agreements on which no action can be brought. Passing now to the agreements specified in s. 4, those numbered 1, 2, 4 and 5 may be disregarded as clearly inapplicable to the present case. The third is the only one which has to be considered. The words are:

> "Any agreement for the application of the funds of a trade union—(a) to provide benefits to members, or (b) to furnish contributions . . . or (c) to discharge any fine. . . ."

I am myself quite unable to see that these words include such an action as that which has been brought in this case. The object of this action is not directly to enforce any agreement for the application of the funds of the trade union in any of the ways specified under the third head. The object of the action is not to apply the funds, but to preserve them for future application; and, to my mind, this action is no more struck at by s. 4 than is an action brought by the trustees for the recovery of the funds of the trade union from some person wrongfully in possession of them.

The question for decision is not new. It came before FRY, J., in 1882 in *Wolfe* v. *Matthews* (1), and was decided in accordance with the above view, and, so far as I know, that case has never been questioned, and has always been considered right. A similar view was taken of the Act in Scotland in *M'Laren* v. *Miller* (7), It is not in conflict with any other decision unless it be *Duke* v. *Littleboy* (5) decided by DENMAN, J., in 1880, but the object of the action in that case was wider than it was in *Wolfe* v. *Matthews* (1), and wider than it is in this case. The cases in which the court has refused to restore expelled members—namely, *Rigby* v. *Connol* (2) and *Chamberlain's Wharf Ltd.* v. *Smith* (6) are also distinguishable. The object of the action in each of those cases was directly to establish and enforce the plaintiff's rights, as a member of the trade union, to the benefits conferred on the members by the rules. Considering the object of the action, it appears to me to be competent for any member who has a beneficial interest in the funds of the union to sue to prevent their application to purposes not warranted by the rules as they stand. It is true that the rules may be altered, but it does not follow that the court ought not to enforce the trust created by them as they stand. Upon the question whether the application of the funds of the society which has been restrained was authorised by the rules, I do not think it necessary to add anything. The strikers from the first were legally in the wrong, and they never got right. They cannot bring themselves within the

rules. The appeal fails on all points, and ought to be dismissed with costs. I agree to the suggested form of the order.

Appeal dismissed.

Solicitors: *Corbin, Greener & Cook*, for *Raley & Sons*, Barnsley; *Marsh, Sherwood & Hart*, for *Carrington & Co.*, Barnsley; *Steadman, Van Praagh & Gaylor*, for *Arthur Neal*, Sheffield.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

DENABY AND CADEBY MAIN COLLIERIES LTD. *v.* YORKSHIRE MINERS' ASSOCIATION

[House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Davey, Lord Robertson and Lord Atkinson), March 12, 13, 15, 16, 19, 20, May 14, 1906]

[Reported [1906] A.C. 384; 75 L.J.K.B. 961; 95 L.T. 561; 22 T.L.R. 543]

Trade Union—Action against union—Competency—Misapplication by union of its funds—Damage resulting to third party—Right of action against union.

If a trade union, in contravention of its rules, misapplies the funds of the union, the wrong is committed against the members of the union, and it does not give to a third party, who has no interest in the funds, any right of action against the union in respect of damage suffered by him as the result of the wrongful act of the union.

Tort—Contract—Inducement not to enter into—Contract of service.
Trade Union—Branch—Unlawful acts by officers—Liability of union.

The officials of a branch of a trade union brought about a strike in contravention of the rules and regulations of the union:

Held: there was nothing in the constitution and rules of the union to render the officers of a branch agents of the union, and, therefore, the union was not liable for any ultra vires acts of those officers.

Per Curiam: To induce or attempt to induce a person who is willing to enter into a contract of service with an employer to refrain from doing so is not an actionable wrong in respect of which the employer can recover.

Notes. This case must be read in the light of s. 3 of the Trades Disputes Act, 1906, subsequently passed, which provides that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or is an interference with the trade of some other person.

Considered: *Gozney* v. *Bristol Trade and Provident Society*, [1908–10] All E.R.Rep. 868. Explained: *Smithies* v. *National Association of Operative Plasterers*, [1908–10] All E.R.Rep. 455.

As to actions against trade unions, see 32 Halsbury's Laws (2nd Edn.) 516–524, and for cases see 43 Digest 112 et seq. For Trade Disputes Act, 1906, see 25 Halsbury's Statutes (2nd Edn.) 1269.

Case referred to:

(1) *Yorkshire Miners' Association* v. *Howden*, ante p. 602; [1905] A.C. 256; 74 L.J.K.B. 511; 92 L.T. 701; 53 W.R. 667; 21 T.L.R. 431; H.L.; 43 Digest (Repl.) 107, *1127*.

Also referred to in argument:

Taff Vale Rail Co. v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426; 70 L.J.K.B. 905; 85 L.T. 147; 65 J.P. 596; 50 W.R. 44; 17 T.L.R. 698; 45 Sol. Jo. 690, H.L.; 43 Digest 127, *1295*.

Giblan v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 19 T.L.R. 708, C.A.; 43 Digest 118, *1226*.

Buran v. *Denman* (1848), 2 Exch. 167; 3 New Pract. Cas; 6 State Tr.N.S. 525; 10 L.T.O.S. 523; 154 E.R. 450; 43 Digest 418, *403*.

Appeal by the plaintiffs in the action from a decision of the Court of Appeal (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.JJ., Collins, M.R., in part dissenting), which set aside the verdict of a special jury and judgment of Lawrance, J., in the action.

The appellants were colliery owners; the defendants the Yorkshire Miners' Association was a trade union, registered under the Trade Union Act, 1871; the defendants Cragg and Kaye were trustees of the association; the defendant Wadsworth was the vice-president, and the defendant Hall the treasurer. Other defendants were officials of the association or of one of the branches. In June, 1902, a strike began at the appellants' collieries, under circumstances which are fully set out in the judgment of the Lord Chancellor, and it lasted till March, 1903. In the present action the plaintiffs claimed (i) damages for illegally paying away the funds of the defendant association in contravention of its rules, to the injury of the plaintiffs, for the purpose of wrongfully and maliciously procuring and inducing workmen employed or formerly employed by the plaintiffs to break contracts with the plaintiffs, and not to enter into contracts with them, and unlawfully to remain in possession of the plaintiffs' houses, and to prevent the plaintiffs from carrying on their business of colliery proprietors, and for other illegal purposes and for carrying on by unlawful means a strike of the plaintiffs' workmen; (ii) damages for wrongfully and maliciously conspiring with workmen formerly employed by the plaintiffs to do and cause the acts aforesaid; (iii) an injunction to restrain the defendants from unlawfully paying away the funds of the defendant association in contravention of the rules of the defendant association, and for the commission of the acts aforesaid. The questions left to the jury at the trial and their answers thereto were as follows:

"(1) Did the defendants Nolan and Humphries, or either of and which of them, unlawfully and maliciously procure the men to break their contracts of employment by going out on strike on June 29 without giving notice? A. Yes. (2) If you answer the first question in the affirmative, then were Nolan and Humphries, or either and which of them in so doing purporting to act as agents of the association and for its benefit?—A. Yes. (3) Did the members of the committees of the Denaby and Cadeby branches, or any of them, unlawfully and maliciously procure the men to break their contracts of employment by going out on strike on June 29 without giving notice?—A. Yes. (4) If you answer the third question in the affirmative, then were the members of the committtees in so doing purporting to act as agents of the association and for its benefit?—A. Yes. (5) Did the defendant association, by its executive council or by its officials, ratify the acts of Nolan and Humphries, or of the members of the committees, in so procuring the men to break their contracts?—A. Yes. (6) Did the defendant association by its officials or by the members of the committees of Denaby and Cadeby branches maintain or assist in maintaining the strike by unlawful means, that is to say—(a) by molesting or intimidating men who were working for the plaintiffs with a view of inducing them to cease from so working?—A. Yes. (b) By inducing or attempting to induce men who were willing to enter into contracts of service with the plaintiffs or to work for them, to refrain from so doing?—A. Yes. (c) By the grant of strike pay against the rules of the association?—A. Yes. (7) Did the defendants

Wadsworth, Parrott, Frith, and Hall, or any and which of them maintain or assist in maintaining the strike by unlawful means—that is to say, by any and which of the above means?—A. Not personally, but as servants of the association. (8) Did the defendants or any and which of them conspire with each other, or with workmen in the employ of the plaintiffs to do any and which of the matters mentioned in question (6)?—A. Yes. (9) Did the defendants or any and which of them unlawfully and maliciously conspire together, and with workmen formerly in the employ of the plaintiff, to molest and injure the plaintiffs in the carrying on of their business, and were the plaintiffs so molested and injured? —Yes."

Thereupon judgment was entered for the appellants, with costs, the inquiry as to damages being stayed by consent of all parties. This decision was reversed by the Court of Appeal, Sir Richard Henn Collins, M.R., dissenting to the extent of holding that Lawrance, J., was justified in leaving the matter to the jury, and that it was impossible to enter judgment for the defendant association. In his opinion, there was no misdirection, and the plaintiffs were entitled to retain their verdict in respect of the causes of action dealt with in question 6 and the following questions.

Eldon Bankes, K.C., *Lush*, K.C., and *H. T. Waddy* for the appellants.

Rufus Isaacs, K.C., *Danckwerts*, K.C., and *Clement Edwards* for the respondent association.

Atherley-Jones, K.C., *S. T. Evans*, K.C., and *Compston* for the other respondents.

Their Lordships took time for consideration.

May 14, 1906. The following opinions were read.

LORD LOREBURN, L.C.—The litigation out of which this appeal comes relates to a strike at the Denaby and Cadeby Collieries, which began on June 29, 1902, and ended about the month of March, 1903. It will be convenient to summarise at the outset the main facts which led to this dispute. For some years before 1902, there had been a controversy between employers and workmen at these collieries in regard to the rate of payment for removing what is called "bag dirt." The controversy related to the price list obtaining in these particular collieries, and not elsewhere, though the men had the sympathy of the defendant association and of their secretary, the late Mr. Pickard, who assisted them in negotiating for a settlement. In fact, however, no satisfactory settlement was reached. On June 14, 1902, another dispute, not confined to these collieries, but applying to all the collieries in the defendant association, was, for the time, ended by the casting vote of Lord James of Hereford, after a meeting of the Conciliation Board. Lord James awarded, to use a phrase sufficiently accurate for the present purpose, a reduction in wages of 10 per cent. It is said that the men at the two collieries were dissatisfied with this award. In that condition of things, when some bitterness undoubtedly existed, on Saturday, June 28, certain officials of the Denaby and Cadeby branches of the defendant association summoned a meeting of the men in both collieries for the morning of Sunday, June 29. Only 400 or fewer out of 5,000 attended the meeting. It was addressed by officials of both branches, and they advocated an immediate strike. The men followed this advice and passed a resolution to stop the wheels. Pickets were placed, and on the night shift of that Sunday, June 29, all except four refused to work. On Tuesday, July 2, one of the four was assaulted, and then the other three ceased working also. Few, if any, of the others worked from June 29 until the end of the strike in the following March. Inasmuch as the men were all working under contracts which could not be terminated except after fourteen days' notice, it is manifest that the abrupt cessation of work on June 29 involved a breach of contract and was unlawful. This was fully recognised by the council of the defendant association, to which many of the strikers belonged. I shall discuss later on the relations

between the Denaby and Cadeby branches of the association and the association at large. At present it is enough to say that the council of the association constituted its supreme governing body and controlled its funds.

At this stage the council refused to maintain the strike by giving strike pay. Further, they sent representatives at once to the two collieries, and they told the men that they had acted illegally in breaking their contracts and must return to work, and that they could take a ballot according to the rules of the association to decide whether they should resume the strike after working out their fourteen days of contract service. The men consented, and, but for an accident, would have resumed work. In August, 1901, the Home Secretary had issued some new regulations in regard to timbering, which rightly or wrongly, were by some persons supposed to be ultra vires. Those who had been employed in these two collieries before August, 1901, had signed contracts which left them free to contest the legality of these regulations because the regulations were not embodied in their contracts, and, therefore, had no contractual force upon them. When, on July 17, 1902, the workmen offered to resume work in compliance with the advice of the defendant association, they were required to sign fresh contracts in accordance with the practice always observed in those collieries in regard to workmen who had been absent from their work. These fresh contracts expressly embodied the new regulations of the Home Secretary and the men declined to sign them, a proceeding in which they were supported not only by the officials of their branches but also by the officials of the defendant association. Accordingly, the strike continued. After this incident the council of the association treated the case no longer as a case of strike, but as one of lock-out, and asserted that they were entitled, under the rules of the association, to grant to their members at these two collieries strike pay. Strike pay was granted by the defendant association from Aug. 24 (dating back to Aug. 17, 1902) down to February, 1903, when one Howden, a member of the association, obtained an injunction against the association prohibiting any further grant of strike pay on the ground that the rules did not admit of this payment under the circumstances. That view was upheld on an appeal to this House: *Yorkshire Miners' Association* v. *Howden* (1) [see p. 602 ante]. As soon as the injunction was granted the men in both collieries submitted, and the strike ended in March, 1903.

After the strike ended the Denaby and Cadeby Main Collieries, Ltd., brought this action. Though there were many defendants, the chief purpose was to fix the defendant association, who alone were in the position to pay damages, with a liability for the loss that had been incurred by the plaintiffs. For the present, therefore, I will deal with the case only so far as it relates to the defendant association. The pleadings are of great length and state the contentions in various forms, but after the evidence had been given, counsel for the plaintiffs asked the learned judge to leave nine questions to the jury. Counsel for the defendants, alleging that there was no evidence to go to the jury, refused either to suggest questions for themselves or to take responsibility for those suggested on behalf of the plaintiffs. The learned judge left to the jury all the nine questions as they stood. The jury answered all of them in favour of the plaintiffs, and they embody the ultimate form in which the case against the defendant association was shaped.

Taken from this source, the first head of claim by the plaintiffs may be stated as follows. The defendants Nolan and Humphreys [officials of branches of the defendant association] unlawfully and maliciously procured the men to break their contracts of employment by going out on strike on June 29 without giving notice. In so doing Nolan and Humphreys purported to act as agents of the defendant association and for its benefit. The members of the committees of Denaby and Cadeby branches of the defendant association also unlawfully and maliciously procured the men to break their contracts of employment by going out on strike on June 29 without giving notice. They also, in so doing, purported to act as agents of the association and for its benefit. The defendant association,

by its executive council, or by its officials, ratified these acts of Nolan and Humphreys or of the members of the committees. In short, the plaintiffs say that the defendant association by its agents instigated the commencement of the strike and ratified the acts of its agents in procuring the breach of contract. This head covers questions 1 to 5 inclusive. It is quite clear that the central council did not know that the strike had begun till Monday, June 30. When they heard of it they at once declared that it was illegal. If we yielded to the suggestion that the strike of June 29 must, nevertheless, from its very suddenness, have been engineered by the central council behind the scenes, we should be acting on pure imagination. Nor can I see any evidence that the persons who procured the men to break their contract purported to act as agents of the defendant association, or that the latter at any time ratified that proceeding. All the evidence is that the breach of contract was from the beginning to end disapproved at head-quarters.

Another view, however, was presented in regard to this first period. Counsel for the appellants contended that Nolan and Humphreys, delegates of the two branches, and the committees of the two branches, had, as the jury found, in fact procured the strike on June 29 in breach of contract, and that the defendant association was, under its constitution and rules, liable as principals for this wrongful conduct of their agents, apart from any ratification. It is necessary to ascertain the relations of the association with its branches and their respective officials in order to decide this point of agency. In substance, the position is as follows. The defendant association comprises about 150 branches, extending, we were told, over Yorkshire and the Midlands. The Denaby branch and the Cadeby branch consist of men working at each of these two adjoining collieries, both belonging to the same owners, and, I suppose, roughly speaking, that each branch in the association consists of men working in the same colliery or under the same employers. Certainly in the present case it is so. Every member of the association contributes according to a fixed scale to its funds. These funds are collected by the branch, and after defraying its local expenses the balance is handed over to the association to be applied in paying the general expenses, the benefits, such, for example, as funeral allowances, and also, in case of need, in maintaining a strike. There are branch officials elected by members of the branch, and central officials of the association elected by the branches. The supreme government of the association is vested in the council (central council I will call it), which consists of officials, the president, two secretaries, the treasurer, and also of delegates, one from each branch, each with a voting power proportioned to the number of members in the branch. It is unnecessary to mention the central executive committee which only acts on emergencies in the interval between council meetings and has no authority in regard to strikes. Besides these central bodies, each branch has a committee of its own, consisting of persons elected by members of the branches.

Careful provisions are to be found in the rules dealing with the rights and duties of the association and the branches respectively in case of strikes and lock-outs, and for a very obvious reason. Strikes or lock-outs may be, and generally are, local in their character, and are caused by disputes relating to the local conditions of service. If one branch were able without control to call out its members on strike in consequence of a local dispute and to claim the financial support of the entire association as a matter of right, then the caprice or folly or selfishness of a few men might dissipate the common funds of all. Hence the necessity for strict rules. No branch is allowed to strike unless two-thirds of its members, voting by ballot, so determine, nor unless three-fourths of the members composing the branch record their votes, and even if that majority is procured the members of the branch are entitled to strike pay only

"if the employers refuse to remedy their grievances and after all proper and peaceful means have been tried to effect a settlement by deputations from

members with the advice and assistance of the council, and such member or members be permitted to cease work by the sanction of the association in accordance with the rules."

Another rule authorises a registered vote to be taken throughout the entire association whenever any number of branches, numbering one-fourth of the council, demand such vote on (among other things) "the adoption or prolongation of a strike." The net result of these provisions is that all strikes of a branch are prohibited unless the prescribed majority of branch members is obtained; that no strike pay is to be granted unless the strike be sanctioned by the council after peaceful efforts have been exhausted, but that a plebiscite of the entire association may adopt a strike after it has commenced. On the other hand, if any branch is locked out in consequence of any action lawfully taken by the association to remedy grievances, the men are entitled to maintenance equal to strike pay.

Can it be said in the face of these rules that the association is liable in damages for the action of delegates or of branch officials or committees in procuring a strike (whether accompanied or not by breach of contract) without a ballot, without the sanction of the council, and without a registered vote of the entire association? In my opinion, the association is not so liable. The delegates are agents of the branches to represent them in the council. When acting in the council they are agents of the entire association, to do the business of the council. They are not agents of the association to represent it or act for it in their localities, either as to strikes or other matters. Branch officials and committees are elected by members of the branch who are engaged in a common service under one particular employer. If they quarrel with the employer about the conditions of their service they have a right to strike. The association does not confer that right, which is derived from the general law, but it restricts the right by rules requiring a prescribed majority as the indispensable preliminary. I do not see how either the officials or committees thereby become agents of the association to procure a strike, even if it were lawful and regular, still less to procure it contrary to the rules and contrary to the law in breach of existing contracts. It is true that on certain conditions the association is bound to furnish strike pay. Will that circumstance create the agency for which counsel for the appellants contends? I will suppose that the employers also are members of an association of coalowners, as we were told that they are, and that the coalowners' association bind themselves to support each other with money in the event of any one member locking out his workmen after certain conditions have been observed. If such member locked out his men without giving the notice prescribed by contract it would seem very strange to suppose that the other members were liable to damages for an act over which they had no control, and one which was contrary to the conditions. Yet the cases are precisely the same.

In my opinion the first head of claim entirely fails. The second head of claim advanced by the plaintiffs is to be found in questions 6, 7, and 8, and relates, not to the initiation of the strike, but to its maintenance by the defendant association after it had been commenced. It amounts to this—that after the strike had commenced the defendant association, by its officials, or by the members of the committees of Denaby and Cadeby branches, assisted and maintained the strike by means of intimidation in order to prevent the men who were still working from continuing to work, by inducing others not to enter plaintiff's service, and by granting strike pay against the rules of the association. It is also charged, as appears by question 8, against all the defendants, that they conspired with the other defendants, or with the plaintiff's workmen, to do all these things. This latter point adds nothing to the charge, and in no case could any judgment be entered in respect of the eighth question, because the answer leaves it quite open which of the many defendants were guilty, and of which, among the several accusations made against them, any of the defendants were guilty. I find no evidence in

support of any material part of this charge against the defendant association. That also was the view of the Court of Appeal, though SIR RICHARD HENN COLLINS, M.R., dissented. As to the charge that the central council granted strike pay against the rules of the association, that is certainly true, and the fact was finally established in *Yorkshire Miners' Association* v. *Howden* (1). The association was restrained at the instance of one of its members from applying its funds for strike pay upon the ground that such payment was not authorised by the rules. I fail to see how the fact that the rules were contravened can confer upon the plaintiffs any ground of action which otherwise they would not have possessed. The wrong committed by the central council of the association was against its own members in dissipating their funds, not against the employers who had no interest in the funds. Had the rules permitted it, the grant of strike pay would have given the plaintiffs no cause of action. It seems a novel argument that they should acquire a right of action from the fact that the money so paid was derived by breach of trust from the funds of the association whom they sue. It is an attempt by persons who are no parties to the trust to sue for breach of it those who are parties.

The third and last head of claim was formulated in the ninth question put to the jury which runs as follows:

> "Did the defendants, or any and which of them, unlawfully and maliciously conspire together, and with workmen formerly in the employ of the plaintiffs, to molest and injure the plaintiffs, and were the plaintiffs so molested and injured?"

To this question the answer of the jury was "Yes." Here again, no judgment could be entered against any defendant upon this answer, for the simple reason that the jury have not informed us which of the defendants took part in the conspiracy. In the view, however, that I take, this circumstance will not affect the result. The question itself relates entirely to an alleged conspiracy after the commencement of the strike to which workmen formerly in the employment of the plaintiffs were parties. No unlawful methods were used by the defendant association or sanctioned by it. And if we were to hold that those who maintained the strike by helping with money the men on strike and their families are liable in damages merely because it caused loss to the employers, we should in effect be saying that every strike is an actionable wrong.

Accordingly, I am of opinion that no case has been established against the defendant association. In regard to the other defendants, Nolan and Humphreys suffered judgment to go by default, and are not before your Lordships' House. The remaining defendants and the representatives of those who are deceased have hardly been the subject of attack in this House, and no separate argument directed against one or more of them apart from the defendant association has been advanced. It is sufficient to say that their case stands upon substantially the same footing as the defendant association, and that in regard to them also I think that the judgment of the Court of Appeal ought to stand.

LORD MACNAGHTEN.—I entirely concur in the judgment of the LORD CHANCELLOR, and I do not think that I can usefully add anything to it.

LORD JAMES OF HEREFORD stated the facts and continued: It should be noted that before any strike pay was voted the contracts of service between the employers and workmen had terminated. The men had absented themselves from their work for a fortnight, and it was proved that an absence of some two or three days was regarded as establishing a discontinuance of service. "The strike" had thus commenced, but this word is of an artificial character, and does not represent any legal definition or description. The legal effect of what had occurred was that the men had wrongfully left their employment without giving the necessary fourteen days' notice; that, therefore, the contract between them and their employers was broken; and that the latter had the right to treat, and did

A treat, the different contracts of service as at an end. They also required, as I have said, that, if the men sought to return to their work, they must do so under fresh contracts of service, which the men refused to recognise, and thus the non-employment and the idleness of the mine continued until March, 1903.

In respect of the period from June 29 to July 15 the members of the Court of Appeal were unanimous in holding that no liability attached to the trade union B central body, and in such view I concur. I do so because I think that there is nothing to be found in the rules that makes the officers of the branches the agents of the central body, and also because I can find no evidence from which it can be shown that authority was given to the branches to act between those dates as such agents. But the determination of the case is not yet arrived at. It was further contended on the part of the plaintiffs that the acts of the defendants' C union in granting strike pay and some individual acts established liability on account of what was termed maintaining the strike existing at the Denaby and Cadeby Collieries. Importance must be attached to this argument in consequence of the judgment given by Sir Richard Henn Collins, M.R., upon the point thus raised. In relation to it consideration should be given to the meaning of the term "maintaining the strike." If one assists in procuring the commission of an D unlawful act, doubtless liability follows; and so, if the defendants had done anything by assistance or otherwise to induce the branch workmen to break their contracts, the union would have been liable. But no such inducing to break a contract was proved. When the assistance was given—that is, when strike pay was voted—the unlawful acts had, as I have already stated, been committed, all the contracts of employment were terminated, and employers and employed were E in respect of contracts entirely unconnected. So that the effect of the grant of strike pay was not to cause or induce the commission of an unlawful act, but to place the workmen in the position of being able to maintain themselves without entering into a new contract of labour with the plaintiffs or with anyone else. This is no more than the subscribing to a strike fund. Within the last few years we have had instances of the public contributing largely towards the maintenance F of men who had ceased to work under conditions which constituted what is called a strike. Were these subscribers liable to an action? It seems to me that they were not—even if the workmen had broken their contracts.

Some other grounds of liability were alleged, but may be briefly dealt with. It was urged that the money of the union was unlawfully expended when applied to the strike pay granted. That may be so as between the members of the union G and those who made the grant, so that an injunction could be obtained to restrain such payments. But this faulty application does not confer any cause of action upon the plaintiffs who have no interest in the money misapplied. If the subscribing to a so-called strike fund is legal, the source from which the money subscribed is derived, however tainted, cannot create illegality. I concur also in the judgment given in the Court of Appeal that no acts of molestation were H brought home to the union, and also that there was no legal ratification of the acts of the branch officials by the central body. In relation to the liability of Parrot, Wadsworth, and Hall, I think it follows that of the union. Those men were not guilty of independent tortious acts. Nolan and Humphreys did not appear, and must be held to be liable, but probably that liability is of no importance to the plaintiffs. For these reasons I think that the judgments of the majority I of the Court of Appeal must be affirmed.

LORD DAVEY.—I had prepared an opinion, but I find myself in such complete agreement with my noble and learned friends who have already addressed the House that it is not necessary for me to say anything more.

LORD ROBERTSON.—I agree that this appeal should be dismissed, and I shall add a few words on that part of the case on which the Court of Appeal was not unanimous. From the first part of the case, however, I carry forward this,

which is my ground of judgment upon it, that the branch officials were not, as such, officers or agents of the respondent association. This must be kept steadily in view on the question of maintenance, and, indeed, directly affects it. We start, then, with this—that the respondents were not responsible for the original breach of contract or for those who caused it, and, in fact, although on a somewhat narrow ground, they disapproved of what was done on June 29. I do not propose to decide, and have no occasion to decide, more in favour of the respondents than that on the specific questions to which the findings of the jury on maintenance relate the appellants have not established liability. Those findings are in answer to the sixth question, and are lettered (a), (b) and (c); and I shall consider (c) first, as it charges the only act which the association is said to have done directly by itself—viz., the grant of strike pay. This grant was never made except to men whose contracts were at an end; and the payment was, therefore, not to induce men to break contracts, but to induce them not to enter into new contracts. So far there is no illegality. Nor do I see how the fact that the payment of this strike pay was held to be a violation of the internal constitution of the association turns it into an invasion of any right of third parties like the appellants. The answer to the charge lettered (b) (inducing or attempting to induce men who were willing to enter into contracts of service with the appellants, or to work for them, to refrain from so doing) is that it is not a legal wrong. The question lettered (a) charges the respondents with molesting or intimidating men who were working for the appellants, with a view of inducing them to cease from so working. The theory upon which this charge is made can only be that by giving financial support to the strike the respondents made themselves liable for all that was done during the strike by the officers of the branches. I am unable to adopt that view, and I do not find any other valid ground for attaching such liability. The ninth query raises substantially the same questions under the form of conspiracy, for the media concludendi are in substance the same. The answers to the seventh and eighth queries are hopelessly ineffective, for the reason given by my noble and learned friend the LORD CHANCELLOR.

LORD ATKINSON. The law and the facts have already been so fully dealt with by my noble and learned friends that I will only say that I fully concur with the judgment of COZENS-HARDY, L.J., in the Court of Appeal.

Appeal dismissed.

Solicitors. *Johnson, Weatherall & Sturt*, for *Broomhead, Wightman & Moore*, Sheffield; *Corbin, Greener & Cook*, for *Raley & Sons*, Barnsley.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

MARCHIONESS OF HUNTLY AND ANOTHER v. GASKELL AND OTHERS

[Court of Appeal (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.), November 1, 2, 8, 1905]

B

[Reported [1905] 2 Ch. 656; 75 L.J.Ch. 66; 93 L.T. 785; 22 T.L.R. 20]

Practice—Pleading—Writ—Endorsement—Striking out—Embarrassing claims—Abuse of process of court—Issue of fresh writ.

Where several of the claims endorsed on a writ are embarrassing or otherwise an abuse of the process of the court the court may order the entire writ to be struck out and give leave to the plaintiff to issue a fresh writ.

C

Estoppel—Estoppel by record—"Final" judgment—Final as distinguished from interlocutory—Possible reversal on appeal.

Per Cozens-Hardy, L.J.: The word "final" when used with reference to a judgment on the trial of an action does not mean a judgment which is not open to appeal, but final as distinguished from interlocutory. A judgment is no less an estoppel between the parties because it may be reversed on appeal.

D

Judgment of Kekewich, J., 93 L.T.Rep. 297, varied.

Notes. Restraints on anticipation were abolished, by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 2 (2) (11 Halsbury's Statutes (2nd Edn.) 812) and the Married Women (Restraint upon Anticipation) Act, 1949 (28 Halsbury's Statutes (2nd Edn.) 735).

E

Referred to: *Hill* v. *Luton Corpn.*, [1951] 1 All E.R. 1028; *Travers* v. *Holley and Holley*, [1953] 2 All E.R. 794.

As to jurisdiction of court to strike out pleadings, see 30 Halsbury's Laws (3rd Edn.) 36–39; and for cases see Digest (Pleading) 65–66.

F Cases referred to in argument:

Penn v. *Lord Baltimore* (1750), 1 Ves. Sen. 444; 27 E.R. 1132, L.C.; 11 Digest (Repl.) 377, *407*.

Lord Cranstown v. *Johnston* (1796), 3 Ves. 170; 30 E.R. 952; 11 Digest (Repl.) 372, *380*.

Re Courtney, Ex parte Pollard (1840), 4 Deac. 27; Mont. & Ch. 239, L.C.; 11 Digest (Repl.) 375, *400*.

G

Toller v. *Carteret* (1705), 2 Vern. 494; 1 Eq. Cas. Abr. 134, pl. 5; 23 E.R. 916; sub nom. *Anon.*; 1 Salk. 404; 11 Digest (Repl.) 375, *395*.

Paget v. *Ede* (1874), L.R. 18 Eq. 118; 43 L.J.Ch. 571; 30 L.T. 228; 22 W.R. 625; 11 Digest (Repl.) 375, *397*.

Re Hawthorne, Graham v. *Massey* (1883), 23 Ch.D. 743; 52 L.J.Ch. 750; 48 L.T. 701; 32 W.R. 147; 11 Digest (Repl.) 379, *421*.

H

Ewing v. *Orr Ewing* (1883), 9 App. Cas. 34; 53 L.J.Ch. 435; 50 L.T. 401; 32 W.R. 573, H.L.; 11 Digest (Repl.) 1374, *391*.

Drew v. *Earl of Norbury* (1846), 9 I.Eq.R. 171, 524; 3 Jo. & Lat. 267; 17 Digest (Repl.) 393, **1163*.

Langmead v. *Maple* (1865), 18 C.B.N.S. 255; 5 New Rep. 277; 12 L.T. 143; 13 W.R. 469; 144 E.R. 441; sub nom. *Langmead* v. *Maples*, 11 Jur.N.S. 177; 21 Digest 208, *492*.

I

Boswell v. *Coaks* (1894), 86 L.T. 365, n.; 6 R. 167, H.L.; Digest (Pleading) 90, *763*.

Bellamy v. *Sabine* (1857), 1 De G. & J. 566; 26 L.J.Ch. 797; 3 Jur.N.S. 943; 6 W.R. 1; 30 L.T.O.S. 68; 44 E.R. 842, L.C. & L.JJ.; 40 Digest (Repl.) 179, *1426*.

Pawley v. *Pawley*, [1905] 1 Ch. 593; 74 L.J.Ch. 344; 92 L.T. 457; 53 W.R. 375; 49 Sol. Jo. 383; Digest (Practice) 677, *2899*.

Appeal by the plaintiffs, the Marchioness and Marquis of Huntly, from an order of KEKEWICH, J.

The marchioness was a daughter of the testator, Sir William Cunliffe Brooks, Bart. She had been left nothing in her father's will, and shortly after his death in 1900 she and her husband commenced proceedings in the Scottish courts claiming a declaration that at the date of his death the testator was a domiciled Scotsman, and for the marchioness the legitim to which she would be entitled under Scottish law. The Scottish courts held that the testator was at his death a domiciled Englishman, but an appeal from that decision to the House of Lords was pending. During his lifetime the testator granted a lease at a nominal rent of a part of his Scottish property, Aboyne Castle, to the marchioness. She gave up this lease in 1899, and then claimed to be repaid certain moneys which she alleged she had spent in improvements to the property. The settlement of this claim was pending at the date of the testator's death. The trustees of the testator's will retained ever since the proceedings relating to the testator's domicil commenced, and had in hand, sufficient estate to meet the above claims if it should be ultimately decided that the testator's domicil was Scottish. On June 27, 1905, the testator's grandson, Ean Francis Cecil, and the trustees of his marriage settlement, sold to Mr. George Coats the Glen Tana Estate, one of the Scottish estates of the testator, for £155,000. On the same day the marchioness (the marquis being made a co-plaintiff) issued the writ in this action against the trustees of the will of Sir William Cunliffe Brooks and Mr. Cecil, all the parties being resident in England.

By the endorsement of the writ they claimed (1) administration of the real and personal estate of the testator; (2) a declaration that until the plaintiff's claim for legitim was stisfied the defendants were not entitled to sell or dispose of any real or personal estate or assets of the testator; (3) an injunction to restrain them from so doing; (4) a declaration that the plaintiffs were entitled to a lien or charge on the Scottish estates of the testator in respect of the moneys expended by them on permanent improvements, and an account of what was due to them in respect thereof; (5) alternatively an injunction to restrain the defendants from selling or parting with the real estate of the testator situate in Scotland until the plaintiff's lien or charge was satisfied; (6) that a receiver might be appointed; and (7) further or other relief.

The plaintiffs registered this action as a lis pendens. Mr. George Coats thereupon declined to complete his purchase of the Glen Tana Estate until the lis pendens was removed.

A summons was then taken out by the defendant to the action asking that paras. 2, 3, 4 and 5 of the endorsement on the writ should be struck out, and that the rest of the action should stand over until the result of the appeal to the House of Lords should be known. They also asked that the lis pendens might be vacated. KEKEWICH, J., held that paras. 2, 3, 4 and 5 of the endorsement were an abuse of the process of the court, and must be struck out. The plaintiffs appealed.

P. O. Lawrence, K.C., and *Ward Coldridge* for the plaintiffs.

Stewart-Smith, K.C., and *Church*, for the defendants, were not called upon.

VAUGHAN WILLIAMS, L.J.—In my judgment, so far from the plaintiffs having to complain of the severity of the judgment of KEKEWICH, J., I think that it was too lenient. The summons is limited in respect of the remedy that is asked for; but the substance of the matter is this. The defendants say that the writ as it stands embarrasses them, because as to certain parts of the claim it is obvious that the plaintiffs have no claim, and the right thing is that those portions of the endorsement should be struck out as being frivolous, vexatious, and an abuse of the process of the court. In my judgment, that is not really the most convenient way for the court to deal with this matter. I think that the right course where an endorsement is vicious in the respects in which this one is vicious —and at all events it is the better course in this case—is that the court, instead of striking out this portion or that portion, should strike out the whole of the

endorsement and leave the plaintiff with the right to issue a new writ in which he shall state the claims that are really the claims which he intends to bring forward. I will deal with the claims here one by one.

The first claim is for the administration of the real and personal estate of Sir William Cunliffe Brooks. There were legal proceedings in Scotland, and in those legal proceedings the marchioness's claim was stated. It is a claim in respect of what in Scottish law is called, I believe, the right of legitim. In this claim it is made perfectly clear that this right of legitim gives no specific right against any real property whatsoever. It gives only the right to receive the payment of a proportionate part of the deceased's estate out of the personal estate of the deceased. Why, then, in this writ of summons, it being thus apparent that the marchioness and her advisers knew the real limits of her claim, and that it was limited to a claim against the personal estate, was the claim thus worded—"administration of the real and personal estate"? I cannot bring myself to believe—in fact it was not suggested—that that was a mere slip. It was put in with will, and, under those circumstances, it seems to me that we must treat this writ as one in which the very first claim has been framed in a way in which her advisers must have known that it could not be supported. On the decisions of the two Scottish courts it is quite plain that the marchioness had no right to legitim; but whichever way one takes it—whether one takes it that the appeal from those decisions is successful or whether one takes it that the appeal is unsuccessful—it is quite plain that it gives her no claim whatever on this real estate. I say that, not speaking so much of the law of Scotland, as to which, perhaps, there is no strict proof before us in the shape of evidence of experts, but I say so from the legal claim of the plaintiffs as stated in these Scottish proceedings in which they are plaintiffs. Under those circumstances, when I read paras. 2 and 3, which claim a declaration of the right of the marchioness to legitim, and an injunction to restrain the defendants from selling, parting with, or disposing of the real and personal estate until it is satisfied, I say that is a repetition of this claim, which, I say again, is not, in my judgment, made in good faith.

Then we come to claims 4 and 5. Claim 4 is for an alleged lien in respect of improvements which are said to have been made upon certain Scottish estates. I went too far when I said "certain Scottish estates." There is no certainty in the matter. It is "Scottish estates." The only certainty that there is about the definition at all is that it was Scottish estates of the testator. At the time of the issue of this writ there was, as is common ground here, a contract for the sale of a particular estate. Under those circumstances it was extremely desirable that this writ should accurately state which was the estate in respect to which this lien was claimed. I am of opinion that, not by accident, in these fourth and fifth paragraphs, there has been this want of certainty as to the estates in respect to which this claim for lien is made. I think that I ought to say that para. 5, although it is only consequential, claims an injunction to restrain the defendants from parting with this estate which is so little ascertained by the words of the claim, until the lien or charge is satisfied. This is the state of the writ at a time when the plaintiffs were perfectly aware that there was a pending sale of a portion of the testator's real estate; and the claim, I think not by accident, omits to define which estate that is. It was said on behalf of the plaintiffs, with regard to the fourth and fifth paragraphs, that certainly, as they stood, they were too general, and the plaintiffs could not object to their being struck out as being embarrassing from their generality; but they asked that they might have the option to amend. We might perhaps have allowed that if we had not before our eyes the claim in paras. 1, 2 and 3, which is a claim, to my mind, utterly inconsistent with the legal claim which the plaintiffs themselves have put forward in the Scottish litigation, and which is made under Scottish law.

Under these circumstances, having regard to what I think has been deliberately done in this action, I think that we shall best do justice by striking out this writ altogether, but with full liberty to the plaintiffs to issue a fresh writ, in

which I hope they will be able to state their claims in such a shape that they will really embody, and embody intelligently, the claims that they wish to make, and not claims for which, when the matter is pressed, their counsel have to admit there is no ground. I think, therefore, that the judgment of KEKEWICH, J., should in substance be affirmed, but the form of the remedy should be different. I think that his judgment was too favourable to the plaintiffs, and that the right way to do justice in this case is in the way which I have just described, and that is by setting aside the whole writ, endorsement and all, with liberty to the plaintiffs to issue a fresh writ.

The only other observation that I wish to make is this: I have not to decide it under the circumstances, but I am not sure that I assent to the view of KEKEWICH, J., that the lien for improvements in respect of this Scottish estate, if it had been stated with particularity, is not an equitable right which might have been enforced against the defendants in England, even though the real estate is situate in Scotland. I think that, having regard to the fact that the plaintiffs have in substance failed, this appeal ought to be dismissed with costs, but the judgment as it stands must be amended in the way I have indicated.

STIRLING, L.J.—I am of the same opinion. I cannot help thinking that the object of this writ, followed as it has been by the registration of a lis pendens, was to embarrass a sale which has been made of part of the testator's Scottish property. The plaintiffs claim in respect to two matters. They say, in the first place, that the Marchioness of Huntly is entitled to legitim, and in respect to that they ask for administration, not only of the personal estate, but also of the real estate of the testator. At the present moment, in an action to which the present plaintiffs were parties, the question of the title to legitim has been decided against the plaintiffs. It is quite true that there is an appeal to the House of Lords pending which may alter the state of matters; but still it is the case of an action which at the present moment, according to the Scottish decisions, has been decided against the plaintiffs. Supposing that the title to legitim was well established, on the evidence as before the court, that is a claim which relates only to the personal estate of the deceased. It is said that, somehow or other, a claim in respect of the real estate is possible. There is no suggestion of that in the affidavits as they stand. Not only is that so, but twice in the course of the argument I myself suggested to counsel for the plaintiffs that it was possible to get further information, and asked if they desired an opportunity of adding anything to their evidence in that respect; but they declined. In that state of circumstances I come to the conclusion that there was no real ground for any claim against the real estate of the testator in respect of legitim.

As regards the second question, it is said that the marchioness is entitled to a charge, according to the law of Scotland, on certain real estate in Scotland in respect of permanent improvements on the property which she occupied at one time. When that is investigated it is found that there is no charge possible on the estate which has been sold. Nevertheless, the writ asks for a declaration of charge on the Scottish estates of the testator, including, therefore, this estate which is being sold. I am of the same opinion as my Lord as to the reason why that is put in the writ. On the whole, looking at the nature of the case, I agree that justice would be done by setting aside the writ altogether, without prejudice to the marchioness commencing a new action in which her claim shall be properly limited.

COZENS-HARDY, L.J.—I am of the same opinion. I cannot help thinking that it would be really shocking if we were not able to put a stop to what seems to me to be a plain abuse of the process of the court, and an attempt to use it for that which is not a legitimate object. I do not intend to express the slightest doubt that the plaintiffs in this action have a perfectly honest contention which they are raising in the Scottish litigation, which raises the question, Was the

domicil of the marchioness's father Scottish, or English? If the domicil was Scottish, she was entitled to legitim; if it was not Scottish, but English, she takes no benefit under the testator's testamentary dispositions. This litigation in Scotland is between the same parties as the present action; the plaintiffs are the same, and the defendants are the same. The two Scottish courts have decided that the domicil was English, and not Scottish, and they have, of course, consequently declined to give the marchioness the relief for which she asked on the footing that she was entitled to legitim, and entitled to be paid a share of the movable estate. Her claim there was not expressed in any way to be against the real estate. In that state of things this writ is issued, the first three paragraphs raising the same contention as to legitim, and her title to payment out of the estate, with the addition of the words "real estate" as well as personal estate. It seems to me that that is res judicata as between the plaintiffs and the defendants, and that on that ground alone, so far as those three paragraphs are concerned, the court ought to say that this action is an abuse of the process of the court. I know that it is urged that there has not been a final decree, not a final judgment; but when the word "final" is used, as I think it is in some authorities, that does not mean, I take it, a judgment which is not open to appeal. It means final, as distinguished from interlocutory. A judgment, as it seems to me, is no less an estoppel between parties, because it may be reversed when the appeal comes on in the House of Lords. Further than that, there is another very serious objection to the first three paragraphs on the ground, as it seems to me, that the plaintiffs are here seeking to obtain from the English court the identical relief which they are seeking to obtain from the Scottish courts. Indeed, I cannot bring myself for one moment to doubt that the insertion of this word "real" in para. 1 of the claim, and the asking for the administration of the real and personal estate of the testator, was simply and solely due to the wish and intention, by registering this action as a lis pendens, to put an obstacle in the way of the completion of the sale of a very large Scottish estate, in the hope that by blocking that sale some sort of arrangement might be come to. I think that paras. 1, 2 and 3 are quite hopeless, and altogether bad.

Then it is said that, according to Scottish law, the marchioness is entitled to a lien on the Scottish estates for certain improvements effected by her, and she asks for a declaration of that lien, and for an injunction to restrain the parting with the real estate of the testator situate in Scotland till such lien or charge is satisfied. For the present purpose I assume that, according to Scottish law, such a lien may exist. It is a point as to which I know nothing. I merely assume that in favour of the plaintiffs. I also assume in their favour that if, according to Scottish law, such a lien exists, relief might be obtained in respect of that lien by a suit in England against the defendants, all of whom are resident in England. I assume that for the purposes of the argument. But that does not in the least justify paras. 4 and 5 of the endorsement, which are framed—and I cannot bring myself to doubt deliberately framed—in a form in which it is impossible to suggest that they are correct. There is no pretence for asking for a declaration of charge upon all the Scottish estates, which would include the estate which has now been sold for £155,000, for, at the utmost, the relief can only extend to the Aboyne Castle estate. That being so, what ought to be done? I do not think that it is for us to tinker and amend the endorsement on the writ under these circumstances. Regarding it, as I do, as an abuse of the process of the court, and as litigation not commenced really for bona fide purposes, I think that our proper course is simply to strike out the writ and to leave the plaintiffs at liberty to commence an action for such further relief as they may be advised, which would not be open to the objectionable features which I have pointed out. In substance, though not in form, I think that the judgment of Kekewich, J., was right so far as it went, and the appeal must be dismissed.

November 8, 1905.—Counsel for the defendants applied for an order under s. 2 of the Married Women's Property Act, 1893, that the defendant's costs might be

paid out of the separate estate of the marchioness, notwithstanding a restraint on anticipation, she being the real plaintiff in the action, and produced evidence that she had no property other than that subject to such restraint. As the costs had not been taxed a receiver was not asked for, but he contended that there was no reason why the order as to the costs should not be made.

Their Lordships made the order asked for.

Solicitors: *L. Weatherley*; *H. G. Church.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

HARSE *v.* PEARL LIFE ASSURANCE CO.

[Court of Appeal (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.), February 19, 1904]

[Reported [1904] 1 K.B. 558; 73 L.J.K.B. 373; 90 L.T. 245; 52 W.R. 457; 20 T.L.R. 264; 48 Sol. Jo. 275]

Insurance—Insurable interest—Policy void for lack of interest—Recovery of premiums—Parties in pari delicto—Insurance induced by innocent misrepresentation of insurers' agent—Parties contracting on equal footing.

The plaintiff was induced to insure his mother's life with the defendant assurance company by the representations of the company's agent that the policy would be valid. These representations were made innocently, and without any fraudulent intent. The plaintiff, having been informed that the policies were void for want of insurable interest, brought an action to recover from the company the premiums he had paid.

Held: assuming that the policy was illegal on the ground that the plaintiff had no insurable interest in his mother's life, yet, as the agent's misrepresentation was an innocent misrepresentation as to the law, and the parties were contracting on an equal footing, the parties were in pari delicto and the premiums could not be recovered back.

Notes. Applied: *Evanson* v. *Crooks* (1911), 106 L.T. 264. Followed: *Phillips* v. *Royal London Mutual Insurance* (1911), 105 L.T. 136; *Elson* v. *Crookes* (1911), 106 L.T. 462. Applied: *Howarth* v. *Pioneer Life Assurance*, [1911–13] All E.R.Rep. 587. Considered: *Hughes* v. *Liverpool Victoria Legal Friendly Society*, [1916–17] All E.R.Rep. 918; *Goldstein* v. *Salvation Army Association Society*, [1917] 2 K.B. 291. Applied: *Re National Benefit Assurance Co.*, [1931] 1 Ch. 46. Considered: *Harry Parker, Ltd.* v. *Mason*, [1940] 2 K.B. 590. Referred to: *Herman* v. *Charlesworth* (1905), 21 T.L.R. 368; *Kettlewell* v. *Refuge Assurance* (1907), 97 L.T. 896; *Griffiths* v. *Fleming*, [1908–10] All E.R.Rep. 760; *Tofts* v. *Pearl Life Assurance* (1913), 110 L.T. 190.

As to return of premium, see 22 Halsbury's Laws (3rd Edn.) 238 et seq.; and for cases see 29 Digest 345 et seq.

Cases referred to:

(1) *Howard* v. *Refuge Friendly Society* (1886), 54 L.T. 644; 2 T.L.R. 474, D.C.; 29 Digest 427, *3329*.

(2) *British Workman's and General Assurance Co., Ltd.* v. *Cunliffe* (1902), 18 T.L.R. 502, C.A.; 29 Digest 61, *208*.

A Also referred to in argument:

Barnes v. *London, Edinburgh and Glasgow Life Insurance Co.*, [1892] 1 Q.B. 864; 8 T.L.R. 143; 36 Sol. Jo. 125, D.C.; 29 Digest 58, *190.*

Kearley v. *Thomson* (1890), 24 Q.B.D. 742; 59 L.J.Q.B. 288; 63 L.T. 150; 54 J.P. 804; 38 W.R. 614; 6 T.L.R. 267, C.A.; 12 Digest (Repl.) 318, *2453.*

B *Rashdall* v. *Ford* (1866), L.R. 2 Eq. 750; 35 L.J.Ch. 769; 14 L.T. 790; 14 W.R. 950; 35 Digest 10, *35.*

West London Commercial Bank v. *Kitson* (1884), 13 Q.B.D. 360; 53 L.J.Q.B. 345; 50 L.T. 656; 32 W.R. 757, C.A.; 35 Digest 11, *38.*

Hudson v. *Observer Life Assurance Society* (1857), 8 E. & B. 40; 26 L.J.Q.B. 303; 29 L.T.O.S. 278; 3 Jur.N.S. 1125; 5 W.R. 712; 120 E.R. 15; 29 Digest 426, *3323.*

C *Beattie* v. *Lord Bury* (1874), L.R. 7 H.L. 102; 44 L.J.Ch. 20; 30 L.T. 581; 38 J.P. 564; 22 W.R. 897, H.L.; 1 Digest (Repl.) 747, *2871.*

Appeal by the defendants from a decision of the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.), reported [1903] 2 K.B. 92, reversing the judgment of the deputy judge of the Oxford County Court.

D The action was brought to recover a sum of £43 8s. from the defendants, an insurance company, being the amount of the premiums which the plaintiff had paid to the defendants upon two policies of insurance, the ground of the action being that the policies were void and that there was therefore a total failure of consideration. The first policy was dated April 29, 1889, and was a policy for the sum of £10 4s. at a weekly premium of 6d., and purported to be granted by E the defendants to the plaintiff on the life of the plaintiff's mother Ann Harse. Under this policy the plaintiff had paid to the defendants premiums which amounted in all to the sum of £12 16s. The plaintiff effected this policy at the suggestion of an agent of the defendants who had pressed him to insure his mother's life, and in the proposal form the pecuniary interest of the plaintiff in the life insured was stated to be "son for funeral expenses." The plaintiff's F mother had no money of her own, and was living with him and kept house for him. The second policy was dated May 18, 1891, and was a policy for the sum of £18 12s. at a weekly premium of 1s. It was made out in the name of Ann Harse, the plaintiff's name not being mentioned in it, but it was effected on the suggestion of an agent of the defendants to the plaintiff, and the plaintiff paid the premiums due under it. Though it was taken out in the name of Ann Harse G the plaintiff alleged that it was understood to be for his benefit. When these policies were taken out the plaintiff knew nothing as to the necessity of his having an insurable interest in his mother's life, and he was induced to take them out on the direct assurance of the defendants' agents that the policies were valid. In 1902 the plaintiff was told that the policies were void for want of insurable interest and, his mother being still alive, he brought this action in the Oxford H County Court to recover £43 8s., the amount he had paid the defendants as premiums on the policies.

At the trial of the action the judge put the following questions to the jury: (i) In the jury's opinion had the person for whose benefit the assurance was really made a real pecuniary interest under either policy?—Yes. (ii) Did the agent in either case make a statement which was false in fact? If so, what was I it?—No. (iii) Did the agent in either case know that what he was saying was untrue?—No. (iv) Was either policy or were both taken out in consequence of what the agent said?—Yes. (v) Did the agent in either case represent that the policy was a good one?—Yes. (vi) Were the agents in what they did, or was either of them, guilty of any fraud, and if so in what respect?—No. The county court judge held that on the death of the plaintiff's mother, her funeral expenses must fall on the plaintiff, that therefore the plaintiff had an insurable interest in his mother's life, and that the first policy being valid, the premiums could not be recovered back. As to both policies he held that even if they were void the

premiums could not be recovered back because the representation of the agents as to the validity of the policies was only a representation of law and was made innocently. He therefore gave judgment for the defendants. A

Upon the plaintiff's appeal the Divisional Court (LORD ALVERSTONE, C.J., WILLS and CHANNELL, JJ.) ([1903] 2 K.B. 92) held that the fact that the plaintiff would at some future date be under a moral, though not a legal, obligation to pay for his mother's funeral expenses did not give him an insurable interest in his mother's life and the first policy was therefore void; that the second policy was really taken out for the benefit of the plaintiff and was also void; and that, as to both policies, the plaintiff being a person ignorant of the law in insurance matters, was entitled to rely upon the representations made by the defendants' agents that the policies would be good and he was therefore not in pari delicto with the defendants and was entitled to recover back the premiums he had paid. The defendants appealed. B C

Sir Edward Clarke, *K.C.*, and *S. T. Evans*, *K.C.* (*Parfitt* with them), for the defendant company.

Montague Shearman, *K.C.*, and *Cecil Walsh* for the plaintiff.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal from a judgment of the Divisional Court under the following circumstances. The plaintiff effected with the defendant company, through one of their agents, two insurances upon the life of his mother, and it appears that he had no pecuniary interest in her life except such as might arise from the fact that, under the circumstances in which his mother was living, he contemplated that on her death he would have to pay her funeral expenses. He continued to pay the premiums on these insurances for some years, until in point of fact the amount he had paid in premiums exceeded the sum for which his mother's life was insured. In that state of circumstances he bethought himself that the policies were really illegal, and that he was therefore entitled to be repaid the premiums on the ground that there had been a total failure of consideration. D E

I will assume, without deciding the question, that the policies were illegal on the ground that the plaintiff had no insurable interest in his mother's life. That question depends upon the Life Assurance Act, 1774, s. 1 of which enacts that F

> "no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void, to all intents and purposes whatsoever." G

If the plaintiff's liability to pay his mother's funeral expenses was not an interest in her life within that section, the policies were illegal, and I will assume for the sake of this judgment that that was so. Therefore ex hypothesi the plaintiff has paid money to another person under an illegal contract, and the question is whether he is entitled to recover back what he has paid. The plaintiff says, and the jury have so found, that he was induced to take out the policies by the representation made by the defendants' agent that the policies would be valid. The jury have also found that the agent did not know that this representation by him was untrue. The learned county court judge held that the representation of the agent as to the validity of the policy having been made innocently the plaintiff was not entitled to recover back the money he had paid. H I

That raises the point which was principally argued before us. The general rule of law is perfectly clear that if one of two parties to an illegal contract pays money under it to the other party he cannot recover it back. If he has deposited the money in the hands of a third person, he may revoke his mandate and claim the money back from the person with whom it is deposited. But when

A the money has been paid to the other party to the contract, it cannot be recovered. That was decided by my brother MATHEW in 1886 with respect to a wagering policy in *Howard* v. *Refuge Friendly Society* (1). The headnote to the report of that case is as follows (54 L.T. at p. 644):

> "J. H. effected with the defendant company two policies of insurance on the life of his father J. H.; in which he had no insurable interest; according to the policies the premiums were to be paid by weekly payments. J. H., the son, continued to make these weekly payments for some years. J. H., the father, had at first no knowledge of the insurances effected on his life, but when he became aware of them he objected to their being continued and gave notice to that effect to the company. J. H., the son, then gave notice to the defendants that the policies were at an end, and claimed the return of the amount of the premiums. The defendants refused to pay, and J. H., the son, brought his action for their recovery, and the county court judge gave judgment for the plaintiff. The defendants appealed. HELD, on appeal, that, under the circumstances of the case the policies were wagering policies, and consequently the premiums paid in respect of them could not be recovered."

That is a clear decision on that part of the case, and now the distinction that arises is a distinction based on what the agent said.

We begin this discussion with an illegal contract. The plaintiff being party to an illegal contract is primâ facie debarred from recovering any money paid under that contract to the other person. But it is said that, by reason of what happened between him and the agent, he is relieved from that rule of law. What was said by the agent in this case to begin with was a representation not of fact, but of law. It was a statement of opinion that the policies were valid. That seems to me to be a statement not of fact, but a statement of law, the general law of the land in relation to insurances; and it has been found as a fact that that statement was made innocently. Taking those two things together, we have a statement of law made innocently to a person who was desirous of entering into an illegal contract—a contract which, if he makes it, carries with it the consequences that he cannot recover any money he pays under it. How is his position altered by the fact that the other person told him that, in his opinion, the contract was not illegal, innocently told him so, believing what he said to be true. It seems to me that unless you can introduce some circumstances of oppression or fraud, or some difference in the position of the parties, which threw the person who made the statement into some fiduciary relation to the plaintiff so as to make it inequitable for him to insist upon keeping the bargain which had been made with the plaintiff, unless you can get those elements in, elements which in a court of equity would be considered either fraud or equivalent to fraud, the party to an illegal contract has to submit to the loss of whatever he has paid under it. That is perfectly clear. I do not say that the jury might not here, if the evidence had supported it, have found that the plaintiff's relations to the agent were such as to bring him within that class of cases where money has been obtained from another person by fraud, duress, or oppression of some kind; but there is no evidence here at all of that, and the jury have not found that, but they have found that this was an innocent statement of what the agent believed to be the law. There is no evidence of fraud or oppression, and there is certainly no finding of fraud or oppression, and we cannot assume it. All we have is that the plaintiff, whether he knew it or not, was a deliberate party to the contract, and was under no misapprehension as to the nature of the contract which he was making, though he may not have known what the law about it was. Nevertheless, what he was intending was clearly a contract forbidden by law, with the consequence that money paid under it cannot be recovered back. He seeks to get out of that position by saying that he acted on the advice of a person who told him to the best of his opinion what he believed to be the law, though there is no evidence, as I have said, of any oppression or any fraud having been practised upon him.

Under these circumstances, in my judgment, he cannot recover back, and I think there is clear authority for that proposition in the case of *British Workman's and General Assurance Co., Ltd.* v. *Cunliffe* (2). In that case it had been held in the court below that the money could be recovered back where it had been paid by a person relying upon the statement of the agent of the insurance company that the policy would be valid. That case came up to this court, and the decision of the court below was affirmed, but on the ground that the statement made by the agent on which the person seeking to recover back the money had acted was fraudulently made. The Court of Appeal expressly put their decision on that ground. To that degree they certainly qualify, or do not adopt at all events, the grounds of the judgment in the court below. It seems to me, therefore, both on the general law, and on the special authority in this court, the plaintiff in this case fails, and, therefore, I think the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. Assuming that these two policies are void on the ground of illegality, it is clear that the plaintiff cannot recover the premiums which he has paid unless he can make out that he was not in pari delicto with the defendant company. Can it be said that he has established that? He relies on the statements alleged to have been made by the defendants' agent when the policy was effected. As to those statements it is clear, in my opinion, that there was no mis-statement of fact on the part of the agent. Further than that, it is clear that there was no fraud of any kind. The present case is not one of oppressor and oppressed, nor is it a case in which advantage has been taken by a clever man of an ignorant man. In fact, there is here no impropriety of any kind beyond the fact that the agent, like the plaintiff, appears to have forgotten or to have mistaken the law. As to the mistake of law, it is clear, as far as I can see, that they both made it. From the findings of the jury it appears that the agent believed the policies to be valid. So also did the plaintiff. In that respect they were equally guilty; their guilt, such as it was, consisting in their forgetting, or being ignorant of, or mistaking the law. There was no greater impropriety on the part of the agent than there was on the part of the plaintiff. But did the statements of the agent, statements which, in my opinion, were only made as to the law, put him or the defendant company in a worse position than the plaintiff? I do not think that a mis-statement as to the law in such a case as the present makes that difference. The case is one in which both parties to the contract ought to know the law; they are contracting on an equal footing, and are presumably persons of equal intelligence. It cannot, in my opinion, be laid down by this court as a principle of law that where a policy is effected with an insurance company, its agents must be treated, without more and without any special evidence, as being under a greater obligation to know the law than the persons whom they approach for the purpose of effecting the policies. Here it is clear to my mind that no fraud of any kind can be imputed. In fact, no case of fraud has been raised against the defendants, nor can it be said that they were in any way bound to appoint as agents persons having some special knowledge of the law. Under those circumstances it appears to me that for the purposes of this case the plaintiff and the defendants' agent must be taken to have been in pari delicto in the matter of effecting the policy, and the defendants cannot stand in a better or worse position than their agent. I say they are not in a worse position because there is no evidence that shows that any other agent of the defendants ever made such mis-statement or was ever guilty of impropriety with reference to a transaction of this sort. On these grounds I agree that the appeal must be allowed.

MATHEW, L.J.—I am of the same opinion, and have very little to add. I think that this policy was illegal. Though it be an illegal contract, the plaintiff says that its illegality ought not to be set up as an answer to his claim because of the misrepresentation made by the defendants' agent that it was a valid policy.

The answer to that is that the misrepresentation was made innocently, and it was a misrepresentation as to the law. A representation as to law is not on the same footing as a representation of a matter of fact. It has been pointed out that the representation made by the agent was not alleged to have been fraudulent. There is no ground whatever for imputing either to the agent or to the defendants any intention of misleading the plaintiff. With reference to the parties being in pari delicto, it was suggested by the plaintiff that this is the case of a great company imposing on an illiterate man. But we know that these policies of life insurance are largely effected through agents who are as humble and illiterate as those whom they approach for the purpose of getting them to effect the policies. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Esson & Mallam*, for *G. Mallam & Sons*, Oxford; *J. M. Storer*, for *E. T. Holt*, Oxford.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

Re HOARE & CO., LTD. AND REDUCED

[COURT OF APPEAL (Vaughan Williams, Romer and Cozens-Hardy, L.JJ.), June 7, 10, 1904]

[Reported [1904] 2 Ch. 208; 73 L.J.Ch. 601; 91 L.T. 115; 20 T.L.R. 581; 53 W.R. 51; 48 Sol. Jo. 559; 11 Mans. 307]

Company—Capital—Reduction—Apportionment of loss—Apportionment between capital and reserve—Larger portion attributed to reserve.

The court has jurisdiction to sanction a scheme for the reduction of the capital of a company, part of which has been lost or is unrepresented by available assets, whereby it is proposed to treat the loss as apportioned rateably between a sum placed to reserve and the capital account properly so called, i.e., the share capital. The fact that too large a proportion of the loss has been attributed to the reserve and too small a proportion to the share capital does not deprive the company of its right to such sanction.

Notes. Applied: *Re Rowland and Marwood's Steamship Co.* (1906), 51 Sol. Jo. 131. Referred to: *Drown* v. *Gaumont-British Picture Corpn., Ltd.*, [1937] 2 All E.R. 609.

As to reduction of capital, see 6 HALSBURY'S LAWS (3rd Edn.) 154–168; and for cases see 9 DIGEST (Repl.) 149 et seq.

Case referred to:

(1) *Re Barrow Hæmatite Steel Co.*, [1900] 2 Ch. 846; 69 L.J.Ch. 869; 83 L.T. 397; 16 T.L.R. 569; on appeal, [1901] 2 Ch. 746; 71 L.J.Ch. 15; 85 L.T. 493; 50 W.R. 71; 18 T.L.R. 9; 46 Sol. Jo. 28; 9 Mans. 35, C.A.; 9 Digest (Repl.) 170, *1038*.

Also referred to in argument:

Re Direct Spanish Telegraph Co. (1886), 34 Ch.D. 307; 56 L.J.Ch. 353; 55 L.T. 804; 35 W.R. 209; 3 T.L.R. 240; 9 Digest (Repl.) 150, *877*.

Appeal from a decision of BUCKLEY, J., on a petition by Hoare & Co., Ltd., to confirm a reduction of capital.

The company was incorporated in 1894, under the Companies Acts, 1862 to 1890, as a company limited by shares to carry on the business of

brewers and maltsters and other kindred trades. The original capital of the company was by its memorandum and articles of association fixed at £1,000,000 divided into 60,000 preference shares of £10 each, 36,000 preferred ordinary shares of £10 each, and 4,000 deferred ordinary shares of £10 each. Provision was made in the articles of association for a reserve fund, divers powers being by cl. 119, para. (viii) conferred on the company's directors, among others a power in the following terms:

> "Before recommending any dividend to set aside out of the profits of the company such sums as they think proper as a reserve fund to meet contingencies, or for equalising dividends, or for repairing, improving, and maintaining any of the property of the company, and for other purposes as the directors shall in their absolute discretion think conducive to the interests of the company, and (subject to cl. 4 hereof) to invest the several sums so set aside upon such investments as they may think fit, and from time to time deal with and vary such investments, and dispose of all or any part thereof for the benefit of the company, and to divide the reserve fund into such special funds as they think fit, and to employ the reserve fund or any part thereof in the business of the company, and that without being bound to keep the same separate from the other assets."

By cl. 53 of the articles of association it was provided that the company might from time to time by special resolution reduce its capital by paying off capital or cancelling capital which had been lost or was unrepresented by available assets or reducing the liability on the shares or otherwise as might seem expedient. After various increases the capital of the company stood at £1,950,000 divided into 80,000 preference shares of £10 each, 75,000 A cumulative preference shares of £10 each, 36,000 preferred ordinary shares of £10 each, and 4,000 deferred ordinary shares of £10 each.

Since its incorporation the company had, out of profits, paid considerable dividends and it had accumulated, pursuant to cl. 119 (viii) of its articles of association, a reserve fund of £292,612 18s. 1d. The assets of the company consisted to a large extent of tied public-houses, both freehold and leasehold, and loans advanced on the security of public-houses. For some time past there had been a large and continuing fall in the value of assets of this description, and looking to this continual fall in value the company caused its brewery premises, public-houses, and loans on public-houses to be valued. In the result it was ascertained that such items were of less value than the amount at which they stood in the company's balance-sheet by the sum of £591,707 13s. 10d., and that capital of the company to that amount had been lost or was unrepresented by available assets. No appreciation of any other of the company's assets had occurred in any way to compensate for such loss. It was considered by the directors desirable in the interests of the company and of all the shareholders therein to deal with this loss by writing off the sum of £396,000 by extinguishing a corresponding amount of the preferred ordinary shares and of the deferred ordinary shares, and the sum of £195,707 13s. 10d. part of the reserve fund of the company. By special resolution of the company unanimously passed and confirmed at extraordinary general meetings of the company held on Mar. 25 and April 12, 1904, it was resolved as follows:

> "That the capital of the company be reduced to £1,554,000, and that such reduction be effected by cancelling the whole of the preferred ordinary shares and the capital paid up thereon as being capital lost or unrepresented by available assets, and by cancelling the sum of £9 per share in respect of each of the deferred ordinary shares as being capital lost or unrepresented by available assets, and by reducing the nominal amount of such deferred ordinary shares to £1 per share."

At separate general meetings of the holders of the company's preference shares and A cumulative preference shares respectively, held on Mar. 25, 1904, immediately after the general meeting, the proposed reduction of capital and alteration of

articles were unanimously approved by the meeting of preference shareholders, and approved nem. con. by the meeting of A cumulative preference shareholders. The special resolution for the reduction of the company's capital was passed with the consent in writing of all the holders of the preferred ordinary shares, and of the deferred ordinary shares. A petition was presented by the company asking that the reduction of capital to be effected by the special resolution might be confirmed. On May 10, 1904, the petition was dismissed by BUCKLEY, J., and the company appealed.

Neville, K.C., Eve, K.C., and *Martelli* for the company.

ROMER, L.J.—The only question that we have to consider in this case is one of principle, or, it may be called, one of law—namely, whether the court has jurisdiction in such circumstances as arise here to sanction the scheme for the reduction of capital which is before us, owing to the loss that has occurred on capital account? I think that we have. The question arises in a case where there was a reserve fund properly set apart by the company under the provisions of its articles. That reserve fund was properly created, that is to say, it was a fund which at the time it was created arose from the fact that there were available assets, after deducting all liabilities of every kind, including the amount represented by the share capital, which might have been applied as the company thought fit without thereby doing any violence to the provisions of the Companies Acts or to the articles of the company. In other words, the surplus which was carried to the reserve fund represented what might have been properly applied at the time, if the company had so thought fit, in paying further dividends to the shareholders, and no person could have complained if they had done so. It was, therefore, a reserve fund properly created, and that reserve fund could have been dealt with by the company in accordance with the provisions of its articles if they had thought fit. It might have been utilised in payment of or in equalising subsequent dividends, or, if the directors had chosen, they might have applied it in making good lost capital, or have applied it to any purpose that they thought fit within the objects of the company.

That was the condition of the reserve fund, and the circumstances under which it was created. What does such a fund as that represent? To my mind, it in nowise represents a capital account properly so called. Let me test it in this way. In this case the directors of the company might, if they had thought fit, have taken assets and set them apart to represent the reserve fund, and might have kept those assets wholly apart from all the other accounts of the company. They might have kept the assets representing the reserve fund strictly to answer that reserve fund, and not have dealt with it in any way as part of the general assets of the company. So long as they did that, it is clear, to my mind, that the assets representing the reserve fund could not be properly called in themselves a capital account or a capital asset. But in this case the directors of the company did what they had power to do, and what is often done in similar cases—namely, they did not set apart special assets to represent the reserve fund, but they allowed the matter to rest in account, and the assets generally to be dealt with by the company in the ordinary way of business, whether those assets might be said so far to represent the reserve fund, or whether they represented the capital account and the other liabilities of the company. What happened in that state of things was this. After some subsequent trading it was found that there was a great loss of assets, so great that after taking the liabilities properly so called of the company, apart from the reserve fund and the capital account, there was insufficient to pay the reserve fund and to meet the capital liability.

The question arises: What ought to be done with regard to the loss? Ought it to be attributed wholly to the capital account or wholly to the reserve fund, or ought it to be treated as apportioned? In my opinion, under the circumstances of this case, the loss ought to be treated as apportioned between the reserve fund and the capital account properly so called—that is to say, the share capital. In the present

case the company propose to do more than that. They propose to attribute more than its due proportion of the loss of assets to the reserve fund than they do to the capital account. In my opinion, that was a matter which they were not absolutely bound to have done, but certainly they had a right to do; and so far, I think, no complaint can be made of their not wiping out the whole of the reserve fund, but at any rate treating for the purpose of the assets a certain part of the assets as representing the reserve fund as written down by them. That leaves a certain amount of assets to represent the share capital after deducting the ordinary liabilities of the company—that is to say, the current debts and the debenture stock, and so forth. Then when we see what assets there are to meet the share capital it is clear that there has been a great loss of the capital, and accordingly we are asked under the Acts of Parliament to sanction a scheme for the reduction of the share capital. In my opinion the court has undoubted jurisdiction to deal with a scheme so framed, and to sanction it if it thinks fit. I quite agree that the court is not bound in such a case as this to sanction the scheme. I can well understand cases in which the court will say: "We will not sanction any reduction of the capital so long as you keep anything by way of reserve fund." I can conceive circumstances under which the court might justly say: "This is a case where we think no reserve fund ought to be allowed to remain, and we will not sanction the scheme in so far as any reserve fund is allowed to remain." But the court, undoubtedly, to my mind, has jurisdiction to sanction such a scheme whereby a proper part, as indicated previously by me, of the reserve fund is allowed to exist. And in the circumstances of this case I think that the court ought to allow the small proportion of the reserve fund which, according to the scheme, is provided for, to remain as a reserve fund. I think, therefore, that not only has the court jurisdiction to sanction the scheme, but that under the circumstances it ought to do so. I may only add, that in this case there is no question as to the rights of creditors, and all the shareholders are unanimous in approving the scheme. Under these circumstances I think that the court ought to approve of the scheme.

VAUGHAN WILLIAMS, L.J.—I am inclined to think that that is right. I asked ROMER, L.J., to deliver his judgment first because in a matter of this sort I knew that he would put it much more clearly than I could myself. But at the same time I consider that it is my duty to state for myself the principle upon which I understand we are acting in the present case.

The particular statute under which we are acting is the Companies Act, 1877, and we have to see, before we can sanction this reduction of capital, whether the case comes within the words of s. 3 of the Act [repealed by Companies (Consolidation) Act, 1908: see now Companies Act, 1948, s. 66]—that is to say, whether there is any lost capital, or any capital unrepresented by available assets. I regard those two things as alternatives, and not as if the latter were exegetical. We have to see whether there is any lost capital, and to what extent. The difficulty which BUCKLEY, J., felt in this case was that he was not satisfied that there was lost capital to the extent which was alleged in the petition, and his doubt arose from the existence of this reserve. I do not use the words "reserve fund" because it is not true to say that there was any reserve fund at all. If there had been a reserve fund in this case which appropriated this sum—a sum which might be paid in dividends, but which the company did not think it prudent to distribute in dividends at the moment, but chose to retain the money in hand ready to distribute it in dividends if they thought fit unless the company by a proper resolution determined to do otherwise with it—I should have said that under such circumstances in the event of a loss arising such as has occurred in this case by the reduction in market value of tied houses, the whole of that loss was a loss which, for the purpose of this statute as to reduction of capital, ought to be entirely written off capital properly so called. We have not that to decide in this case, because the facts do not raise such a case. But I want to say before leaving

A that point that, however much capital you have lost at any given date, if your profit and loss account shows a profit balance, then you are entitled to distribute that profit balance as dividend, notwithstanding the fact that you have lost capital which you have not replaced.

Under these circumstances, so far as this undistributed money is to be considered, I think that, even if it had arisen after the loss of capital, you could B have appropriated it to the payment of dividend, and the whole of that loss would then be properly written off capital. When I heard the company's argument the other day I thought they were arguing upon that basis, and I quite expected a resolution to have been produced relating to the action of the board showing that there had been some such appropriation. That is not the case here. What has been done is this. No fund has been created. There has been no investment C of this fund which might have been distributed as dividends. What has been done is exactly the same as if the balance of profit and loss—that is to say, the profit balance—had existed in sovereigns, and the directors had met together and said: "We have a sum that we could distribute, if we chose, now in dividends, but we think it wiser not to do so at present, and therefore we will carry this sum to a reserve." That is, to my mind, precisely the same as if they had said, D "We will pour these sovereigns into the till." Now you have got those sovereigns in the till. It is not, to my mind, a true way of looking at those sovereigns to say: "Here is a fund consisting partly of these sovereigns and partly of the other items appearing upon the asset side of the balance sheet, and we will treat the capital and the reserve as being two funds which are charged upon one security, that one security being the total of the assets, including therein all the assets side of the E balance-sheet, and the money which has been poured into the till." I do not think that it would be right to regard the capital and that reserve fund as two funds charged upon one security. If it were so, and there was a loss, you get at the rateable proportion of the loss without any difficulty.

If one cannot do that, what is the proper way of doing what is desired? I suppose one has to say that although the sum undistributed has not been segregated F from the circulating capital, but has been poured into the till, nevertheless the power of the directors to do with this money as they may think best in the interests of the company has not yet gone. Supposing, for instance, there had been no scheme for reduction at all, what could the company have done? Could they have distributed this sum as a dividend? Theoretically I think that they could. But ought they to do so? I think not. Then, as I understand, our G conclusion in the present case is that what, as commercial men managing a commercial undertaking, ought to be done is to distribute the loss in proportion to the figures of the share capital and the reserve fund. As I understand from the figures in the present case, although that has not been done, the departure has only been in the sense of attributing too large a proportion of loss to the reserve fund and too small a proportion of loss to the share capital. Under those circum- H stances, inasmuch as there has been an undoubted loss of capital in this case, and we think that loss has been properly allocated as a commercial matter between the share capital and the reserve fund, we may sanction this scheme.

COZENS-HARDY, L.J.—I agree. I think the leading idea of BUCKLEY, J.'s I judgment was that you cannot reduce capital unless you find that the capital has been lost, and is not represented by any fund whether it is in the nature of capital or income. I cannot read s. 3 of the Companies Act, 1877 [see now Companies Act, 1948, s. 66], in that sense. I think that if you prove that capital has been lost you do not want to consider whether or not it is unrepresented by available assets. Although capital may not be lost it may still be unrepresented by available assets, and in that case there is power to reduce. Some difficulty has been caused here, I agree with VAUGHAN WILLIAMS, L.J., in saying, by calling the reserve a "reserve fund" when there is strictly no reserve fund. Two of the items consti-

tuting the reserve are items which really have been dealt with on the footing of cl. 119 (viii) which empowers the directors:

> "before recommending any dividend to set aside out of the profits of the company such sums as they think proper as a reserve fund."

That clause authorises the directors to apply the fund either for the equalisation of dividends, or for repairing, improving, and maintaining any of the property of the company or in any other way conducive to the interests of the company, including, of course, the payment of debts and liabilities of the company. It goes on to say that the directors may

> "employ the reserve fund or any part thereof in the business of the company, and that without being bound to keep the same separate from the other assets."

We now know that that is exactly what has been done. We also know that other items mentioned in this balance-sheet are part of the profits of the company which might have been applied in payment of dividend, and have never by any act of the directors or of the company been turned to any capital purpose. That being so, these large items being employed in the business of the company, and not kept separate from the assets of the company, we have to deal with a large loss—that is to say, the net assets after payment of debts are insufficient to represent the share capital and the reserve fund. How ought that to be dealt with? I adopt the view of ROMER, L.J., on that point. I think that if the assets ought to represent both the share capital and the reserve fund, and they are not sufficient to do so, the proper course is to attribute the loss rateably between them—in other words, that we should not be justified in saying that a larger amount of capital has been lost than would be the result of working out the proportion in that manner. No doubt the whole of this reserve fund might have been applied to make good this loss of capital. The directors propose to take more than its proportionate share, but to leave what I may call a moderate reserve fund. That being so, it seems to me that we are entitled to say that it has been established in the present case that capital has been lost, and lost to the extent that it is proposed to be written off by this order.

I desire to say one word about *Re Barrow Hæmatite Steel Co., Ltd.* (1), a decision of my own which BUCKLEY, J., referred to. In that case the reserve fund had not been taken into account at all. It was blended with the other assets, but not taken account of. I do not think that I there meant to say more than that, in considering the loss of capital, you must have regard to the fact that the assets include a reserve fund, but not separately invested. If my language goes further than that I certainly desire to qualify it in the sense which I have now mentioned.

Appeal allowed.

Solicitors: *Sandilands & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

PERRING & CO. v. EMERSON

[King's Bench Division (Lord Alverstone, C.J., Wills and Darling, JJ.), October 30, 31, 1905]

[Reported [1906] 1 K.B. 1; 75 L.J.K.B. 12; 93 L.T. 748; 54 W.R. 47; 22 T.L.R. 14; 50 Sol. Jo. 14]

Distress—For rent—Illegal distress—Uncertificated bailiff—Seizure of goods of third party on demised premises under hire-purchase agreement—Law of Distress Amendment Act, 1888 (51 & 52 *Vict.*, *c.* 21), *s.* 7.

Section 7 of the Law of Distress Amendment Act, 1888, which enacts that no person shall act as a bailiff to levy any distress for rent unless he shall be authorised to act as a bailiff by a certificate given by a county court judge, applies not only as between landlord and tenant but also as between a landlord and a third party whose goods are upon the demised premises, and renders a distress by an uncertificated bailiff void so that the owner of the goods can treat it as an illegal distress.

Notes. As to the consequences of levying a distress by a person not holding a bailiff's certificate, see 12 Halsbury's Laws (3rd Edn.) 128; and for cases see 18 Digest (Repl.) 321. For the Law of Distress Amendment Act, 1888, s. 7, see 6 Halsbury's Statutes (2nd Edn.) 168.

Cases referred to:

(1) *Werth* v. *London and Westminster Loan and Discount Co.* (1889), 5 T.L.R. 320, 521, D.C.; 18 Digest (Repl.) 326, *715*.

(2) *Buszard* v. *Capel* (1828), 8 B. & C. 141; 2 Man. & Ry.K.B. 197; 6 L.J.O.S. K.B. 267; 108 E.R. 996; affirmed sub nom. *Capel* v. *Buszard* (1829), 6 Bing. 150; 3 Y. & J. 344; 3 Moo. & P. 480; 130 E.R. 1237, Ex. Ch.; 18 Digest (Repl.) 257, *73*.

Also referred to in argument:

Gibbs v. *Cruikshank* (1873), L.R. 8 C.P. 454; 42 L.J.C.P. 273; 28 L.T. 735; 37 J.P. 744; 21 W.R. 734; 18 Digest (Repl.) 270, *175*.

Fergusson v. *Norman* (1838), 5 Bing.N.C. 76; 1 Arn. 418; 6 Scott, 794; 8 L.J.C.P. 3; 2 J.P. 809; 3 Jur. 10; 132 E.R. 1034; 37 Digest 23, *181*.

Appeal by the defendant from the Brentford County Court in an action brought by the plaintiffs against the defendant for the conversion of the plaintiffs' goods.

The plaintiffs, who were furniture dealers, in November, 1904, supplied furniture on a hire-purchase agreement to Pierce at his flat, of which the defendant was the landlord. In February, 1905, Pierce, the tenant of the flat, was in arrear to the plaintiffs with two instalments payable under the hire-purchase agreement, and the plaintiffs thereupon sent their men to Pierce's flat to retake possession of the furniture under the power given them by the agreement. The plaintiffs' men went with a van to the flat and began to remove the furniture, and, while they were engaged in removing it, Milner, who was not a certificated bailiff, but who was employed by the defendant as his agent to distrain upon the goods on the premises for rent in arrear, entered the flat and said that the goods must not be removed, as he had distrained upon them on behalf of the defendant for rent due by Pierce which was in arrear. Milner then prevented the plaintiffs' men from removing any more of the goods which they were removing when Milner entered. At that time about one-third of the goods had been removed from the flat and had been placed by the plaintiffs' men in the plaintiffs' van, which was standing a short distance off in a private road belonging to the defendant, but at a place which was not a part of the demised premises. Milner refused to allow the goods in the van to be removed, claiming that he had already distrained upon all the goods. Later in the day a certificated bailiff, acting for the defendant, arrived, and he took

possession on behalf of the defendant of all the goods, including those in the van, and certain of the goods in the van were removed back to the flat. The goods which had not been removed from the flat and those which were brought back from the van to the flat were then seized by the certificated bailiff acting for the defendant, and were sold by the orders of the defendant.

The plaintiffs then brought the present action claiming damages for the conversion of their goods, upon the ground that the alleged distress by Milner was absolutely void, inasmuch as Milner, who levied it, was an uncertificated bailiff. The county court judge held, in accordance with the plaintiffs' contention, that the alleged distress by Milner was void, and he gave judgment for the plaintiffs. The defendant appealed.

Morle for the defendant.
Henlé for the plaintiffs.

LORD ALVERSTONE, C.J.—This case raises a question of very considerable difficulty, and a good deal may be said in favour of the view that the Law of Distress Amendment Act, 1888, was mainly passed to amend the law as between landlord and tenant, and that the prohibition against levying a distress by an uncertificated bailiff was inserted in the Act for the protection of tenants rather than for the protection of third parties. But I do not think it is possible to limit the effect of the Act to cases between landlords and tenants. Section 6 shows that the framers of the Act were considering the rights of persons other than tenants—namely, the owners of goods which were distrained upon. That brings us to the effect of s. 7, upon which this question turns. Section 7 provides:

> "From and after the commencement of this Act no person shall act as a bailiff to levy any distress for rent unless he shall be authorised to act as a bailiff by a certificate in writing under the hand of a county court judge; and such certificate may be general or apply to a particular distress or distresses, and may be granted at any time after the passing of this Act in such manner as may be prescribed by rules under this Act. . . . If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act, the person so levying and any person who has authorised him so to levy shall be deemed to have committed a trespass."

That section undoubtedly in the main may be said to deal with the relations of landlords and tenants because it created a new liability on the part of a person who authorised an uncertificated bailiff to go in and levy—namely, that such person was to be deemed to have committed a trespass; but, applying general principles to the construction of the section, I am unable to come to the conclusion that the words of this section were intended to apply only as between landlords and tenants.

I think upon general principles of construction that the right to levy a distress on goods, which might or might not be the goods of third persons, was considered to be an act of sufficient importance as to be limited to persons who possessed the qualification required by the Act, and that inasmuch as it is by the section made an illegal act for an uncertificated bailiff to do this act at all, it would require stronger words than we have in this Act to make it a legal act as between landlord and owner while it is not a legal act as between landlord and tenant. It was agreed that Milner, who was authorised by the landlord to distrain, was not a certificated bailiff, and when the certificated bailiff arrived some of the goods had been removed from the demised premises to the plaintiffs' van, and that those which remained in the flat had been claimed by the owners of the goods, and unless the landlord was entitled to rely on the act of the uncertificated person, the owners of the goods had succeeded in retaking possession of them.

I come to the conclusion, not without hesitation, that the Act was intended to go further than merely protecting the interests of the tenant against unlawful distresses

by his landlord, and that it enures for the protection of the owner of the goods on the demised premises as well as for the protection of the tenant. For a time I thought that this view was inconsistent with the decision in *Werth* v. *London and Westminster Loan and Discount Co.* (1), but it appears that the Act of 1888 was not under the consideration of the court in that case, and further that, the tenant having waived the irregularity that the seizure was at an improper hour, the third person could not take advantage of it. Therefore that case is not an authority against the view that I am constrained to take of the meaning of this section. As to the other part of the case that has been referred to—namely, that some of the goods, although not on the demised premises, were upon the landlord's property, the authority of the Exchequer Chamber in *Capel* v. *Buszard* (2) seems to me to be clear that a landlord cannot distrain upon goods which are not upon the demised premises. In my opinion, therefore, the main point urged that s. 7 does not make the section available as regards the owner of goods on the demised premises is not good, and this appeal fails.

WILLS, J.—I am of the same opinion. If the goods of a third person were upon the demised premises when rent was owing to the landlord the landlord had no title to those goods until there had been an effective seizure of the goods under a distress, and until that seizure the landlord could not interfere with the owner's right to take the goods away. Then comes the critical question in this case as to what is the effect of s. 7 of the Law of Distress Amendment Act, 1888. I am unable to see how an act which is expressly forbidden by the statute could enure for the benefit of the person who claims by virtue of that illegal act. It seems to me that the act of seizure by an uncertificated bailiff, being forbidden in terms, can have no effect at all given to it; that the section enures for the benefit of the owner of the goods as well as for the benefit of the tenant, and that the right of the owner to take away his goods remains until a lawful seizure has been made. I cannot help thinking that if it had been intended in this Act that the common law right of the landlord to seize under a distress for rent the goods of third persons on the demised premises should still be preserved although the act of seizure by an uncertificated bailiff was expressly forbidden, some words would have been inserted in the section to meet that view and carry out that object.

We have been pressed by the decision of the Divisional Court in *Werth* v. *London and Westminster Loan and Discount Co.* (1), and I must say that at first I felt some difficulty with regard to that case as I was under the impression that it was decided under this statute until it was pointed out by counsel for the plaintiffs that although the actual decision was after the Act came into operation, yet it was a decision in reference to matters which had occurred before the Act was passed. In that case the court treated a distress after sunset as a mere irregularity, and, treating it as such, they decided that the irregularity might be waived and that upon the evidence it had been waived. I should myself have thought that a distress after sunset could not be properly described as a mere irregularity, but I should have thought that it was an illegal act, as to which different considerations would apply. However that may be, I entirely fail to see how, from any point of view, an act which is expressly forbidden by the statute can be treated as a mere irregularity in the making of a distress. With regard to the words at the end of the section "shall be deemed to be a trespasser," I think that the construction contended for carries too far the well-known doctrine that where you have an act forbidden by the enacting words of a section and have in the same section, or in a section necessarily connected with it, a specific penalty provided, that gets rid of the principle which otherwise would be applicable—namely, that the doing of the act which is so forbidden would be a misdemeanour, and that proceedings must be taken as provided in the section. In my opinion, the proper operation of this clause at the end of the section is to render the uncertificated person who levies a distress in contravention of the section liable to an action for trespass, and to prevent him from being indicted for what would be the common law

misdemeanour of doing an act which is forbidden by the statute. For these reasons I think the landlord had no right to take the goods in dispute.

DARLING, J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *P. J. Rutland*; *W. H. Lane.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

Re ALDERSEY. GIBSON *v.* HALL

[Chancery Division (Kekewich, J.), May 11, 1905]

[Reported [1905] 2 Ch. 181; 74 L.J.Ch. 548; 92 L.T. 826]

Evidence—Presumption of death—Person not heard of for seven years—Time of death—Burden of proof.

When a person has been absent for seven years without being heard of, the presumption arises that he is dead, but no presumption arises as to the time of his death.

By her will, dated May 13, 1889, the testatrix gave a share of the income of her residuary estate on trust to be paid half-yearly equally between the children of her deceased niece during their lives with a right to accrual and with certain gifts over. J. J. H., one of the children, survived the testatrix who died on August 31, 1890, but he had not been heard of since Mar. 31, 1895, and on Nov. 28, 1904, an order was made declaring that he was to be presumed to be dead on Mar. 31, 1902, i.e. at the expiration of seven years since he was last heard of. On a summons to determine how the share of J. J. H. should be dealt with,

Held: the trustees were justified in declining to pay the income after Mar. 31, 1895, when J. J. H. was last heard of as the onus of proving that he had survived that period was on those who claimed on his behalf and this onus had not been discharged. Accordingly, the share of the income together with any accrued share should be dealt with as though J. J. H. had died on Mar. 31, 1895.

Notes. As to presumptions of life and death, see 15 Halsbury's Laws (3rd Edn.) 344; and for cases see 22 Digest (Repl.) 157 et seq.

Cases referred to:

(1) *Re Phene's Trusts* (1870), 5 Ch. App. 139; 39 L.J.Ch. 316; 22 L.T. 111; 18 W.R. 303, L.J.; 22 Digest (Repl.) 158, *1438.*

(2) *Doe d. Knight* v. *Nepean* (1833), 5 B. & Ad. 86; 2 N. & M. 219; 2 L.J.K.B. 150; subsequent proceedings sub nom. *Nepean* v. *Doe d. Knight* (1837), 2 M. & W. 894; Murp. & H. 291; 7 L.J.Ex. 335; 150 E.R. 1021, Ex. Ch.; 22 Digest (Repl.) 159, *1448.*

Also referred to in argument:

Re Benjamin, Neville v. *Benjamin*, [1902] 1 Ch. 723; 71 L.J.Ch. 319; 86 L.T. 387; 18 T.L.R. 283; 46 Sol. Jo. 266; 22 Digest (Repl.) 163, *1483.*

Re Lewes' Trusts (1871), 6 Ch. App. 356; 40 L.J.Ch. 602; 24 L.T. 533; 35 J.P. 357; 19 W.R. 617, L.JJ.; 22 Digest (Repl.) 163, *1481.*

Re Green's Settlement (1865), L.R. 1 Eq. 288; 35 L.J.Ch. 252; 13 L.T. 541; 12 Jur.N.S. 70; 14 W.R. 192; 22 Digest (Repl.) 163, *1479.*

Re Rhodes, Rhodes v. *Rhodes* (1887), 36 Ch.D. 586; 56 L.J.Ch. 825; 57 L.T. 652; 22 Digest (Repl.) 160, *1457.*

Adjourned Summons by Joseph Hewitson Gibson, the sole trustee of the will of the testatrix, asking whether John J. Hall was living or dead, and if dead when he died, also if John J. Hall survived the testatrix but died before Edward Pattinson, then whether any and which of his children or remoter issue took any interest (a) in his original one-seventh share of the residuary estate given to the children of Jane Hall; or (b) in the one-seventh share given over upon the death of Edward Pattinson without issue, and generally raising the question as to the destination of the original and the fraction of the accrued share given over upon Edward Pattinson's death without issue, assuming the court to be satisfied, that John J. Hall survived the testatrix and Edward Pattinson.

Jane Aldersey, the testatrix, who died on Aug. 31, 1890, by her will dated May 13, 1889, directed her trustees to stand possessed of her residuary estate upon trust; to divide the same half-yearly into seven equal parts or shares, and to pay five such shares to five named nephews and nieces during their respective lives, another share equally between the children of her deceased niece Jane Hall during their respective lives and the remaining share equally between a great-nephew and three great-nieces during their respective lives. If any of the nephews or nieces should die without leaving issue the share of each as well as any accruing share should be divided among such of the nephews and nieces and great-nephew and great-nieces, and the children of Jane Hall, or the issue of such of them as might be dead, as should be living at the deaths of such nephews and nieces respectively, so that the nephews and nieces should each take equal proportions of the share or shares of such deceased nephew or niece, the great-nephew and great-nieces one other equal proportion of the share or shares equally between them, and the children of Jane Hall another equal proportion of the share equally between them. The testatrix then provided for the event of her great-nephew, or either of her great-nieces, or any of the children of Jane Hall dying without lawful issue; and declared that her trustees should have no power to sell or dispose of her residuary real estate, but should continue to divide the annual proceeds of her residuary personal estate amongst the issue of such of her nephews and nieces and her great-nephew and great-nieces, and of the children of Jane Hall as should die leaving lawful issue, such issue to take his or their parents' share or shares respectively in equal shares.

Jane Hall, the deceased niece of the testatrix, had six children, John J. Hall and five others who were still living.

John J. Hall married, in 1876, Mary Hall, by whom he had five children, all of whom were still living. In July, 1883, John J. Hall was living with his wife and children, at 4, East London Street, Edinburgh. Between July 11 and July 27, 1883, John J. Hall left Edinburgh to take up a situation in London, and his wife had not since seen him, though she continued to correspond with him until November, 1888.

By an order made on Nov. 28, 1904, it was declared that John J. Hall was to be presumed to be dead on Mar. 31, 1902, being the expiration of seven years from Mar. 31, 1895. From the evidence before the court upon the application on which that order was made the court came to the conclusion that John J. Hall had not been heard of since some time before Mar. 31, 1895. The court had appointed Mary Hall, the widow of John J. Hall, to represent the estate of John J. Hall for the purposes of this action.

Edward Pattinson, one of the named nephews in the will of the testatrix, died without leaving lawful issue on Mar. 16, 1896.

P. F. S. Stokes for the plaintiff, sole trustee of the will of the testatrix.
Mark L. Romer for four children of John J. Hall.
F. Russell for the widow of John J. Hall.

KEKEWICH, J.—Questions relating to the presumption of death frequently arise for decision in chambers in the administration of estates, and especially of small estates. The question has to be determined whether somebody is dead, and, if so, when he died; and, although the court is bound to direct inquiries in many cases, one can almost say beforehand that the inquiries will be productive of very little result, and that the master will say he has no evidence upon which he can act. These questions are usually disposed of in chambers, and I am not sorry that a case has arisen in which I have had the assistance of arguments in court and of reference to authorities.

The case to which one always refers on this subject is *Re Phene's Trusts* (1), and to that case I will now content myself with referring. The judgment in the case is very exhaustive, and also very instructive. The point there was, shortly, this: The testator died on Jan. 5, 1861, having made a bequest in favour of nephews and nieces. That, in point of law, meant nephews and nieces living at the testator's death. He had a nephew who had gone abroad in 1853, and was last heard of on June 16, 1860—i.e., within seven months of the testator's death. The question was whether he was entitled to share in the testator's bounty. The law would presume that, whatever was proved or concluded, he was dead at the expiration of seven years from June 16, 1860, but that presumption gave no assistance in solving the question whether he was alive on the day of the testator's death—viz., Jan. 5, 1861—and GIFFARD, L.J.—differing from JAMES, V.-C., came to the conclusion, not that he was dead on Jan. 5, 1861, but that those who claimed his share as nephew must prove that he was alive, that the burden was upon them, and that as they had not established that fact the property was not divisible among the nephews and nieces who were proved to have survived the testator. That is not the case here, though it is not very far from it. There is a considerable difference, but the law stated by GIFFARD, L.J., enables me to dispose of this case, as it has enabled me to dispose of a great many others. The headnote in the report of that case states (5 Ch. App. at p. 139) that "there is no presumption of law in favour of the continuance of life," and although those are not the actual words used by the lord justice, I think that he did so decide, and that the head note is perfectly accurate. Commenting on the opinion expressed by KINDERSLEY, V.-C., in several decisions, and on the judgments of the Court of Queen's Bench and the Exchequer Chamber in *Doe d. Knight* v. *Nepean* (2), upon which the Vice-Chancellor proceeded, he says (5 Ch. App. at p. 149):

> "The Vice-Chancellor KINDERSLEY appears to have acted on the passages in both these judgments, which are to the effect that the onus of proving the death of Matthew Knight lay on the plaintiff, because the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown. Those passages are not essential to the conclusions arrived at, or sound in point of reasoning. The other parts of the same judgments go to prove that there is not and ought not to be any such presumption of law."

Again, his Lordship says (ibid. at p. 152):

> "The true proposition is, that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail."

If I can apply that to the facts of this particular case my difficulty comes to an end, but the question is, who is asserting the right, and therefore on whom is the burden? The argument on behalf of the widow of John J. Hall is this: Here is a gift of a share of the testatrix's property unto and equally between the children of her late niece Jane Hall. My husband John J. Hall was a child of Jane Hall, and he was alive at the death of the testatrix. Therefore he is included in the class to whom that share was given, and there is no burden of proof upon me. It lies on those who say that my husband is dead and that bounty has ceased to

show that that is so. No doubt it is often difficult to say on whom the burden of proof rests, but I do not myself entertain any doubt about the burden in this particular case. The trustees were to divide the residuary estate half-yearly into sevenths. The gift of this particular share is to the children of the testatrix's late niece Jane Hall, but only during their respective lives. There were six children of Jane Hall living at the date of the testatrix's death. The result is that John J. Hall is entitled to a one forty-second share in the income of the residue during his life. His widow is claiming that on his behalf. That would be paid to her without question until March, 1895, up to which time he was heard of. At any time after that period the trustees would necessarily say to the widow: "You have not proved your title to the fund for the last half-year, because you have not proved that your husband was alive at the expiration of the last half year." The trustees would only be doing their duty, and the burden would be thrown upon the person claiming on behalf of John J. Hall. That burden would not have been discharged, and has not since been discharged, and is not capable of being discharged now. The widow cannot say that John J. Hall survived the day when he was last heard of. It might be said he was not likely to have died on the next day. The answer is, very likely not. That is a question of probabilities with which the court is not concerned. He might have lived a long time after, but it is for the person claiming his share to say how long, and the trustees would be quite right in declining to recognise the widow's title, unless she proved that the tenant for life was alive, and that his life endured. There is no presumption in favour of the continuance of life; it is entirely a matter of evidence in each case; and if the claimant fails to prove the continuance of life the claim must fail. Therefore, I think that the share of income which belonged to John J. Hall as long as he lived was undisposed of so far as this gift is concerned from Mar. 31, 1895.

The question as to the title to his share in the residue after the death of Edward Pattinson was then argued.

KEKEWICH, J.—I am about to deliver a judgment which does not satisfy me logically, but I venture to think it is the best way of cutting a knot which is incapable of being untied. I am now dealing with an accrued share which came to the children of Jane Hall through the death of the testatrix's nephew Edward Pattinson on Mar. 16, 1896, without issue. If John J. Hall were living at that time he would be entitled to participate in that share. He was last heard of in 1895, and there is no presumption of his having died at any particular time during the ensuing seven years, or of his having lived for any part of that seven years. The gift is to be divided among such of the testatrix's nephews and nieces and great-nephews and great-nieces, and the children of her late niece Jane Hall, or the issue of such of them as might be dead, as should be living at the death of the deceased nephew Edward Pattinson. The widow of John J. Hall claims payment of an aliquot part of this share. I must hold upon the judgment I have already delivered that in order to sustain her claim to be paid she must prove that her husband was one of the children of Jane Hall living at the death of Edward Pattinson. That she cannot do. Therefore her claim fails. Then comes the question who is entitled. The children of John J. Hall say they are entitled because they are the issue of a child who is dead. To be strictly logical, I think I ought to hold that the burden is on them to show that they are the children of a person who was dead in 1896; and that they are quite as unable to prove as their mother was to prove that John J. Hall was then alive. It is, however, quite impossible to hold there was an intestacy. The testatrix has said that one of two classes of persons must take—either the children of her late niece or the issue of such as might be dead. In these circumstances I think I must hold, with regard to this particular will, that, though there is no proof of his death, John J. Hall must be taken to be dead at the death of Edward Pattinson because he was not proved to be alive. There will be a declaration that the plaintiff is to be at liberty

to deal both with the original share of John J. Hall and the share which would have accrued to him had he survived Edward Pattinson as though he had died on Mar. 31, 1895.

Solicitors: *Chester, Broome & Griffithes.*

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

MIDLAND COUNTIES DISTRICT BANK, LTD. *v.* ATTWOOD

[Chancery Division (Warrington, J.), December 16, 17, 21, 1904]

[Reported [1905] 1 Ch. 357; 74 L.J.Ch. 286; 92 L.T. 360; 21 T.L.R. 175; 12 Mans. 20]

Company—Winding-up—Voluntary winding-up—Contract—Effect of winding-up—Contract of service—Dismissal of servants.

A resolution for the voluntary winding-up of a limited company does not operate as a notice of discharge to the servants of the company.

Notes. Section 131 of the Companies Act, 1862, has been repealed and replaced by s. 281 of the Companies Act, 1948 (3 Halsbury's Statutes (2nd Edn.) 676).

Considered: *Reigate* v. *Union Manufacturing Co. (Ramsbottom), Ltd.*, [1918–19] All E.R.Rep. 143. Referred to: *Re Havana Exploration Co., Nathan's Claim*, [1914–15] All E.R.Rep. 1086; *Thomas* v. *Todd*, [1926] All E.R.Rep. 564; *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549.

As to dismissal of the servants of a company on a winding-up, see 6 Halsbury's Laws (3rd Edn.) 325; and for cases see 9 Digest (Repl.) 566.

Cases referred to:

(1) *Reid* v. *Explosives Co., Ltd.* (1887), 19 Q.B.D. 264; 56 L.J.Q.B. 388; 57 L.T. 439; 35 W.R. 509; 3 T.L.R. 588, C.A.; 9 Digest (Repl.) 566, *3737*.

(2) *Turner* v. *Sawdon & Co.*, [1901] 2 K.B. 653; 70 L.J.K.B. 897; 85 L.T. 222; 49 W.R. 712; 17 T.L.R. 45, C.A.; 12 Digest (Repl.) 700, *5352*.

(3) *Brace* v. *Calder*, [1895] 2 Q.B. 253; 64 L.J.Q.B. 582; 72 L.T. 829; 59 J.P. 693; 11 T.L.R. 450; 14 R. 473, C.A.; 34 Digest 104, *776*.

(4) *Re Imperial Wine Co., Shirreff's Case* (1872), L.R. 14 Eq. 417; 42 L.J.Ch. 5; 27 L.T. 367; 20 W.R. 966; 9 Digest (Repl.) 576, *3805*.

Also referred to in argument:

Re General Rolling Stock Co., Chapman's Case (1866), L.R. 1 Eq. 346; 35 Beav. 207; 12 Jur.N.S. 44; 55 E.R. 874; 9 Digest (Repl.) 566, *3731*.

Re Oriental Bank Corpn., MacDowall's Case (1886), 32 Ch.D. 366; 55 L.J.Ch. 620; 54 L.T. 667; 34 W.R. 529; 9 Digest (Repl.) 566, *3733*.

Horsey Estate, Ltd. v. *Steiger*, [1899] 2 Q.B. 79; 68 L.J.Q.B. 743; 80 L.T. 887; 47 W.R. 644; 15 T.L.R. 367, C.A.; 10 Digest (Repl.) 1100, *7600*.

Fryer v. *Ewart*, [1902] A.C. 187; 71 L.J.Ch. 433; 9 Mans. 281; sub nom. *Watney, Combe, Reid & Co.* v. *Ewart*, 86 L.T. 242; 18 T.L.R. 426, H.L.; 10 Digest (Repl.) 1100, *7601*.

Re Anglo-Moravian Hungarian Junction Rail. Co., Ex parte Watkin (1875), 1 Ch.D. 130; 45 L.J.Ch. 115; 33 L.T. 650; 24 W.R. 122, C.A.; 10 Digest (Repl.) 921, *6290*.

Lilley v. *Elwin* (1848), 11 Q.B. 742; 17 L.J.Q.B. 132; 11 L.T.O.S. 151; 12 J.P. 343; 12 Jur. 623; 116 E.R. 652; 34 Digest 108, *813*.

Hamlyn & Co. v. *Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, *5266*.

Rhodes v. *Forwood* (1876), 1 App. Cas. 256; 47 L.J.Q.B. 396; 34 L.T. 890; 24 W.R 1078, H.L.; 12 Digest (Repl.) 700, *5355*.

Phillips v. *Alhambra Palace Co.*, [1901] 1 K.B. 59; 70 L.J.Q.B. 26; 83 L.T. 431; 17 T.L.R. 40; 45 Sol. Jo. 81; 49 W.R. 223, D.C.; 12 Digest (Repl.) 663, *5138*.

Motion for an interim injunction to restrain the defendant, a former employee of the plaintiff company, from committing a breach of an agreement for service, which raised a question as to the effect of a voluntary winding-up on contracts of this nature.

By an agreement of Nov. 10, 1891, between the plaintiff bank, by its then name of the Nottingham and District Bank, Ltd., of the one part and the defendant of the other part, the defendant agreed to serve the bank as manager of their branches at Ilkestone and Eastwood "or elsewhere, and in the same or such other capacity as the said bank shall direct." By cl. 2 of this agreement it was provided that the defendant should not

> "during the continuance hereof engage in any other business or calling whatsoever without the previous written consent of the said bank."

After providing for the salary that was to be payable to the defendant, and for the termination of the agreement by one calendar month's notice on either side, cl. 7 was as follows: The defendant

> "shall not within a year of the termination of this agreement, whether by notice or under the terms of the next clause,"

enter into the service of or in any way act for any bank carrying on business within a radius of five miles of Ilkestone, of Eastwood, or any branch of the said bank to which the defendant might hereafter be appointed as manager. A sum of £500 was also fixed as liquidated damages in case of any breach by the defendant of this clause. By cl. 8 the bank were empowered to put an end to the agreement in the event of the defendant being guilty of misconduct in connection with his duties. The defendant ceased to be manager of the Ilkestone and Eastwood branches and became, and until quite recently continued to act as, the manager of the plaintiff's branch bank at Derby.

By an agreement of November, 1904, the Birmingham District and Counties Banking Co., Ltd., agreed to acquire the whole of the assets, undertaking, and goodwill of the plaintiff bank as from Dec. 31, 1903, and for this purpose it became necessary to wind-up the plaintiff bank, and accordingly by a special resolution, duly passed and confirmed on Nov. 18 and Dec. 3, 1904, it was resolved that the plaintiff bank be wound-up voluntarily, and that two named persons should be appointed liquidators to adopt the agreement of November, 1904, and carry the same into effect on behalf of the plaintiff bank. The defendant was instructed to assist in the transfer of the business to the Birmingham District and Counties Banking Co., Ltd., but on Dec. 3, 1904, he left the plaintiffs' branch bank at Derby, and subsequently entered the service of the Nottingham Joint Stock Bank, Ltd., for the purpose of opening and managing a new branch bank for that company at Derby. On Dec. 5 the plaintiff bank gave the defendant a month's notice to determine their agreement of service with him, and commenced the present action to restrain the defendant from acting for the Nottingham Joint Stock Bank, Ltd., or any other banking company at Derby or within five miles round, in breach of his agreement with the plaintiff bank of Nov. 10, 1891. The Birmingham District and Counties Banking Co., Ltd., was also a plaintiff in the action.

George Lawrence for the defendant, raised the point of law that the voluntary winding-up of the Midland Counties District Bank, Ltd., by the plaintiffs operated as a wrongful dismissal of the defendant and put an end to the agreement and consequently that the restrictive provisions of cl. 7 did not apply.

R. J. Parker for the plaintiffs.

Cur. adv. vult. A

Dec. 2, 1904. **WARRINGTON, J.,** read a judgment in which he stated the facts and continued:

On these facts the plaintiffs would plainly be entitled to the relief they seek, unless the defendant has some defence in point of law. The only defence relied upon is founded upon the contention that the voluntary winding-up of the employing company operated in itself as a wrongful dismissal of the servants of the company, including the defendant, and that he is not, under the circumstances, bound by the restrictive provisions of cl. 7. The question I have to determine is whether this defence is well founded. It is well settled that an order for the compulsory winding-up of a company operates as a notice to dismiss the servants; and it has been decided by the Court of Appeal that the appointment by the court of a receiver and manager in a debenture-holder's action has the same effect: *Reid* v. *Explosives Co., Ltd.* (1). In order to determine whether a voluntary winding-up is to have that effect, one must consider what there is in the events I have mentioned which could terminate the agreement of service.

It is contended by counsel for the defendant that it is the change in the nature of the business carried on by the employer. On the other hand, it is contended by counsel for the plaintiffs that the change in the nature of the business is immaterial; that the circumstance in the cases I have mentioned which cause the termination of the relation is the change in the personality of the employer; the latter is, in my opinion, the correct view. If the business had ceased altogether that would have been no breach by the employer of his agreement with the servant, provided he had continued to pay his salary: see *Turner* v. *Sawdon & Co.* (2); and it seems to me, therefore, that the change from a going banking business to one that is being carried on with the view to a beneficial winding-up could not have the effect contended for. On the other hand, a change of personality certainly puts an end to the contract of service: see *Brace* v. *Calder* (3). This change of personality appears to me to take place in a compulsory winding-up. The business is from the date of the winding-up order carried on by the court for the purpose of liquidation with the assistance of the official liquidator, who is an officer of the court.

Is there, in a voluntary winding-up, a change in the personality of the employer? In my opinion, there is not. In that case the assets of the company remain under the control of the company; the liquidator is an officer of the company; the business may even be continued by the directors, if either the company or the liquidators so think fit. The governing section in the Companies Act, 1862, as to the effect of a voluntary winding-up on the status of the company is s. 131, which runs thus:

> "Whenever a company is wound-up voluntarily, the company shall from the date of the commencement of the winding-up cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof."

Those later words imply that for the beneficial winding-up of the company the company does continue to exist. Then the section, after providing that transfers of shares and alteration in the status of members shall be void, continues:

> "But its corporate state, and all its corporate powers, shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound-up."

If, therefore, there is no authority binding me to decide otherwise, I should be prepared to hold that the voluntary liquidation did not operate to dismiss the servants of the company. Is there any such authority? The only case referred to as such is *Re Imperial Wine Co., Shirreff's Case* (4), and it is quite true that in that case Lord Romilly, M.R., said (L.R. 14 Eq. at p. 418):

"I am of opinion that the resolution to wind-up the company ipso facto put an end to Shirreff's employment as manager, and was equivalent to his dismissal."

But the point was not argued. It was assumed that Shirreff's employment had been determined, as, in fact, it had been, for not only had the company been wound-up, but Shirreff himself had been appointed liquidator and received £400 for his services. The only question that was argued was whether he was entitled to prove for a certain sum payable to him under the articles of association in case he should be dismissed from his office as manager. I cannot, therefore, regard that case as an authority binding me to decide contrary to my own opinion. In *Reid* v. *Explosives Co.* (1) there had been an appointment of a receiver and manager by the court in a debenture-holders' action, followed by a voluntary liquidation, and MANISTY, J., had held—but for what reasons I cannot ascertain—that the latter event had operated to dismiss the plaintiff, who had been in the service of the defendant company, but it was unnecessary to decide the point, because the same learned judge decided that the appointment as a receiver and manager had had that effect; and in the Court of Appeal the point was not decided, and I infer that LORD ESHER, at all events, inclined to the view that, inasmuch as in a voluntary liquidation the liquidator is appointed by, and is an officer of, the company, there would not be such a change in the personality of the employer as to dismiss the servants. On the whole, I am of opinion that the defence fails, and that the injunction must go as asked by the notice of motion.

Solicitors: *Field, Roscoe & Co.*, for *Pinsent & Co.*, Birmingham; *Rawle, Johnstone & Co.*, for *W. J. Holbrook*, Derby.

[*Reported by* E. L. HOPKINS, ESQ., *Barrister-at-Law.*]

POLLEY *v.* FORDHAM

[KING'S BENCH DIVISION (Lord Alverstone, C.J., and Kennedy, J.), July 1, 4, 1904]

[Reported 91 L.T. 525; 68 J.P. 504; 20 T.L.R. 639]

Magistrates—Protection—Illegal distress—Distress based on conviction on summons—Lack of jurisdiction shown on face of summons—Not brought to notice of magistrate—Justices Protection Act, 1848 (11 & 12 *Vict.*, *c.* 44), *s.* 2.

By s. 2 of the Justices Protection Act, 1848, where a justice of the peace does an act in a matter in which by law he has no jurisdiction, the person injured thereby may bring an action without alleging malice or want of reasonable and probable cause. This section applies where it appears upon the face of a summons that a justice had no jurisdiction to entertain the matter, even though the want of jurisdiction was not brought to his knowledge at the hearing of the summons.

Notes. As to protection of magistrates, see 30 HALSBURY'S LAWS (3rd Edn.) 714–716; and for cases see 38 DIGEST (Repl.) 82 et seq. For Justices Protection Act, 1848, see 14 HALSBURY'S STATUTES (2nd Edn.) 801.

Cases referred to:

(1) *Langridge* v. *Hobbs*, [1901] 1 K.B. 497; 70 L.J.K.B. 362; 84 L.T. 319; 17 T.L.R. 237; 45 Sol. Jo. 260; 19 Cox, C.C. 671, D.C.; 38 Digest (Repl.) 204, *282*.

(2) *Johnston* v. *Meldon* (1891), 30 L.R.Ir. 15; 38 Digest (Repl.) 93, **407.* A
(3) *Pease* v. *Chaytor* (1863), 3 B. & S. 620; 32 L.J.M.C. 121; 8 L.T. 613; 27 J.P. 309; 9 Jur.N.S. 664; 11 W.R. 563; 122 E.R. 233; 38 Digest (Repl.) 99, *719.*

Also referred to in argument:

Allen v. *Worthy* (1870), L.R. 5 Q.B. 163; 39 L.J.M.C. 36; 21 L.T. 665; 34 J.P. 263; 28 Digest (Repl.) 206, *299.* B
Knight v. *Halliwell* (1874), L.R. 9 Q.B. 412; 43 L.J.M.C. 113; 30 L.T. 359; 38 J.P. 470; 22 W.R. 689; 38 Digest (Repl.) 204, *281.*
Ratt v. *Parkinson* (1851), 4 New Sess. Cas. 651; 20 L.J.M.C. 208; 17 L.T.O.S. 94; 15 J.P. 356; 38 Digest (Repl.) 91, *655.*
Kendall v. *Wilkinson* (1855), 4 E. & B. 680; 3 C.L.R. 668; 24 L.J.M.C. 89; 24 L.T.O.S. 309; 19 J.P. 467; 1 Jur.N.S. 538; 3 W.R. 234; 119 E.R. 251; C
38 Digest (Repl.) 94, *680.*
Pike v. *Carter* (1825), 3 Bing. 78; 10 Moore, C.P. 376; 4 Dow. & Ry.M.C. 145; 3 L.J.O.S.C.P. 169; 130 E.R. 443; 38 Digest (Repl.) 98, *717.*
Burley v. *Bethune* (1814), 5 Taunt. 580; 1 Marsh. 220; 128 E.R. 816; 38 Digest (Repl.) 92, *658.*
Lowther v. *Earl of Radnor* (1806), 8 East, 113; 103 E.R. 287; 38 Digest (Repl.) D
98, *716.*
Fawcett v. *Fowlis* (1827), 7 B. & C. 394; 1 Man. & Ry.K.B. 102; 1 Man. & Ry.M.C. 21; 6 L.J.O.S.M.C. 44; 108 E.R. 770; 38 Digest (Repl.) 86, *602.*

Appeal from a decision of His Honour Judge Smyly, sitting at Shoreditch County Court.

On Feb. 11, 1903, the plaintiff was convicted by Mr. Fordham, a metropolitan E
magistrate, of neglecting to have two of his children vaccinated, and was fined £1 and 16s. costs in each case. It appeared upon the face of the summons that the children, being twins, were at the date of the summons eighteen months of age, but the learned magistrate did not read the summons, and the plaintiff, who appeared in person on the summons, did not point out to him that such was the F
case. The plaintiff having failed to pay the fines, Mr. Fordham, on April 11, 1903, issued a warrant of distress against the plaintiff's goods. On April 17, a distress was put in on the plaintiff's premises and was paid out by the plaintiff under protest on April 29. On July 8 a Divisional Court made an order absolute quashing the convictions against the plaintiff on the ground that, the children being eighteen months of age, the plaintiff had been improperly convicted. G
On Aug. 26, the plaintiff issued a summons in the county court against Mr. Fordham, claiming damages for illegal distress. It was contended on behalf of the defendant, that the action was out of time under the Public Authorities Protection Act, 1893 [repealed by Law Reform (Limitation of Actions, etc.) Act, 1954]. The learned county court judge held that the plaintiff's action was barred by s. 1 (a) of that Act, as the injury was suffered by the plaintiff from the conviction on H
Feb. 11, more than six months before action brought, and he entered judgment for the defendant. It was, however, held on appeal ([1904] 2 K.B. 345) that the learned county court judge was wrong, as the act complained of was not the conviction, but the distress, and, therefore, the action was not barred by the Act of 1893, and the action was remitted to the county court for a new trial.

The case having come before the learned judge and a jury a second time, and I
evidence having been heard on either side, the jury, in answer to questions put by the judge, found that (i) the want of jurisdiction was not brought to the notice of the magistrate at the hearing of the summons; (ii) the age of the children, apart from its being on the summons, was at no time brought to the notice of the magistrate; (iii) damages £10. Upon these findings judgment was entered for the magistrate with costs. The plaintiff appealed on the ground that the judge was wrong in leaving questions (i) and (ii) to the jury, and that, as the magistrate in convicting the plaintiff, had acted in excess of jurisdiction, there

was no defence to the action, and the only question for the jury was as to the amount of damages.

Kingsbury for the plaintiff.
Robertson for the defendant.

LORD ALVERSTONE, C.J.—In this case an appeal has been brought against a judgment entered for the defendant by the learned county court judge in an action brought against Mr. Fordham, the metropolitan magistrate, in trespass because he had issued a distress warrant in a case in which the parties did not contend before us when the case came up that the conviction could be supported. The summons on the face of it was for not vaccinating a child within six months of its birth. The date of the birth appears upon the summons, and the expiration of the six months would be calculated from that, and the twelve months within which the proceedings must be taken would also appear to have expired some four or five months before the issue of the summons. The learned county court judge asked the jury two questions: "Was the want of jurisdiction brought to the notice of the defendant, Mr. Fordham, at the hearing of the summons?" to which the jury answered "No"; and: "Was the want of jurisdiction at any time brought to the notice of the defendant?" to which the jury answered "No." If the case were one which depended upon reasonable and probable cause, or on the magistrate having acted maliciously or carelessly or negligently, those questions might be of considerable importance, but they do not seem to me to be applicable to a case which comes under s. 2 of the Justices Protection Act, 1848.

By s. 1 of the Act:

> "Every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause. . . ."

By s. 2:

> "For any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such justice in any such matter, may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration that the Act complained of was done maliciously and without reasonable and probable cause. . . ."

Therefore, the distinction between acts done within the jurisdiction and acts done without the jurisdiction is very marked, the old right being preserved, and it not being necessary in the latter case to allege that the act was maliciously done or done without reasonable and probable cause. I would simply note in passing that that would seem also to be the reason for s. 3 of the Act, which provides that where a warrant of distress or commitment is issued by a magistrate other than a magistrate who was a party to the conviction the action should not be brought against him in respect of the issue of that warrant.

I think it convenient to consider for a moment whether or not the point taken by counsel for the defendant—namely, that upon the face of this summons, even as it was framed, the magistrate might have had jurisdiction—is a good one. The ground on which he bases that argument is that, although the summons states that each child was born on April 19, 1901, and although it alleges that the plaintiff neglected to cause the child to be vaccinated within six months, and although that summons is dated Feb. 3, 1903, the magistrate still might have had jurisdiction to deal with the case. Counsel says that there might have been two extensions of time of two months each, which I think would be enough, or three

if necessary under s. 18 of the Vaccination Act, 1867 [repealed by National Health Service Act, 1946] or, he says, there might have been a certificate given under sub.-s. (4) of s. 1 of the Vaccination Act, 1898 [repealed by Act of 1946], that, owing to there being infectious disease about, the time was extended, or the child need not be vaccinated. If that had been the kind of case made, and if upon a summons upon which such a matter was open the magistrate had bona fide come to a wrong conclusion of law upon the facts before him, then I think many of the authorities to which counsel for the defendant has called our attention might have to be considered and might be very pertinent. But I cannot see my way to hold that the magistrate was entitled to deal with the matter as though there was another time fixing the completion of the offence than that which was mentioned in the summons. Counsel relied upon s. 39 (2) of the Summary Jurisdiction Act, 1879 [see now Magistrates' Courts Act, 1952, s. 81] which provides:

> "Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, byelaw, regulation, or other document creating the offence may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant."

I can quite imagine that if on the face of the summons the jurisdiction of the court appeared, it was not necessary to negative the existence of, or to make any statements with regard to, any matters which might subsequently become important when any particular defence was raised. But I cannot help pointing out that this is not a case in which the summons showed it to be possible that the magistrate would have jurisdiction; it is a case in which on the face of it the summons showed that the time had gone by, and that the court had no jurisdiction.

I do not think it necessary to refer to all the cases to which our attention has been called, although I want to say a word about one or two of them. I think that counsel for the defendant did not quite give full effect to my brother WILLS' judgment in *Langridge* v. *Hobbs* (1). In *Langridge* v. *Hobbs* (1) the dates appear to be practically of the same character as I have indicated in this case, eighteen months having elapsed since the birth of the child, and it was argued before the justices that there was a provision in the Vaccination Order, 1898, for notice to be given by the vaccination officer to the parent requiring him to have the child vaccinated within fourteen days and the offence was not completed until the expiration of that notice. The justices accepted that argument, but this court held that the offence was complete and time began to run six months after the birth of the child. Therefore, in one sense, although I do not think it is a stronger case than the present one, it was possible that the justices might have thought that they still had jurisdiction to deal with the matter. But my brother WILLS in his judgment pointed out that the Act said that if the vaccination had not been performed at the end of six months from the birth of the child, an offence had been committed, so that in that case, the child having been born on Dec. 30, 1898, the offence was complete on June 30, 1899, and, as the proceedings were not taken until July, 1900, they were out of time. It seems to me that the very fact that the summons was issued under s. 16 of the Vaccination Act, 1867, and that the matters which are referred to in s. 18 of the Act of 1867 and s. 1 (4) of the Vaccination Act, 1898, would be matters for defence, shows that the offence in respect of which the magistrate issued the summons in this case was an offence for not vaccinating within six months.

One of the cases on which counsel for the defendant relied was *Johnston* v. *Meldon* (2), in the Irish court, and nothing that I say in any way militates against the authority of that case. There, as I understand, a question of bona fide claim to title having been raised, the justices nevertheless came to the

conclusion that they ought to entertain the matter, and the court, the judgment of which was delivered by PALLES, C.B., applied to that case the principle that was laid down by BLACKBURN, J., in *Pease* v. *Chaytor* (3), where he pointed out that, if magistrates come to a wrong decision upon facts which are before them, which would have given them jurisdiction, an action cannot be maintained against them in respect of anything which was not done maliciously or without reasonable and probable cause. But no authority has been cited before us to show that that rule ought to be applied in cases within s. 2 of the Justices Protection Act, 1848, or in cases in which an action of trespass would have laid upon the ground that there was an absence of jurisdiction altogether. I think I should require some authority binding on me before I came to the conclusion that the doctrine respecting reasonable and probable cause or availing oneself of reasonable means of knowledge or having the means of knowledge applied to a case, where the summons was, so to speak, bad on the face of it. Counsel is not able to find any case that goes so far, and I think on principle there ought to be no authority to go so far, because it does seem to me that for the purpose of dealing with this question under s. 2 of the Act of 1848 the dates of the offence as alleged in the summons ought to be looked at. I do not understand the magistrate to have taken the point in the court below that he considered that, even if the summons was as I have stated it, he still would have jurisdiction, and I do not understand him to have said that he thought any offence other than failure to vaccinate within six months was before him, but he practically has said that the ages of the children, the date of the summons, and the expiration of time since the children's birth were not sufficiently brought to his attention at the time.

The two questions which JUDGE SMYLY left to the jury would have been very material had the action been upon the case or was to be treated as one in which it was necessary to allege malice and want of reasonable and probable cause; but it seems to me that in the case of a proceeding where upon the face of it the summons must have shown that the magistrate had no jurisdiction, they are questions which are not material. I think the appeal ought to be allowed, and there should be judgment entered for the plaintiff for £10, with costs of this appeal and the costs below.

KENNEDY, J.—I have come to the same conclusion. I should like, looking at the importance of the matter, to feel that I have not left in doubt what the view is which I have formed after hearing the arguments of counsel.

What are the undisputed facts in this case? One fact is that the foundation of the jurisdiction upon which the defendant acted appears upon the summons that was taken out. I have great sympathy with those who, having to discharge multifarious, difficult, and responsible duties, naturally enough rely to a large extent upon the services of their clerks and assistants and the officials whose duty it is to bring certain classes of illegality before the magisterial tribunal, but, as I understand the effect of the evidence, if Mr. Fordham had seen this summons this trouble would never have arisen. I do not find him suggesting the ingenious point which is made by his counsel, for him—namely, that on the face of the summons, if he had seen it, he would have imagined that he had jurisdiction. What he does say is that these summonses, when brought before him by the proper public official, are dealt with by him as so far matters of course that he affixes his rubber stamp to them with confidence. The point that he thought he had jurisdiction is not suggested, and he tells us, as I read the learned judge's note of his evidence, in more passages than one that, if he had had his attention called to the date appearing on the summons, he would have looked into the matter. He says on the first point to which I have referred:

> "The summons was applied for in the ordinary course with a number of others. I always grant them when asked for by a person in authority."

Then he said: A

"When Mr. Polley appeared Mr. Bower asked him if he admitted he had not had his children vaccinated according to the Vaccination Acts. Mr. Polley said, 'Yes.' I understood by that it was a plea of guilty."

Then he deals with the point whether something was said when another person against whom a summons had been taken out—a person of the name of Coppen— B was being dealt with, and he says:

"I am sure the plaintiff is mistaken when he says he called my attention to the age of the children."

He describes how he first heard of any question of jurisdiction, and in cross-examination he said: C

"A metropolitan magistrate has no time to read all the summonses. The officer comes into the box and says: 'I want thirty summonses.' I say he can take them. Then summonses are made out, they are passed by the chief clerk, who puts a tick upon them, and when I see a tick I assume they are right, and sign without going into them. I do not sign, but put a rubber stamp upon them. No one uses the rubber stamp except myself." D

On this question as to how the matter was raised before him, he says:

"The statement that he called my attention to the ages is untrue. I had no discussion as to the reading of s. 29 [of the Vaccination Act, 1867] in either of the cases—that is, Coppen's case and Polley's case. I asked Mr. Polley whether he objected to both being taken together. On the face of the summons E I would not know."

That is all he says—that he would not know that the time had not been enlarged.

"If Polley had told me the children were eighteen months old I should have verified that fact, and told him to withdraw his plea, and then asked if he had any extension. If the vaccination officer had called my attention to the F age I should have asked whether there was any extension. There was no mention of the age of the children. The age certificates were not produced to me. He did not when he came and asked for time tell me the children were over age. If he had not pleaded guilty I should probably have found out."

Found out what? Found out that he had no jurisdiction. He would have G assumed, if he had that information, that he had no jurisdiction quite rightly, unless some extension was given, directly he knew the child had been born eighteen months before.

If that is so, are we to hold that because, assuming the finding of the jury, he was not informed, nor was he aware of the children's age, and so had no jurisdiction, that is a defence in an action brought against him by the plaintiff after the H execution has taken place under the conviction which has since been quashed? I confess I am quite unable to see sufficient authority for such a proposition in the cases cited, and it seems to me it would be a very unreasonable view to take. It is not a question of ousting the jurisdiction by reason of evidence, before he actually has convicted, but he has accessible a document which has been created by himself by a stamp, and which on the face of it showed he had no I jurisdiction. He may not have seen it; it may not have been the ordinary course for him to do so; but it seems to me that to say that because the person brought before him did not give evidence or call his attention to the facts therefore he can be held excused for the subsequent injury to that person would be to start a very questionable theory of administering justice. If the magistrate, owing to the pressure of business and the general correctness of the information he receives from his official, has had the opportunity of knowing he was doing or directing an illegal thing, it seems to me it is more just that there should be no sufficient

excuse found in that on which his counsel relies, and on which the jury were asked to find for the defendant—that a person charged did not tell him: "I want to point out you have no jurisdiction." There are a considerable number of people who are summoned, and who have no knowledge of the law, and are also not only poor, but largely illiterate, and they are in no position to point out to the magistrate why he has no jurisdiction. It would reduce the thing practically to absurdity if it was an answer by the magistrate to say when he has acted without jurisdiction: "It was not called to my notice that I had no jurisdiction. It is true that there was no foundation for the summons, and, if I had looked at it, I should have seen that I had no jurisdiction. I tell you honourably and honestly that I should have asked questions if the matter had come to my knowledge, but as a matter of practice I have no time to look at these documents. It is not the practice of the court to do it."

Is there any ground for saying on the authorities that there is the defence which counsel suggests? It seems to me that the suggestion that an action cannot be brought against a magistrate for anything done in the discharge of his duty unless it appears that his attention was called to all the facts necessary to enable him to come to a right conclusion may possibly be applicable (I desire to leave that open as my Lord has done) to such a case as where the question of the ousting of the jurisdiction on a claim of right is raised, and the magistrates have to deal with the evidence brought before them, and ought to know all the facts. But to use that in a case of this kind, it seems to me, is in substance to add to s. 2 of the Act of 1848, which inferentially shows that an action shall lie in a case in which a person has been injured by a magistrate who has exceeded his jurisdiction, a condition that all the facts must have been brought to the magistrate's knowledge before he acts. That is a qualification which does not exist. I would only further say this. It is suggested that s. 39 (2) of the Summary Jurisdiction Act, 1879, applies in the present case. With great respect to counsel for the defendant, it appears to me to have no application to this case at all. Where on the face of it a charge is a good charge, then if in fact the person charged is not guilty by reason of

> "any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the Act . . . creating the offence [it] may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant."

But I fail to see how that section can apply to a charge as made here, which on the face of it shows that the person included in the charge is not liable in the proceedings. The section is intended to apply to a case in which the offence was primâ facie rightly charged, but which it may turn out was not committed because of some exception, proviso, excuse, or qualification. It seems to me that nobody can say that this charge was a good charge on the face of it. I mean good as being within the jurisdiction of the magistrate. Secondly, when it is said that the facts ought to have been brought to the magistrate's notice, I say that that is not, as I understand it, the law, and is not so stated in the cases under s. 2 of the Act of 1848. Thirdly, when the magistrate, as he says, took the answer of the plaintiff: "This child has not been vaccinated according to law" to be a plea of "Guilty," it appears to me, with great respect, that he was, assuming that which certainly in the case of a man of this sort ought not to be assumed—namely, that he was laying stress on the words "according to law." What the plaintiff was answering is, I think, clear. He said, "I admit my child has not been vaccinated." It is perfectly true he was bound to say that, and he might probably have added: "And I do say and I believe the law to be generally that the child ought to be vaccinated," but it seems to me he was not in any way giving an answer which could justify the magistrate in assuming that he

pleaded guilty, and he, having pleaded guilty, it is a defence to the magistrate and excuses him for trespass. I do not think what he said did amount to a plea of guilty in any proper sense which affords a defence. With regard to the matter of damages I say nothing. The jury ultimately did find £10, and counsel for the plaintiff says no more than that he is prepared to take it.

Appeal allowed.

Solicitors: *H. T. Nicholson*; *Solicitor to the Treasury.*

[*Reported by* W. de B. Herbert, Esq., *Barrister-at-Law.*]

R. *v.* DODDS. Ex Parte ROBERTS AND OTHERS

[Court of Appeal (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), March 29, 30, April 4, 1905]

[Reported [1905] 2 K.B. 40; 74 L.J.K.B. 599; 93 L.T. 319; 69 J.P. 210; 53 W.R. 559; 21 T.L.R. 391]

Licensing—Licence—Renewal—Power of justices to impose conditions—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *ss.* 1, 9.

Licensing justices **held** (by Sir Richard Henn Collins, M.R., and Cozens-Hardy, L.J., Mathew, L.J., dissenting) to have no power, under the Licensing Act, 1904, s. 9 (2) [see now Licensing Act, 1953, s. 11 (4)], to require an applicant for the renewal of an on-licence to give an undertaking to observe reasonable conditions, and to refuse to issue the licence unless the undertaking is given.

Statute—Construction—Proviso—Inconsistency with positive part of statute—Limitation of proviso.

If there is an inconsistency between a proviso and the positive part of the statute which precedes it, the scope of the proviso must be limited so as to make it harmonise with the unambiguous provisions which it follows: per Sir Richard Henn Collins, M.R.

Notes. Considered: *R.* v. *Jackson* (1906), 96 L.T. 77; *Smith* v. *Portsmouth Justices*, [1906] 2 K.B. 229. Followed: *R.* v. *Crewe Licensing Justices, Ex parte Bricker*, [1914–15] All E.R.Rep. 1154. Referred to: *R.* v. *Southampton Justices, Ex parte Fuller, Smith and Turner* (1906), 70 J.P. 13; *R.* v. *Shann*, [1910] 2 K.B. 418; *R.* v. *Customs and Excise Comrs.*, [1914] 2 K.B. 390.

As to power to refuse to renew a licence, see 22 Halsbury's Laws (3rd Edn.) 550 et seq.; for cases see 30 Digest (Repl.) 32 et seq.; for Licensing Act, 1953, ss. 11 et seq., see 33 Halsbury's Statutes (2nd Edn.) 157 et seq. As to construction of provisos, see 36 Halsbury's Laws (3rd Edn.) 399–401; and for cases see 42 Digest 658–660.

Cases referred to:

(1) *Sharp* v. *Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 39 W.R. 561; 7 T.L.R. 389, H.L.; 30 Digest (Repl.) 12, *51*.

(2) *R.* v. *Howard and Others, Farnham Licensing Justices*, [1902] 2 K.B. 363; 71 L.J.K.B. 754; 51 W.R. 21; 18 T.L.R. 690; sub nom. *R.* v. *Farnham Licensing Justices, Ex parte Smith*, 86 L.T. 839; 66 J.P. 579, C.A.; 30 Digest (Repl.) 50, *377*.

(3) *R.* v. *Grimwade, Ex parte Catchpole & Co.*, [1905] 2 K.B. 50 n.; 69 J.P. 185; 53 W.R. 377; 21 T.L.R. 366.

(4) *R.* v. *Bowman*, [1898] 1 Q.B. 663; 14 T.L.R. 303; sub nom. *R.* v. *Bowman and Others, Justices and Duncan, Ex parte Patton*, 67 L.J.Q.B. 463; 78 L.T. 230; 62 J.P. 374, D.C.; 30 Digest (Repl.) 36, *275*.

(5) *R.* v. *Cotham*, [1898] 1 Q.B. 802; 67 L.J.Q.B. 632; sub nom. *R.* v. *Pilkington and Others, Justices and Wallace, Ex parte Williams, R.* v. *Cotham and Others, Justices and Webb, Ex parte Williams*, 78 L.T. 468; 62 J.P. 435; sub nom. *R.* v. *Cotham and Others and Webb, Ex parte Cotham and Others and Webb*, 46 W.R. 512; 14 T.L.R. 367; 42 Sol. Jo. 470, D.C.; 30 Digest (Repl.) 41, *320*.

(6) *R.* v. *Smith* (1873), L.R. 8 Q.B. 146; 42 L.J.M.C. 46; 21 W.R. 382; sub nom. *R.* v. *Southport Justices*, 28 L.T. 129; 37 J.P. 214; 42 Digest 766, *1925*.

Appeal from the decision of the Divisional Court (Lord Alverstone, C.J., Wills and Kennedy, JJ.) discharging a rule nisi for a mandamus directing Birkenhead licensing justices to deliver to one of the appellants a renewal licence of a hotel, and also a rule nisi to hear and determine an application for a renewal of the licence.

At the annual general licensing meeting for the borough of Birkenhead, Roberts, the appellant in question, who was the tenant and licensee of the Commercial Hotel, applied for the renewal of the on-licence of the hotel. When applications for the renewal of on-licences came on to be heard, the chairman of the justices announced that the licensing committee would ask all persons applying for the renewal of on-licences to give certain undertakings on the renewal of their licences, that the applications would be adjourned, and that notice of the required undertakings would be served upon the registered owners of the licensed premises. Notices were then served on the owners of all the premises with on-licences within the borough, including Messrs. Walker & Son, the owners of the Commercial Hotel, stating that licensees would be required to give to the justices upon application for renewal of their licences an undertaking to observe the following conditions:

> "(1) No intoxicating liquor shall be used or supplied upon credit. (2) No intoxicating liquor shall be supplied to any child under the age of fourteen years. (3) No games, draws, or raffles shall be suffered to take place on the licensed premises (except billiards in alehouses). (4) The licensee shall devote the whole of his time to the business of this licence. (5) The back door of the premises shall be kept locked except for domestic purposes. (6) No clubs for the purpose of a distribution of drink at Christmastide or any other period shall be permitted at the premises."

At the adjourned meeting of the licensing committee, the owners of the Commercial Hotel and of all the other on-licensed premises in Birkenhead (with one exception) refused to consent to the giving of the required undertaking by the licensees. The chairman thereupon announced that all the licences would be renewed, but that they would remain in the hands of the clerk to the licensing justices to be delivered by the clerk to the licensees upon their giving to the clerk an undertaking to observe the conditions, which were printed on the back of each licence. The meeting was then further adjourned. At the adjourned meeting the applicants for renewal requested the meeting to adopt the course of refusing the renewal of the licences in order that the matter might be taken on appeal to quarter sessions. The committee refused to adopt that course, the chairman stating that the renewal of the licences was not refused, but that the licences could be obtained by the respective licensees upon giving to the clerk the required undertaking. Subsequently the appellant Roberts applied to the clerk to the justices for his licence, but upon his refusal to give the required undertaking the licence was not delivered to him.

A rule nisi was thereupon obtained on behalf of Roberts, and on behalf of Messrs. Walker and Son, calling upon the justices to show cause why a writ of mandamus

should not issue directing them to hear and determine according to law the application for a renewal of the licence, and also a rule nisi calling upon them to show cause why a writ of mandamus should not issue commanding them to deliver to Roberts his renewal licence. The rules came before the Divisional Court on Mar. 24 when, after argument, they were discharged. The appellants appealed to the Court of Appeal.

Pickford, K.C., and *Rigby Swift* for the appellant Roberts.
Bodkin and *F. E. Smith* for the appellants, Walker & Son.
Asquith, K.C., *Low*, K.C., and *Shepherd Little* for the justices.

Cur. adv. vult.

April 4, 1905. The following judgments were read.

SIR RICHARD HENN COLLINS, M.R.—The question on this appeal is whether, although the Licensing Act, 1904, s. 1, has expressly limited the power to refuse the renewal of an existing on-licence to five named grounds [see now Licensing Act, 1953, ss. 11 et seq.], it is nevertheless competent to the justices of the licensing district to refuse it unless the applicant consents to give an undertaking to keep and observe certain conditions to be endorsed on the back of the licence as to the conduct and management of the business, and not covered by the five grounds named. The Divisional Court has decided that it is. A technical question arises also—viz., whether, even if the justices were wrong, the appellants ought not to have appealed to quarter sessions instead of proceeding as they have done by motion for a mandamus.

The court below has decided the case upon the merits, and both sides are anxious that it should, if possible, not be determined on merely technical grounds. I will address myself, therefore, to the main question above stated. The circumstances under which the Act of 1904 came to be passed are well known. The House of Lords had finally decided in *Sharp* v. *Wakefield* (1) that the discretion of justices was absolute in refusing renewals except in the case of licences falling within the Wine and Beerhouse Act, 1869, and in existence on May 1 of that year. The discretion was, of course, to be exercised judicially

> "according to the rules of reason and justice, not according to private opinion; according to law, and not humour":

see per Lord Halsbury, L.C., in *Sharp* v. *Wakefield* (1) ([1891] A.C. at p. 179). After that decision renewals were more frequently refused on grounds of general policy, and not by reason of defects in the premises or of misconduct of the licensee. *R.* v. *Howard and Others, Farnham Licensing Justices* (2), was much discussed, and legislation was called for to mitigate the hardship of individuals whose means of livelihood had been lost by the withdrawal of licences for the benefit of the community without misconduct on their part. This led to proposals of compensation, which were adopted and embodied in the Act of 1904. In order to discriminate between those who on a general reduction of licences might be deemed fairly entitled to compensation and those who might not, it was necessary to ascertain the grounds upon which the justices in any particular case had acted in refusing a renewal. It was apparently thought by the legislature that the simplest way of working out this result was to take away the unlimited discretion of justices and substitute a limited discretion based on defined grounds, which were no doubt those by which the justices had in practice guided themselves. Hence the provisions of s. 1 of the Act of 1904 controlling the discretion and obliging the justices to specify in writing the grounds of their refusal. A practice had also grown up, known to all persons conversant with licensing procedure, for the justices, having the general discretion I have referred to, to demand from applicants undertakings as to the conduct and management of the business if the licence were renewed. We were told that such undertakings were sometimes asked for and given even in cases

of licences under the Act of 1869, which had existed at the date of the passing of that Act.

This brief anticipatory statement is necessary in order to appreciate the bearing of the sections and the precise point raised for decision. Section 1 of the Act of 1904 enacts as follows:

"(1) The power to refuse the renewal of an existing on-licence, on any ground other than the ground that the licensed premises have been ill-conducted, or are structurally deficient or structurally unsuitable, or grounds connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void, shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act. In every case of the refusal of the renewal of an existing on-licence by the justices of a licensing district they shall specify in writing to the applicant the grounds of their refusal. (2) Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises and, unless it appears to quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district) an opportunity of being heard and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates."

Section 2 deals with the amount of compensation. Section 3 provides for a compensation fund. Section 4 deals with new licences and the attaching of conditions thereto. Sections 5 to 8 deal with machinery.

Then comes s. 9, which, coupled with s. 1, raises the point for decision. It enacts as follows:

"(1) The provisions of this Act shall apply to the transfer of an existing on-licence as they apply to the renewal of an existing on-licence, with the substitution of transfer for renewal. (2) If the justices of a licensing district refuse to renew an existing on-licence on the ground that the holder of the licence has persistently and unreasonably refused to supply suitable refreshment (other than intoxicating liquor) at a reasonable price, or on the ground that the holder of the licence has failed to fulfil any reasonable undertaking given to the justices on the grant or renewal of the licence, the justices shall be deemed to have refused the licence on the ground that the premises had been ill-conducted: Provided that where the justices, on an application for the renewal of an existing on-licence, ask the licence-holder to give an undertaking as aforesaid, they shall adjourn the hearing of the application and cause notice of the required undertaking to be served upon the registered owner of the premises and give him an opportunity of being heard:"

[see now Licensing Act, 1953, s. 11 (4)]. Subsections (1) and (2) create no difficulty. The latter merely makes it clear that the two classes of acts named therein may be treated by justices as falling within one of the grounds of refusal limited by the first section of the Act.

It is upon the proviso to sub-s. (2) that the decision of the court below is based. It is upon the words "required undertaking" that the learned judges mainly, if not wholly, found themselves. If these words may be fairly read as merely a synonym for the undertaking which the justices are supposed to have "asked for" in the

earlier part of the sentence, the whole fabric of implication based on the use of the word "required" falls to the ground. Unless it is to be read as equivalent to "insisted upon as a condition of renewal," it cannot ground the inference drawn from it, that the legislature assumed the existence of a power to require in that sense an undertaking, as surviving the inhibition of the first section, with the result that it must be taken to have sanctioned an additional ground for the refusal of a licence as arising upon a failure to give an undertaking. In other words, we must first construe "required" in a sense not necessarily demanded by the context, and then infer that it was intended by the use of that word to repeal or modify the express and unambiguous enactment of the first section, and vest in the licensing justices another ground of refusal, although the power to refuse except on the five grounds named has been expressly withdrawn from them and vested in the quarter sessions. Surely a bold inference to draw from such slight materials. Down to this point in the discussion there can, it seems to me, be no possible doubt as to the effect of the enactment. The intention to limit the discretion to refuse a renewal to the grounds named in s. 1 is clear beyond controversy. "The power to refuse the renewal of an existing on-licence on any ground other than" the five named "shall be vested in quarter sessions instead of the justices of the licensing district"; and to withhold a renewal unless the applicant will give an undertaking as to the mode of carrying on the business is, in my judgment, the same thing as to refuse it on a ground other than one of the five. A fortiori when the undertaking relates to matters outside the five grounds. This provision is express and absolute, and leaves nothing to implication, and yet it is contended that, notwithstanding this clear and peremptory inhibition in the governing enactment, it is to be read as not meaning what it says, but as covering and permitting a refusal on a ground not falling within any of those named, but the right to act on which is to be implied out of a proviso to a subsection which is addressed, by way of greater caution apparently, to providing that a particular line of conduct may be deemed misconduct within the governing enactment.

In my judgment, it is not competent for this court to introduce by implication only a provision directly contradictory of an unambiguous enactment addressed to the very point itself. If we are at large to draw inferences and make implications, why are we to leave out the inference arising from the fact that the legislature has not only abstained from enacting this sixth ground of refusal, but has by the limitation of five other grounds directly excluded it? And why are we to suppose that it intended that the refusal to give an undertaking should be a ground of refusal of the renewal when, its attention being obviously called to the existing practice as to undertakings, it addresses its enactment expressly to the breach of such undertakings when given, and not to the refusal to give them at all? The proviso, as I have pointed out, does not in its context purport to relate at all to the first section, and surely, if there is any apparent inconsistency between the two, it is the scope of the proviso which must be limited so as to make it harmonise with the primary and unambiguous inhibition of the first section. To contradict the plain language of the Act by a surmise based on such materials is, in my judgment, to substitute legislation for interpretation. But it cannot be contended that the proviso is altogether nugatory if it be held not to add another ground of refusal to those named in the first section. We learn that such undertakings were sometimes given in cases under the Act of 1869, though it is clear that the justices had no power to refuse the renewal except upon the four grounds named in that Act, and it may be that others hereafter may do what one of the applicants has done in this case, voluntarily give the undertaking asked for.

Though the court below have arrived at the conclusion that the justices were acting within their powers in refusing renewals in the cases under appeal, I am, nevertheless, entitled to pray in aid of my own opinion their decision in the case of a licence in existence before May, 1869, and governed by the Act of that year. They have held that in that case the justices had no power to exact the undertaking, presumably because to do so, was to refuse upon a ground other than the

four named in that statute: see *R.* v. *Grimwade, Ex parte Catchpole & Co.* (3). Now, by s. 9 (3) of the Act of 1904 the grounds mentioned in s. 8 of the Act of 1869 are substituted as the grounds on which the power to refuse the renewal of an existing licence is reserved to the justices of the licensing district. On what grounds they can have held that the justices had no power to refuse the renewals in those cases which do not equally apply to the cases under review I am, with deference, at a loss to determine. The words of s. 8 of the Act of 1869 are no more clear and peremptory than those of s. 1 of this Act, and the practice as to asking undertakings from applicants under the former Act existed in some places. The words of the redoubtable proviso do not purport to be limited to one class of licences more than another. They are,

> "where the justices, on an application for the renewal of an existing on-licence, ask the holder to give an undertaking."

Why is this provision to be limited to licences other than those existing in May, 1869, and regulated by the Act of that year? If it does apply to them, and no reason has been given why it does not, then the court below, on their decision, must read the word "required," on which they rest the whole weight of their conclusion in the cases now under discussion, in two different senses according to whether the licence is one governed by the conditions of s. 8 of the Act of 1869 or not—in the former class in the sense contended for by the appellants, viz., as a synonym for "asked for"; in the latter in the sense which they have adopted as governing their decision in the cases now under appeal, viz., "stipulated for as a condition of allowing the renewal."

While cordially agreeing with the decision of the court below in the case under the Act of 1869, I must, with great deference, express my inability to adopt their conclusion in the cases which are the subject of this appeal. With regard to the technical point, I think that the true effect of what the justices did was that they did not refuse the renewals in such a form as to admit of an appeal to quarter sessions. In fact, when asked to give a positive refusal so as to facilitate an appeal, they declined to do so, and insisted that they had allowed renewal. What they, in fact, had done was to cause licences to be printed containing on their face a variation from the statutory form by the introduction of the following words:

> "This renewal licence is granted upon the licensee giving an undertaking to keep and observe the conditions endorsed on the back hereof";

and on the back were endorsed six conditions. These licences were deposited with their clerk, to be delivered to the applicant on his giving the undertakings. Not having, in their view, refused the renewals, they did not specify in writing to the applicant the grounds of their refusal. Nevertheless, it is now contended on their behalf that the applicant was bound to treat what they had done as a refusal to renew, and to have appealed if he objected, and that the remedy by mandamus was, therefore, not open. It seems to me that, if I am right in the construction I have placed upon the statute, what the justices have done is to decide in favour of renewal, with a condition which they had no power to impose and which is, therefore, nugatory, and that a mandamus ought to go to compel them to deliver the renewal licences without the condition. If their decision cannot be so treated, then I think the result is that they have not decided the point submitted to them at all, and that a mandamus should go, as in *R.* v. *Bowman* (4), and *R.* v. *Cotham* (5). In my opinion, therefore, the appeal must be allowed.

MATHEW, L.J.—In these cases I differ, I need not say with much hesitation, from the opinions of my learned colleagues. I think the judgments of the Divisional Court were right, and ought to be affirmed.

The statute which we are called on to construe is entitled:

> "An Act to amend the Licensing Acts, 1828 to 1902, in respect to the extinction of licences and the grant of new licences,"

and by s. 10 of the Act is to be construed as one with the Licensing Acts aforesaid. Before the statute in question the right of appeal to quarter sessions was granted to all persons aggrieved by any act of any justices done in or concerning the exercise of their powers. Where there was a refusal to grant the renewal of a licence, the decision of the licensing justices might be reviewed by quarter sessions, and subject to this their discretion was absolute. For many years this practice had been followed all over England of granting a renewal of a licence upon an undertaking to observe certain conditions intended to secure the orderly and proper management of licensed houses. Each applicant was required to satisfy the magistrates either by verbal or written assurances that the conditions which they required would be complied with. If any objection were made to the act of the justices in this respect it seems clear that there would be an appeal to quarter sessions. When the Act of 1904 was passed, the licences then in existence were for the most part of this limited character. The undertaking which was in these cases required was admitted to be of the usual character, and to be perfectly reasonable. This is shown by the statements which counsel were instructed to make to the justices. For many years the conditions had been accepted and assented to by those interested in licensed premises in Birkenhead.

The question upon this appeal is whether the procedure which had been previously adopted of granting a renewal of a licence upon conditions had, under the Act of 1904, been placed beyond the jurisdiction of the justices. This was said to be a necessary implication from the language of the statute. Under s. 1 the absolute discretion previously conferred upon the justices was confined to the cases therein specified, and in respect of the decision of the justices in those cases there would be for persons aggrieved an appeal to quarter sessions. Refusal to renew in cases other than those specified in s. 1 was vested in quarter sessions instead of the justices of the licensing district. No provision is made for an application in such cases to quarter sessions. By sub-s. (2) where the justices came to the conclusion that the renewal of any particular licence required consideration, they were to refer the matter, together with their report thereon, to quarter sessions, and that court was, as appears from the rules, to have the power either to continue the licence or to cancel it subject to the payment of compensation as provided by the Act. They appear to have no further powers. This enactment only applies when there has been no default on the part of the applicant, and the only question is whether the licence should be continued or withdrawn. It has no application to cases where the renewal is granted on the undertaking to fulfil conditions. There is no ground for any implication so far that the authority of the licensing justices to impose conditions was in any way affected. That there was no distrust of the discretion of the justices is shown in s. 4, where they are empowered to attach to the grant of a new licence such conditions as they think proper in the interests of the public. Further, under s. 9, sub-s. (2) where an applicant agrees to the condition, the justices may, upon giving an opportunity of being heard to the registered owner, grant the renewal in the exercise of their discretion, and may disregard any objections the owner may offer.

But then it is said the language of sub-s. (2) shows that the discretion of the justices can no longer be exercised when the holder of the licence objects to any conditions and refuses to enter into any undertaking. The enactment, it is argued, only applies where there has been a consent to a condition, and where there has been no consent there can be no condition or undertaking. Here it is said that, as the applicant refused to give an undertaking, the justices had no power to refuse the licence on any ground. But I see no reason why the enactment should receive this interpretation. The section in terms applies only where consent has been given. It is intended to provide a mode of punishment where an undertaking has not been fulfilled. It has no reference to the question of the terms upon which a renewal may be granted, but it is said that the proper inference from the language of the section is that consent is optional; in other words, that there should be added by implication to the section a proviso that

A an applicant should not be compellable to consent to a condition, however reasonable it may be. But, in the first place, under the second clause of s. 9 (2) the authority of the justices to require an undertaking seems to be taken for granted. In the next place, this construction would have the effect of nullifying the section. No applicant would consent to an interference with the conduct of his business, particularly where the breach of an undertaking might jeopardise his licence. B Further, the control which has hitherto been exercised by the justices would be completely swept away. This condition of things would, no doubt, be an advantage to publicans, but it would be secured at the expense of the interests of the community in each locality.

Without clear language I do not think that there should be attributed to the legislature the intention to sanction so formidable and, if I may be permitted to C hazard the opinion, so lamentable, a revolution in the mode which has hitherto been adopted in administering the Licensing Acts. There is no apparent reason for the supposed change. With respect to what took place before the licensing justices, the evidence appears to me to be quite clear. If there were any doubt, it is removed by the subsequent correspondence. The justices declined to say that they refused the applications, for the reason that they were willing to grant D them if their conditions were complied with. They were quite right in declining to give any effect to the hollow assurances offered on behalf of the trade that the publicans in the locality were anxious to do what the justices thought right. The sure test of their willingness was that they should give the undertaking required of them.

E **COZENS-HARDY, L.J.**—This appeal raises an important and difficult question as to the powers of licensing justices under the Licensing Act, 1904. The Birkenhead justices, acting in perfect good faith and with the sole desire to promote the welfare and order of the borough, desire to exact from all applicants for the renewal of on-licences certain undertakings, which I assume to be reasonable. The licences are in the usual form, except that the following clause is inserted:

F "This renewal licence is granted upon the licensee giving an undertaking to keep and observe the conditions endorsed on the back hereof."

Six conditions are endorsed, but it is not contended that all those conditions should be exacted in the case of every house. The justices deny that they have refused the licences; on the contrary, they assert that they have renewed the G licences, although the clerk has been directed not to hand them out unless and until the undertakings are given. The licence-holders decline to give any undertaking. The Divisional Court have held that the justices may require a reasonable undertaking to be given as a condition of granting a renewal; and the main point in this appeal is whether that view is correct.

Prior to Jan. 1, 1905, justices had a general discretion to grant or refuse H renewals of licences of the class with which this appeal alone deals: *Sharp* v. *Wakefield* (1); and a practice very naturally grew up by which the justices made terms with the licence-holders, and insisted, as a condition of renewal, that certain undertakings should be given. These undertakings were sometimes endorsed on the licence, and sometimes entered in the clerk's book, and sometimes were verbal. I cannot doubt that this was a most wholesome practice. The undertakings were I given because without them the licence would not have been renewed. The undertakings were observed because a wilful breach would have almost certainly been a fatal objection when the next application for renewal came before the justices. But, except in the manner and to the extent above indicated, these undertakings were voluntary and had no sanction. They are not mentioned in any of the licensing statutes. A great change was effected by the Licensing Act, 1904, in the position of licensing justices. By s. 1 the power to refuse renewal on any ground other than one of five particular grounds is taken away from the licensing justices and is vested in quarter sessions, and quarter sessions can only act on a reference

from the justices and on payment of compensation. The only one of the five grounds on which the justices may refuse a renewal which need be referred to is "that the licensed premises have been ill-conducted." A

It is, however, contended, that, notwithstanding the plain language of this subsection, there is to be found in s. 9 (2) an implied power in the justices to refuse renewal unless reasonable undertakings are given, or, which amounts to the same thing, to grant renewal only upon such undertakings being given. I cannot adopt this contention. It really involves the addition of a sixth ground on which the justices may refuse. The first paragraph of the subsection lends no support to the contention. It is fully satisfied by regarding the undertaking as one which is not exacted, but volunteered. And although the second paragraph of the subsection contains the words "the required undertaking," I think the context shows that "required" is merely equivalent to asked for or requested. The judges in the Divisional Court seem to have thought that the construction which I have adopted renders s. 9 (2) perfectly useless, because no licence-holder would be so foolish as to volunteer an undertaking the non-fulfilment of which might entail the refusal of renewal without possibility of compensation. With the utmost respect, I am unable to concur in this view. Although the general discretion upon which the former practice of undertakings rested is gone, it is easy to see that it may still be greatly to the interest of the licence-holder to give a reasonable undertaking. For example, the justices may ask for a reasonable undertaking which they think ought to be given, and may say that if it is not given they will refer the matter to quarter sessions, under s. 1 (2), with a view to the refusal of renewal. The licence-holder will be very desirous not to run the risk of having the renewal refused by the quarter sessions. A refusal means to him the loss of his occupation and trade, and it will be a poor consolation to him to know that compensation will be payable "to the persons interested in the licensed premises"—see s. 2 (1) (2)—for the fraction attributable to his interest will in most cases be very small. Nor does it appear unreasonable that the registered owner of the licensed premises should have an opportunity of being heard before a voluntary undertaking is given, inasmuch as the giving of such an undertaking may result in the refusal of the licence and the loss of the compensation, the greater part of which would go to the owner. And, further, it is perfectly reasonable that the breach of an undertaking voluntarily given, after notice to the registered owner, should be held to amount to ill-conduct, so as to bring the case within the jurisdiction of the justices under s. 1. B C D E F

In my opinion, the old practice of exacting undertakings on renewals of on-licences cannot survive the destruction of the general discretionary power to grant or to refuse, to which the existence of the practice was due. It is not for us to legislate; our duty is limited to interpretation. In my opinion, the introduction in the licence in the present case of the undertaking which is not found in the form prescribed by the Secretary of State under s. 48 of the Licensing Act, 1872, was not authorised. I agree with the judgment of the Master of the Rolls on this point. It is, however, contended by the respondents that, even if the justices were wrong in their view of the law, the appellants ought to have appealed to quarter sessions under s. 27 of the Alehouse Act, 1828, and that the remedy by mandamus is not available. I think this objection would be valid if the justices had refused, on wrong grounds, to grant renewal: *R.* v. *Smith* (6). But they did not refuse. They attempted to attach a condition or impose a term which was not authorised, and in such a case the remedy by mandamus is appropriate: *R.* v. *Bowman* (4). I think the proper order is that a mandamus should issue to the justices commanding them to deliver up to the applicant a renewed licence in the proper statutory form, without exacting any undertaking. *Appeal allowed.* G H I

Solicitors: *Godden, Son & Holme*, for *Thompson, Hughes & Co.*, Birkenhead; *Lloyd-George, Roberts & Co.*, for *Gerrard Copeland*, Birkenhead.

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

A

Re WINGFIELD AND BLEW

[Court of Appeal (Vaughan Williams, Romer and Cozens-Hardy, L.JJ.), August 3, 1904]

B [Reported [1904] 2 Ch. 665; 73 L.J.Ch. 797; 91 L.T. 783; 48 Sol. Jo. 700]

Husband and Wife—"Necessaries"—Right of wife to pledge husband's credit—Costs of matrimonial proceedings—Effect of decree of judicial separation—Petition for divorce brought by husband after decree—Costs of proceedings for alimony—Costs of detinue action begun by wife before decree.

C *Solicitor—Retainer—Withdrawal—Must be definite, clear and precise.*

In October, 1901, the husband presented a petition for divorce. In November his wife retained solicitors to defend her in the proceedings. In December, 1901, she employed the same solicitors to begin an action for detinue against her husband with reference to certain of her property. On April 25, 1902, the husband's petition for divorce was dismissed, and the wife, on a counter-

D charge in her answer, was granted a decree of judicial separation. On July 15, 1902, the husband presented a second petition for divorce. On Oct. 30, 1902, the wife obtained judgment in the detinue action. On Feb. 27, 1903, the second petition for divorce was dismissed.

Held: a wife judicially separated from her husband has no authority to pledge his credit for necessaries, not even for necessaries in respect of matters

E which were not within the contemplation of the parties or within the scope of the permanent alimony ordered, and, therefore, the wife was not entitled to pledge the husband's credit for her costs of the second petition brought by him, but the husband was liable for (i) the costs of the proceedings for alimony, for they were to be considered as part of the proceedings of the first petition, and (ii) the costs of the action for detinue which had been begun before the

F wife had obtained the decree of judicial separation, the husband not having withdrawn the retainer of the solicitor employed by the wife.

Held, further: when a good retainer has been given at the commencement of an action something definite, clear, and precise is required to withdraw that retainer and to get rid of its effect, and, therefrom, the solicitor's retainer in the action for detinue was not determined by his having notice of the decree

G of judicial separation.

Notes. Considered: *Sheppard* v. *Sheppard*, [1905] P. 185. Referred to: *Gilroy* v. *Gilroy* (1914), 58 Sol. Jo. 378.

As to a wife's authority to pledge her husband's credit, see 19 Halsbury's Laws (3rd Edn.) 856 et seq.; and for cases see 27 Digest (Repl.) 173 et seq. As to a solicitor's retainer, see 36 Halsbury's Laws (3rd Edn.) 59 et seq.; and for cases

H see 42 Digest 47 et seq. For Matrimonial Causes Act, 1950, see 29 Halsbury's Statutes (2nd Edn.) 388.

Cases referred to:

(1) *Harrison* v. *Harrison* (1888), 13 P.D. 180; 58 L.J.P. 28; 60 L.T. 39; 36 W.R. 748; 4 T.L.R. 646, C.A.; 27 Digest (Repl.) 680, *6496*.

I (2) *Ottaway* v. *Hamilton* (1878), 3 C.P.D. 393; 47 L.J.Q.B. 725; 38 L.T. 925; 42 J.P. 660; 26 W.R. 783, C.A.; 27 Digest (Repl.) 198, *1575*.

(3) *Gordon* v. *Gordon*, [1904] P. 163; 73 L.J.P. 41; 90 L.T. 597; 52 W.R. 389; 20 T.L.R. 272; 48 Sol. Jo. 297, C.A.; 27 Digest (Repl.) 595, *5569*.

Also referred to in argument:

Turner v. *Rookes* (1839), 10 Ad. & El. 47; 2 Per. & Dav. 294; 8 L.J.Q.B. 211; 113 E.R. 18; 27 Digest (Repl.) 201, *1597*.

Grindell v. *Godmond* (1836), 5 Ad. & El. 755; 2 Har. & W. 339; 1 Nev. & P.K.B. 168; 6 L.J.K.B. 31; 111 E.R. 1351; 27 Digest (Repl.) 201, *1596*.

Hunt v. *De Blaquiere* (1829), 5 Bing. 550; 3 Moo. & P. 108; 7 L.J.O.S.C.P. 198; 130 E.R. 1174; 27 Digest (Repl.) 195, *1542*. A

Manby v. *Scot* (1663), 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O. Bridg. 229; 1 Sid. 109; 83 E.R. 1065, Ex. Ch.; 27 Digest (Repl.) 173, *1273*.

Underwood, Son and Piper v. *Lewis*, [1894] 2 Q.B. 306; 64 L.J.Q.B. 60; 70 L.T. 833; 42 W.R. 517; 10 T.L.R. 465; 38 Sol. Jo. 479; 9 R. 440, C.A.; 42 Digest 51, *415*. B

Court v. *Berlin*, [1897] 2 Q.B. 396; 66 L.J.Q.B. 714; 77 L.T. 293; 46 W.R. 55; 13 T.L.R. 567; 41 Sol. Jo. 715, C.A.; 36 Digest (Repl.) 472, *433*.

Appeal by the husband in a matrimonial suit against a decision of WARRINGTON, J., on an application by solicitors for a review of taxation which referred to the costs of the wife incurred in defending proceedings for a divorce brought by the husband, and with reference to other proceedings incidental thereto, the question raised being whether she had authority to pledge her husband's credit for those costs. C

Harry Pinson and Joanna Mary Pinson were married in January, 1888. In August, 1901, the husband turned his wife out of doors, and on Oct. 30 he presented a petition for divorce. On Nov. 29, 1901, the wife retained Messrs. Wingfield and Blew to act for her as her solicitors in defending her against that petition. On Dec. 13, 1901, she employed them to commence an action for detinue against her husband with reference to certain clothes belonging to her. On Feb. 4, 1902, an order for interim alimony was made. On April 25, 1902, the petition for divorce was tried, and was dismissed with costs. It was held that the wife was entitled to a judicial separation, and a decree to that effect was made, giving her the custody of the children. On July 15, 1902, the husband presented a second petition for divorce against the wife alleging different acts of adultery from those alleged in the first petition. On Aug. 1, 1902, an application for permanent alimony was made by the wife. That application was resisted by the husband on the ground that the second petition was in substance a continuation of the first proceedings, and the result of it might be to show that the wife was not entitled to permanent alimony, or not entitled to it on the same scale as she would have received it under the decree for judicial separation. D E F

The registrar before whom the matter came refused to grant permanent alimony, but he increased the interim alimony. On appeal the judge refused to interfere with the registrar's order on the ground that the registrar had a discretion which he had exercised, and that he (the judge) ought not to interfere. On Oct. 30, 1902, the detinue action was tried, with the result that the wife obtained a judgment for costs as between party and party against her husband. The husband, on the other hand, established a counterclaim for a ring which he said the wife had retained, and got judgment on the counterclaim with costs. On Feb. 27, 1903, the second petition for divorce was dismissed with costs, and on Mar. 17, 1903, permanent alimony was decreed, it being ordered that all arrears should be paid as from the date of the decree for judicial separation. On June 13, 1903, Messrs. Wingfield and Blew delivered to the husband their bills of costs relating to the proceedings connected with the divorce, including the first and second petitions and the alimony proceedings, and also the costs of the action for detinue. The husband had already paid the party and party costs of these proceedings, and the claim made by the solicitors was for the difference between those costs and the costs as between solicitor and client. On July 29, 1903, Messrs. Wingfield and Blew obtained an order under s. 37 of the Solicitors Act, 1843, for taxation of their costs, which recited that it was alleged that the solicitors were employed by Harry Pinson by his agent, Joanna Mary Pinson, his wife, to transact matters of business for her as such wife of and incidental to proceedings for divorce instituted by Harry Pinson between the years 1901 and 1903 inclusive. The taxing master considered that the husband was liable for the taxed costs as between solicitor and client to the date of the order for judicial separation, and for any subsequent costs in respect G H I

of the completion of that order, and for the costs of the detinue action to the same date. Messrs. Wingfield and Blew took out a summons for a review of the taxation, which was heard on July 11, 1904, by WARRINGTON, J., who held that the husband was liable for the costs. The husband appealed.

By s. 26 of the Matrimonial Causes Act, 1857 [see now Matrimonial Causes Act, 1950, s. 21 (1) (b)] :

> "In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied to her use."

Rowden, K.C., *Montague Lush*, K.C., and *Sheldon* for the husband.
Norton, K.C., and *Van Neck* for the solicitors.

VAUGHAN WILLIAMS, L.J.—I propose to deal with the three separate divisions of costs in question in this action one after the other. The first one I propose to deal with is the costs of the husband's second petition for divorce. I cannot agree that the second petition was part and parcel of the first petition so that the retainer of the solicitor to act in the first petition can be considered as a retainer of that solicitor to act in the second petition in such a sense that he would have been bound to go on with the second petition unless for some good cause he could have determined his obligation under that retainer and have got rid of the retainer. I think that his retainer came to an end when that petition was disposed of. I wish to say, with respect to the conclusion which WARRINGTON, J., arrived at, that he seems to have construed s. 26 of the Matrimonial Causes Act, 1857, as if that section, instead of defining the status of a wife after an order had been made for judicial separation in the way in which it was, had put the wife in exactly the same position as she would have been under the old law prior to the passing of the Act. I do not think that that is the result of s. 26. I do not think that it could have been said that after an order for judicial separation the authority of the wife to pledge her husband's credit continued in respect of necessaries which the alimony allowed could not have been supposed to cover. I do not think that that is the meaning of the Act of Parliament. The words of the section are very strong. In my opinion, the effect of that section is in every case of a judicial separation absolutely to do away with the right of the wife to pledge her husband's credit while she is so separated, and I think that it is not possible to limit that by saying that she is to have a right to pledge his credit in respect of some matters which become necessaries by reason of the husband's conduct towards her, as for instance, by reason of his commencing proceedings for a dissolution of marriage.

With regard to the costs of the action of detinue as between the husband and wife, it seems to me that, it being admitted that at the time when that action was commenced the wife had the authority of her husband to retain the solicitor to act for her—not by reason of any express authority, but by reason of the relation of coverture which was then existing—the mere fact that the order for judicial separation was made did not bring that retainer to an end. I think that the retainer was for this purpose an indivisible retainer, and that it continued until the husband did something to bring it to an end. It was contended that it was brought to an end by the judicial separation by reason of these words in s. 26 of the Act of 1857 :

> "and her husband shall not be liable in respect of any engagement or contract she may have entered into."

We were asked to go to the length of saying that every contract which remained in fieri, and was not fully performed, but which was of such a nature that the wife when she entered into it had authority to pledge her husband's credit by reason of the coverture, ceased to bind the husband from the moment that an order for judicial separation was made. I do not think that the words of that section involve that proposition, and it is obviously one of such a nature that we should not so read the section unless the words were so plain as to make it clear that that was the intention of the legislature. Having regard to the words

> "in every case of a judicial separation the wife shall whilst so separated be considered a feme sole,"

and reading the words

> "and her husband shall not be liable in respect of any engagement or contract she may have entered into"

in connection with the words in the earlier part of the section, it appears to me that that section does not relieve the husband from liability in respect of contracts made on his account by his wife under her authority, which contracts were in existence and undetermined at the time of the judicial separation.

I have now only to deal with the costs so far as they relate to the getting and perfecting of the order for permanent alimony which was a necessary consequence of the making at the instance of the wife of an order for judicial separation. I do not mean by "necessary consequence" that there was no discretion in the court. There was a discretion, but, at any rate, it was the usual and ordinary consequence. It appears to me that we ought to treat these costs as covered by the original retainer given in the first divorce suit by the wife, and that they ought to be borne by the husband. With regard to the suggestion that the order for judicial separation brought the liability of the husband to an end so soon as the order was made, I have nothing to add to what I have already said. I do not see that it is possible to suggest, so far as *Harrison* v. *Harrison* (1) is concerned, that there is anything in the judgments of the lords justices on which such a proposition could be founded. As regards *Ottaway* v. *Hamilton* (2), to this extent I assent to what was said by counsel for the husband. I think there is more to be said in his favour upon that authority than there was upon the authority of *Harrison* v. *Harrison* (1). Still, having carefully read through the portion of the judgment of BRAMWELL, L.J., upon which he relied, I cannot see that those observations compel us to come to any such conclusion as he suggested, although they are not so inconsistent with it as the judgments in *Harrison* v. *Harrison* (1). Under these circumstances I think that the order of WARRINGTON, J., must be modified in the way I have mentioned.

ROMER, L.J.—I also have come to the conclusion that the decision of WARRINGTON, J., was right, except in respect to the question of the costs of the second divorce proceedings. I differ from him there, because I come to a different conclusion as to the true effect of s. 26 of the Matrimonial Causes Act, 1857. In the first place I think that it cannot be properly said that the second divorce proceedings could be regarded as a continuation or part of the original divorce proceedings. I think that the second divorce petition presented by the husband must be regarded as a distinct proceeding on his part—one which would not be covered by the original retainer given by him through his wife's implied agency in the case of the original petition. That being so, we have to consider what is the effect of s. 26 of the Act upon the position of the wife in respect of that second petition. When that second petition was presented the wife had obtained a decree for judicial separation. Upon the construction of s. 26 I do not feel any difficulty. I think that the first part of the section is clear in that it takes away, from and after the time of judicial separation, all right and power on the part of the wife to pledge her husband's credit or to contract on his behalf. The second part of the section merely gives the wife power to make the husband liable for necessaries

in a special case, that case being where upon a judicial separation alimony has been decreed to be paid and the husband has not duly paid it. That construction of the section is fatal to the wife in respect of the costs of this second petition because she cannot allege, in order to justify her retainer of the solicitor on behalf of the husband, that she had his implied authority under the section, inasmuch as the husband had in fact duly paid the alimony which he had been ordered to pay. Therefore she did not fall within the exception in the second part, and her general agency was wholly taken away by the first part. As the point has been argued, and may have a bearing on other parts of this case, I should also like to add that the words in the first part of the section "in respect of any engagement or contract she may have entered into" are, in my opinion, intended to be governed by the words "whilst so separated" at the beginning of the section. It is to be noted that the section commences by saying that

> "in every case of a judicial separation the wife shall, whilst so separated, be considered a feme sole."

The section is not intended to cover any question, and is not considering any question, of what had been done by the wife before the decree of judicial separation. I think that the true construction of the whole section is that it is only considering the rights and powers of the wife after judicial separation has been awarded, and during the period of judicial separation. That decides the only point upon which I differ from WARRINGTON, J.

As to the other points I may be brief. First, as to the costs of the detinue action. In my opinion, for the purpose of the question which we have to consider here, there can be no true distinction between the case of an implied authority given by the husband to the wife to retain a solicitor and the case where the husband had expressly given her authority to retain a solicitor, and the wife had so retained him. In that case the solicitor starts with having authority to prosecute this detinue action on behalf of the wife but on the retainer of the husband. He is bound to prosecute the action on that retainer, and is certainly entitled to do it on the authority and liability of the husband, at any rate until his retainer is withdrawn. In the present case there was no withdrawal by the husband of the retainer. The solicitor, therefore, was bound, or at least entitled, to go on with the action on behalf of the wife, unless, indeed, it could be said that, he having had notice of the judicial separation, that was equivalent to the husband giving him express notice of withdrawal. In my opinion, that notice cannot have that effect. It is quite conceivable that, notwithstanding the judicial separation, the husband may have wished that action to be properly conducted to a conclusion by the wife and by means of a solicitor acting on his credit. It may well be that the husband might have thought that the wife had not sufficient means to conduct such an action satisfactorily, and was quite willing that the solicitor should continue to act for the wife. For this and, perhaps, for other reasons I am satisfied that mere notice of judicial separation, even with notice of what the general effect of this separation is under s. 26 upon the position of the wife, would not affect the operation of the retainer which was given before the judicial separation, the operation of that retainer not coming within the provisions of s. 26 at all. Therefore, I think that the judge came to a right conclusion as to that. I need not consider whether the husband could have even intervened by express notice of withdrawal of retainer in such a case as this where the solicitor had been originally instructed and retained by the husband to conduct proceedings of the wife against the husband and those proceedings were still pending. That is a question I will reserve for consideration when it arises.

Lastly, as to the costs of the proceedings for alimony. I agree in thinking there is more difficulty as to that point, but I think that those proceedings are covered by the proceedings under the first petition for divorce. I think that they may be fairly considered as part of the ordinary proceedings in a divorce suit such as this was—necessary in order to complete the proceedings and falling within the con-

templation of any party to the suit who gives a retainer to a solicitor to act and who does not expressly withdraw his retainer pending the proceedings. I think that the alimony proceedings may be fairly considered to be necessary and proper proceedings and to be part of the general proceedings on a divorce petition—that is to say, proceedings which the solicitor would be bound, or at least entitled, to conduct without a fresh retainer. Therefore the costs of the alimony proceedings are governed by the same principle as the costs of the detinue action.

COZENS-HARDY, L.J.—I agree. I start with the admission that the husband cannot dispute the original retainer in the first divorce suit and in the detinue action. He has paid, or has expressed his willingness to pay, solicitor and client costs up to the date of judicial separation on that footing. It may be that he might have denied the retainer at an early stage of the divorce proceedings, and might have relied on the change in the law introduced by the Married Women's Property Act. It is not necessary to express, and I do not express, any opinion as to that.

There are three points to be considered. First, as to the costs of the first divorce petition after the order for judicial separation. The suit was not finally ended by that decree. The divorce proceedings were of this nature. The husband commenced proceedings in the Divorce Court claiming a divorce on the ground of adultery. The wife by her answer claimed judicial separation according to the provisions of the Act of Parliament on the ground of cruelty, and before the case came on she obtained an order for alimony pendente lite. That alimony was increased from time to time, but no permanent alimony was obtained until a much later date. It appears to me that all these proceedings in respect of alimony which were taken either under s. 24 or under s. 32 of the Matrimonial Causes Act, 1857 [relating to an order for the payment of alimony to a trustee and to an order that the husband shall secure to the wife a sum for alimony: see now Matrimonial Causes Act, 1950, s. 27 and s. 19 respectively], ought properly to be regarded as proceedings in the first divorce suit, proceedings which were reasonably in contemplation of the parties when the admitted retainer was given to the solicitor to act for the wife in that suit. That would be my impression if there were no authority on the point, but when one considers *Harrison* v. *Harrison* (1), although it may be said, and said with truth, that as the husband was not a party to those proceedings it was not an absolute decision, still it is impossible to read the judgments of the three learned judges in that case without seeing that the whole foundation of the order refusing the solicitor a charge on the wife's property for his costs was that he had a right to proceed against the husband to recover the costs incurred in that case after the order absolute on the footing of a retainer granted at the beginning of the divorce suit. The recent decision of *Gordon* v. *Gordon* (3) really proceeds on the same footing, and involves the same principle. Therefore, I think that WARRINGTON, J., was quite right in saying that the husband is liable for all the steps up to the order for permanent alimony in the first divorce proceedings.

With regard to the action of detinue that is a much plainer and easier case than the other. It is a simple case of an indivisible retainer not withdrawn by any act of the husband. It is said that, inasmuch as the solicitor had notice of the order for judicial separation, which would prevent the wife from giving a new retainer, that notice ought to be treated as equivalent to a withdrawal of the old retainer. I cannot follow that. When once a good retainer has been given at the commencement of an action something definite, clear, and precise is required to withdraw that retainer, and to get rid of the indivisible effect of that retainer.

As to the third point, I cannot agree with WARRINGTON, J. I think that he was influenced by s. 16 of the Act of 1857 [see now Matrimonial Causes Act, 1950, s. 14 (1)], which says that a sentence of judicial separation "shall have the effect of a divorce a mensa et thoro under the existing law," although it goes on to say "and such other legal effect as herein mentioned," and that he applied in the consideration of this case the old authorities which held that where a divorce

A a mensa et thoro had been granted and alimony had been allowed, that alimony was only a provision for such necessaries as were reasonably in the contemplation of the parties or of the court, and did not prevent the wife from entering into a contract for necessaries in respect of a matter which was not within the contemplation of the parties, or within the scope of the alimony which was allowed. The difficulty I feel is that s. 26 appears to me to cut away and destroy the foundation B of that limitation. The language of the section is too strong. It expressly enacts with one exception only that in every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole, and the husband shall not be liable in respect of any engagement or contract she may have entered into, as I read it, while the judicial separation shall continue. That being so, it appears to me that the old authorities have nothing to do with the matter. The proviso C at the end of the section cannot help the wife because it is admitted that the husband has paid the alimony which he was ordered to pay. He is not, therefore, liable within the exception, and he is expressly exempt under the first part of s. 26. I think that the decision of WARRINGTON, J., was entirely right except as to this one point, but as to that the order must be amended. There will be no costs here or below.

D Solicitors: *J. Mitchell*, for *A. Willcock & Taylor*, Wolverhampton; *Wingfield & Blew*.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law*.]

E

F

Re SUSSEX BRICK CO.

[COURT OF APPEAL (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.), February 12, 1904]

[Reported [1904] 1 Ch. 598; 73 L.J.Ch. 308; 90 L.T. 426; 52 W.R. 371; 11 Mans. 66]

G *Company—Winding-up—Register—Rectification—Power of court to order after company in liquidation.*

Under s. 35 of the Companies Act, 1862 [now Companies Act, 1948, s. 116], the court had power to rectify the register of members of a company if the name of any person was, without sufficient cause, omitted from the register, or if unnecessary delay took place in entering on the register the fact of any H person having ceased to be a member of the company. By s. 98 of the Act of 1862 [now Companies Act, 1948, s. 257 (1)]: "As soon as may be after making an order for winding-up the company the court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act . . ."

I **Held:** the power conferred on the court by s. 35 was independent of and not affected by s. 98, and, therefore, the court had power, in a case falling within the terms of the section, to rectify the register although the company had gone into liquidation; the order might be made nunc pro tunc so as to operate from the time when the alteration in the register should have been made; the grant of the order was fully in the discretion of the court; and where injustice might result it might be made subject to conditions or refused.

Notes. As to the rectification of the register or list of contributories of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 216–220, 641–645; and for cases see

9 DIGEST (Repl.) 215 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452. A

Cases referred to:

(1) *Re Joint Stock Discount Co., Nation's Case* (1866), L.R. 3 Eq. 77; 36 L.J.Ch. 112; 15 L.T. 308; 15 W.R. 143; 9 Digest (Repl.) 223, *1424*.

(2) *Re Scottish Universal Finance Bank, Breckenridge's Case* (1865), 2 Hem. & M. 642; 71 E.R. 613; sub nom. *Re Scottish and Universal Finance and Banking Association, Buckridge's Case*, 12 L.T. 796; 13 W.R. 677; 9 Digest (Repl.) 227, *1467*. B

(3) *Reese River Silver Mining Co.* v. *Smith* (1869), L.R. 4 H.L. 64; 39 L.J.Ch. 849; 17 W.R. 1042, H.L.; 9 Digest (Repl.) 135, *770*.

Also referred to in argument: C

Re London, Hamburg and Continental Exchange Bank, Ward and Henry's Case (1867), 2 Ch. App. 431; 36 L.J.Ch. 462; 16 L.T. 254; 15 W.R. 569, L.JJ.; 9 Digest (Repl.) 217, *1377*.

Appeal from a decision of BUCKLEY, J., on an application by the transferor, and transferees of shares in the Sussex Brick Co. to have the register of shareholders rectified by putting the names of the transferees on the register in place of that of the transferor. D

The facts, as stated by **BUCKLEY, J.,** were as follows: This is an application in which Belcher, the transferor, and Brown and Pollock, the transferees, of two blocks of shares, concur in seeking to obtain a rectification of the register by putting the transferees' names on in lieu of that of the transferor. The shares are all fully paid. On Mar. 12, 1903, there was sent to the company by Brown a transfer dated Mar. 3 for 17,234 shares. He asked for an acknowledgment and a new certificate. On Mar. 14 the secretary wrote in reply sending a receipt. The reply is simply: "Herewith enclosed please find transfer receipt 17,234 shares in the company from Belcher's name to Brown and Pollock." That was marked in the corner, "One inclosure." Unfortunately that enclosure is not forthcoming, but it is what is called a transfer receipt. I have the form of it because I have it as regards the other transfer. It bears in print at the foot: "Certificate in exchange for this receipt will be ready about——" From a subsequent letter it would seem that that must have been so filled in as to read thus: "Certificate in exchange for this receipt will be ready about the 28th inst"—that is, Mar. 28. A board meeting was held on Mar. 21. On Mar. 27 Brown sent to the secretary a letter enclosing the certificate of 5,000 other fully-paid shares, and the transfer of them which had been executed as long before as January, 1901, and asked for a new certificate of those shares. On April 1 the secretary wrote back saying: "As you are aware the books have been closed until after the meeting tomorrow." That would be the 2nd, and I infer that means they would be open again on April 3. On the 4th Brown writes again: "As we presume the books of the company are now open, we shall be glad to receive reply to our letter of 27th ult." On the 4th the secretary wrote acknowledging the receipt of the transfer for the 5,000 shares, and stating that he would place it before the directors at the next board meeting, "when a certificate will be made out and signed and forwarded to you." On the 4th Brown wrote again acknowledging receipt of that letter, and saying: "You do not, however, say anything about the 17,234 shares the receipt for which we enclose, and the certificate for which was to have been ready 28th ult. May we take it that this certificate will be sent to us with the others?" On the 7th the secretary wrote: "In reply to yours of the 4th, the transfers of 17,234 shares will be placed before the directors together with the transfer of the 5,000 at their next board for registration, and when registered I will forward the certificate to you. Formal receipt for the 5,000 shares herewith enclosed." That document has at E F G H I

A the foot: "A certificate in exchange for this receipt will be ready about the 27th inst." So the transaction throughout was this. Fully-paid shares, no possible objection to registering the transfer, and no objection is suggested or raised, but the reply which is always made is: "At our next board meeting the matter will be carried through and you shall have your certificate back." In fact on April 2 the company passed a resolution for voluntary liquidation, and on the B 20th it was confirmed.

Taking the two transfers separately, the transfer sent in on Mar. 12 should have been before the board meeting which was held on Mar. 21, and it was not brought before that board. Why it was not, I do not know. There was no reason why it should not be. The next transfer, which was lodged on Mar. 27, was after the date of that board meeting, but according to the letters which passed it would C have been in the ordinary course of the company's business to have convened a board which would have passed the transfer and issued a new certificate. Before April 27—viz., on the 20th—the company was wound-up. I suppose the fact is at that particular time a voluntary liquidation being in contemplation the board was not meeting as regularly as it otherwise would have met, and there was a delay occasioned by that. I do not say an improper delay, but a delay in point D of fact, and the transfers ought to have been registered before the winding-up on April 20. However, they have not been registered, and the application now is, the company being in liquidation, to register them notwithstanding the winding-up.

HIS LORDSHIP held that under s. 98 of the Companies Act, 1862, coupled with s. 35, he had power to rectify the register, notwithstanding the winding-up, if he thought there had been improper delay. There had been a delay under s. 35, E and the transfers ought to be registered. He, therefore, made an order for rectification of the register by substituting the names of the transferees for that of the transferor. He refused to order the register to be rectified by dating the transfer as of an earlier date than the date of his order, and the transferees appealed, asking that the order might be varied by providing that the rectification of the company's register should have effect as regarded the 17,234 shares as F at and from Mar. 20, 1903, and as regarded the 5,000 shares as at and from April 4, 1903.

Muir Mackenzie for the transferees.
Gore-Browne, K.C., and *J. E. Harman* for the liquidator.

G **VAUGHAN WILLIAMS, L.J.**—I think this appeal must be allowed. I propose to deal with this case as one in which there has been an unfortunate accident which resulted in very unnecessary delay in putting the names of these gentlemen, Messrs. Brown and Pollock, upon the register. Section 35 of the Companies Act, 1862 [Companies Act, 1948, s. 116], says:

> "If the name of any person is, without sufficient cause, entered in or omitted H from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in England or Ireland, by motion in any of His Majesty's superior courts of law or equity, or by application to a judge I sitting in chambers, or to the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the Court of Session, or in such other manner as the said courts may direct, apply for an order of the court that the register may be rectified, and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained."

There can be no doubt but that the names of these gentlemen ought to have been on the register at an earlier date; and, so far as this case is concerned, at a date earlier than the time of the holding of the meetings with regard to the reconstruction of this company. Under those circumstances there can be no doubt that *Re Joint Stock Discount Co., Nation's Case* (1) is an authority for the proposition that when it is right that an order for rectification should be made (and LORD ROMILLY there draws no distinction between an order for rectification by taking the name off, or by putting a name on, the register), the court may make an order not only that the right name shall be put on or taken off the register as the case may be, but that the register shall be treated as if the name had been on or off the register when it ought to have been on or off the register.

It has, however, been argued that it is quite true that that may be done in the exercise of the powers given by s. 35 of the Act of 1862, but the power which was actually exercised by LORD ROMILLY in that case was a power exercised in respect of a list of contributories, and after the commencement of a liquidation the only power under which the register can be modified is under s. 98 and s. 35 no longer applies. By s. 98 [s. 257 (1) of Companies Act, 1948] :

> "As soon as may be after making an order for winding-up the company the court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities."

It is said that after a liquidation rectification is not ordered under s. 35, but under s. 98; and that under these circumstances the rectification in the present case ought not to be made nunc pro tunc. On that point there is a decision of WOOD, V.-C., in *Re Scottish Universal Finance Bank, Breckenridge's Case* (2), and it is clear that this particular point was raised there. Counsel is there reported to have said in argument (2 Hem. & M. at p. 644) :

> "The 98th section of the Act is a positive direction as to the course which is to be pursued. The court is to settle a list of contributories with power to rectify the register for that purpose, and is bound to rectify the register so far as may be necessary."

When the learned Vice-Chancellor gave judgment he said (ibid. at p. 645) :

> "It is said in opposition to the motion that it is irregular after a winding-up order has been made, because the whole matter is then in the hands of the court, and I am referred to the 98th section of the Act to show that the rectification of the register is after such an order a matter merely auxiliary to the settlement of the list of contributories. But there is nothing in that section to prohibit the court from acting in respect of the share register of the company in any manner in which it might have acted had that section not existed, and I cannot, therefore, hold that the hands of the court are in any manner tied by that section."

That decision of WOOD, V.-C., seems to me to be exactly in point, and to negative the argument which counsel for the liquidator submitted to us. I see that view is taken in BUCKLEY ON THE COMPANIES ACT (8th Edn.), at p. 322, where several other authorities besides *Breckenridge's Case* (2) are referred to. It is said there :

> "After a winding-up order has been made the power of rectification given to the court by s. 35 is not cut down and reduced to a mere power of rectification in the settling of the list of contributories. It is open to a contributory, after the order has been made and before the list of contributories has been settled to move for rectification under . . . the 35th section."

I have only to add that I do not mean for a moment to suggest that anyone is entitled to such an order ex debito justitiæ; it is a matter in the discretion of

A the judge, and there might be cases in which the learned judge, although he considered it essential to putting in order completely the rights of the applicant, might refuse to do so because he thought it would work injustice in respect of other people. If I thought here that it would work injustice to other people, and especially if I thought it would work injustice to persons who are not in any way bound to bear the mistakes of the company, I should have carefully considered the B matter before I made this order. But in the present case there is no evidence that any injustice will be caused at all. It has been suggested that if we make this order we shall invalidate the resolutions because the meetings will not have been properly called; and a variety of other suggestions of that sort were made in the course of the argument. As the matter stands, we can do justice and prevent any wrong accruing to those two gentlemen, Mr. Brown and Mr. Pollock, without C doing any injustice to anyone else. Under these circumstances I think that the order for rectification ought to be treated as an order of some date immediately before the holding of the meeting.

STIRLING, L.J.—I am of the same opinion. The first objection raised in this case to the exercise of the jurisdiction which is conferred on the court by s. 35 D of the Companies Act, 1862, is that the court is deprived of the power of exercising that jurisdiction, except for the purpose of settling the list of contributories. That objection is based on the wording of s. 98. It is said that the power of rectification which is derived under s. 35 is not applicable to the settlement of the list of contributories. I think that is entirely contrary to previous decisions. There is not only the case to which my Lord has referred—namely, *Breckenridge's Case* (2)— E but I observe, on looking at another case which is cited in BUCKLEY ON THE COMPANIES ACTS, namely, *Reese River Silver Mining Co.* v. *Smith* (3) that there is the high authority of LORD CAIRNS for the proposition which was laid down by SIR WILLIAM PAGE-WOOD in the case which has already been cited. LORD CAIRNS says (L.R. 4 H.L. at p. 80):

F "Notwithstanding the winding-up, the court under the 98th section is to rectify the register of members in all cases where such rectification is required in pursuance of the Act—that is to say, at all events in those cases pointed out by the 35th section."

The present case falls within the 35th section, because as the learned judge has found, and the finding of fact is not disputed, in the language of the Act "unneces- G sary delay" has taken place in the entering on the register the fact of a person having ceased to be a member of the company, and he has also found that the names of the applicants Brown and Pollock have been omitted without sufficient cause from the register. That being so, the jurisdiction to make such an order as BUCKLEY, J., has made exists, and the order, therefore, must be sustained as far as it goes. But the object of this appeal is to fix the date at which the change on H the register is to be operative; and it is contended on behalf of the liquidator that the court under s. 35 has no power to do that. There again, it seems to me we have the guidance of authority so old as the decision of LORD ROMILLY in *Re Joint Stock Discount Co., Nation's Case* (1) which was decided in 1866. That order was made by the Master of the Rolls, no doubt having regard to s. 98, in the exercise of the powers conferred by s. 35. It is, therefore, an authority that in I a proper case the court has power to fix a date at which the change in the register is to be made.

After that there comes, no doubt, a serious question. The application of the appellant is in substance that the registration be made nunc pro tunc. When an application of that sort is made, the court ought to be very careful to see that it does no injustice by making the registration retrospective. I may point out that the power which is conferred by s. 35 is not imperative. All that it provides is that the court may, in a proper case, make an order for rectification. Therefore,

the court has full discretion to deal with every case which comes before it in such a way as may produce complete justice, but in the present case I fail to see that any injustice is to be done if the alteration is made as is asked. These gentlemen, the present applicants, pressing to have their transfers registered, and seeking their certificates as early as possible, get answers from the secretary of the company which led them to believe that by the date of the last meeting the register would be altered, and they would appear as members. Supposing this had been done, and although they had not received their certificates, they sent in notices of dissent from the special resolution in the way prescribed by s. 161 of the Companies Act, 1862 [see now Companies Act, 1948, s. 287 (3)]. That gave the liquidator full notice of the position that they took in the matter, and he chose to disregard it. Then this application is made to BUCKLEY, J., with the result that the register is altered in favour of the applicants. There is no evidence before us to satisfy me in any way that any injustice is likely to accrue from the alteration of the register being dated so as to cover the notice which was given by the present appellants in the exercise of the rights which they had as members under s. 161. I think, therefore, that the order ought to be made.

COZENS-HARDY, L.J.—I am entirely of the same opinion. It seems to me that the argument for the liquidator is really based on the hypothesis that the register of members is a thing which ceases to have any real operation or existence after the winding-up order, and that the only right which can be dealt with after a winding-up order is to be given effect to by making some change in the list of contributories. But, if the scheme and method of the Act is looked at, the register of members is one thing, and the list of contributories is an entirely different thing. The list of contributories, to mention one distinction, what is known as list A and list B, is something larger than and different from the register of members, and the Act itself, as it seems to me, indicates in no doubtful manner that, notwithstanding a winding-up, the register of members and the status of members may be altered. Section 131 of the Act of 1862 [see now Companies Act, 1948, ss. 281, 282], under which BUCKLEY, J., has acted or partly acted, says this:

> "Whenever a company is wound-up voluntarily the company shall, from the date of the commencement of such winding-up, cease to carry on its business except in so far as may be required for the beneficial winding-up thereof, and all transfers of shares, except transfers made to or with the sanction of the liquidator, or alteration in the status of the members of the company, taking place after the commencement of such winding-up, shall be void."

That section asserts that there may be after a winding-up transfers of shares with the sanction of the liquidator. That being so it seems to me that, quite apart from any list of contributories, there is a register of members to which all the provisions of s. 35 of the Act of 1862 ought to be applied. The authority to which my Lord has called attention, and also the authority to which STIRLING, L.J., has called attention, seem to me conclusively to show that the power given by s. 35 is independent of that which is found by reference under s. 98. I, therefore, cannot doubt that the court has the right to exercise every power which is conferred by s. 35 where there has been an undue delay in registering a transfer. That there has been undue delay here is found as a fact by the learned judge, and the accuracy of that finding is really not disputed. Then we have authority going back to the very early days of the Companies Act, 1862, that under s. 35 in a proper case an order having a retrospective effect may be made—may be made not must be made—and may be made imposing such conditions as the court thinks necessary to protect the rights of any third persons; but in a case like this, where there has been no serious suggestion of any ill result or any unjust consequence which would follow from dating the transfers as of the date when they ought to

have been made, I can see no ground for imposing any condition whatever. I think, therefore, the order proposed by my Lord is quite right.

Muir Mackenzie: It will be sufficient for the transferees if the registration of each transfer is carried back to April 4, 1903.

VAUGHAN WILLIAMS, L.J.—Then let that be the date.

Harman: The notice of the confirmation meeting of April 20 will not be invalidated in consequence.

VAUGHAN WILLIAMS, L.J.—It will not affect that notice at all. The notice was in accordance with the register as it then stood.

Appeal allowed.

Solicitors: *Ingle, Holmes, Sons & Pott*; *Morris, Fuller & Co.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

KILGOUR *v.* GADDES

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.), February 9, 10, 1904]

[Reported [1904] 1 K.B. 457; 73 L.J.K.B. 233; 90 L.T. 604; 52 W.R. 438; 20 T.L.R. 240]

Easement—Right of way—Creation—Acquirement of right by tenant against tenant of same landlord—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 2.

A tenant cannot, by enjoyment for a period of forty years, acquire a prescriptive right to a way, under s. 2 of the Prescription Act, 1832, as against another tenant of the same landlord.

Notes. Considered: *Deary* v. *Sanders*, [1919] 1 K.B. 223. Referred to: *Cory* v. *Davies*, [1923] 2 Ch. 95; *Aldridge* v. *Wright*, [1929] 2 K.B. 117.

As to creation of easements by prescription, see 12 HALSBURY'S LAWS (3rd Edn.) 543 et seq.; and for cases see 19 DIGEST (Repl.) 57 et seq. For Prescription Act, 1832, see 6 HALSBURY'S STATUTES (2nd Edn.) 669.

Cases referred to:

(1) *Timmons* v. *Hewitt* (1888), L.R. 22 Ir. 627, 641; 19 Digest (Repl.) 72, **161.*

(2) *Beggan* v. *M'Donald* (1878), L.R. 2 Ir. 560; 11 I.R.C.L. 362.

(3) *Gayford* v. *Moffatt* (1868), 4 Ch. App. 133; 33 J.P. 212, L.C.; 19 Digest (Repl.) 47, *249.*

(4) *Clancy* v. *Byrne* (1877), I.R. 11 C.L. 355; 19 Digest (Repl.) 108, **296.*

(5) *Bright* v. *Walker* (1834), 1 Cr.M. & R. 211; 4 Tyr. 502; 3 L.J.Ex. 250; 149 E.R. 1057; 19 Digest (Repl.) 59, *327.*

(6) *Wheaton* v. *Maple & Co.*, [1893] 3 Ch. 48; 62 L.J.Ch. 963; 69 L.T. 208; 41 W.R. 677; 9 T.L.R. 559; 37 Sol. Jo. 615; 2 R. 549, C.A.; 19 Digest (Repl.) 60, *336.*

(7) *Harris* v. *De Pinna* (1886), 33 Ch.D. 238; 56 L.J.Ch. 344; 54 L.T. 770; 50 J.P. 486; 2 T.L.R. 529, C.A.; 19 Digest (Repl.) 139, *895.*

(8) *Fahey* v. *Dwyer* (1879), 4 L.R.Ir. 271; 19 Digest (Repl.) 65, **141.*

(9) *Frewen* v. *Philipps* (1861), 11 C.B.N.S. 449; 30 L.J.C.P. 356; 25 J.P. 676; 7 Jur.N.S. 1246; 9 W.R. 786; 142 E.R. 871, Ex. Ch.; 19 Digest (Repl.) 140, *902.*

(10) *Daniel* v. *Anderson* (1862), 31 L.J.Ch. 610; 7 L.T. 183; 8 Jur.N.S. 328; 10 W.R. 366; 19 Digest (Repl.) 55, *299*. A

Also referred to in argument:

Large v. *Pitt* (1797), Peake, Add. Cas. 152, N.P.; 19 Digest (Repl.) 60, *333*.

James v. *Plant* (1836), 4 Ad. & El. 749; 6 Nev. & M.K.B. 282; 6 L.J.Ex. 260; 111 E.R. 967, Ex. Ch.; 19 Digest (Repl.) 17, *50*. B

Gardner v. *Hodgson's Kingston Brewery Co.*, [1903] A.C. 229; 72 L.J.Ch. 558; 88 L.T. 698; 52 W.R. 17; 19 T.L.R. 458, H.L.; 19 Digest (Repl.) 58, *317*.

Tickle v. *Brown* (1836), 4 Ad. & El. 369; 1 Har. & W. 769; 6 Nev. & M.K.B. 230; 5 L.J.K.B. 119; 111 E.R. 826; 19 Digest (Repl.) 76, *429*.

Appeal by the plaintiff from a decision of WALTON, J., upon further consideration after the trial of the action with a jury. C

The plaintiff claimed from the defendant damages for trespass to land and an injunction. The plaintiff and the defendant occupied adjoining houses. The plaintiff was the assignee of a lease granted by Sir James Graham on July 13, 1850, for the term of ninety-nine years; and the defendant was the assignee of a lease granted by Sir James Graham on Jan. 10, 1850. The reversions on these two leases were always vested in one and the same owner. Between the two houses there was a D passage over which the occupiers of both houses had a right of way to the back yards of their houses. In the yard at the back of the plaintiff's house there was a pump. This yard opened into the passage. Until 1902 there was no fence separating the plaintiff's yard from the common passage, and the pump was as accessible from the back of the defendant's premises as from the back of the plaintiff's premises. A dispute having arisen with regard to the use of the passage, the E plaintiff in 1902 erected a screen and a door which prevented the defendant from using the pump. The defendant broke the door, and thereby obtained access to the pump. The plaintiff thereupon brought this action claiming damages and an injunction. The defendant denied that the place where the pump was situate was the property of or in the possession of the plaintiff, and he claimed a prescriptive right to use the pump by user for forty years, under the Prescription Act, 1832, and F counterclaimed a declaration of his right to use the pump, damages, and an injunction. The action was tried before WALTON, J., with a jury. The jury found, in answer to questions left to them by the learned judge: (i) that the pump had been used as of right by the occupiers of the defendant's premises for forty years before action; and (ii) that it was so used at and before the grant of the defendant's lease. The learned judge, upon further consideration, found that the pump was upon land G included in the plaintiff's lease, and that there was no definite path or way at any time from the defendant's premises to the pump affording any apparent sign of the easement claimed. He, therefore, held that the defendant had no easement by express or implied grant, but that he had acquired a prescriptive right against the plaintiff by forty years' enjoyment, under s. 2 of the Prescription Act, and gave judgment in the defendant's favour for damages and an injunction. The H plaintiff appealed.

Sanderson, K.C., and *J. Lumb* for the plaintiff.

Cavanagh for the defendant.

SIR RICHARD HENN COLLINS, M.R.—The argument in this case has covered a very wide area, but the point when properly understood is a short one. I

The question is whether as between two termors under the same landlord a right of way by prescription can be acquired for the owner by the one termor against the other. I say "for the owner," because under the Prescription Act, 1832, an easement of that kind must be acquired for the owner in fee. In this case, as I have pointed out, the tenants of the so-called dominant and servient tenements held under the same landlord. If that proposition is right, this prescriptive easement must under the Prescription Act be acquired for the owner of the fee. I have limited what I have said to the case of a right of way and similar rights under s. 2

of the Prescription Act. In this case we are not concerned with the case of a prescriptive right to light, which stands upon a totally different footing under the provisions of s. 3 of the Prescription Act. Section 2 provides:

> "No claim which may be made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water . . . when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

On the words of that section it appears that the easement must in all cases have been enjoyed as of right, and that is made clear by the provisions of s. 5, which prescribes the rules for pleading the right to easements of this kind and enacts:

> ". . . in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done."

That is a clear enactment that the enjoyment for the period of forty years must be as of right. The point was taken long since that s. 5 applied to a claim for a prescriptive right to light, but it was held that it did not.

As has been pointed out by Romer, L.J., in the present case, and almost in the same language as that used by Palles, C.B., in explaining why the occupier cannot acquire the right for the owner, the reason is that the enjoyment and user cannot be as of right. In *Timmons* v. *Hewitt* (1), Palles, C.B., said (L.R. 22 Ir. at p. 635):

> "These extracts from the judgments in *Beggan* v. *M'Donald* (2) appear to me to show that the case is no authority upon the question at present before us. Where the two tenements are held by termors under the same landlord, prescription does not apply; because, as pointed out by Lord Cairns, in *Gayford* v. *Moffatt* (3) (4 Ch. App. at p. 135),
>
> > 'the possession of the tenant of the demised close is the possession of his landlord; and it seems to me an utter violation of the first principles of the relation of landlord and tenant to suppose that the tenant, whose occupation of close A was the occupation of his landlord, could by that occupation acquire an easement over close B, also belonging to his landlord.'
>
> This doctrine was approved and acted upon by the Court of Common Pleas in this country in *Clancy* v. *Byrne* (4). If I am asked how it is consistent with the Prescription Act, I answer that such user and enjoyment is not as of right within the meaning of the 2nd section. It is a user by a termor, who, if he acquire the right, must acquire it as incident to the land of which he is termor, and thus for the benefit of his reversioner. Such user cannot be as of right, unless a reversioner can in law by user acquire a right against himself."

So stands the law upon the question. That seems to me to be conclusive of this case. There has been a long argument as to the possibility of a termor under

one landlord acquiring a prescriptive right of way as against the termor under another owner of other land. That raises an interesting question. It has been decided in Ireland that such a right can be acquired. That is contrary to the view which has been expressed in this country, and is contrary to *Bright* v. *Walker* (5) and *Wheaton* v. *Maple & Co.* (6), though the point was not absolutely necessary to the decisions in those two cases. That question, however, has nothing whatever to do with the question in the present case. The judgment of WALTON, J., in the present case in the court below is based entirely upon the authority of the judgment of CHITTY, J., in *Harris* v. *De Pinna* (7). In that case it was a subsidiary point, but CHITTY, J., expressed the opinion that an easement such as this could be acquired by prescription by one tenant of a landlord over land in the occupation of another tenant of the same landlord. When those observations of CHITTY, J., are examined they seem to me to be based upon an unsound foundation.

His opinion was based upon two cases decided in Ireland—*Fahey* v. *Dwyer* (8) and *Beggan* v. *M'Donald* (2). *Beggan* v. *M'Donald* (2) was not an authority for any proposition of the kind. In that case it was decided that by uninterrupted enjoyment for a period of forty years a right of way might be acquired against a lessee whose lease had been in existence during the whole of that period, the dominant and servient tenements being held under different owners, though the period of three years after the termination of the lease had not expired and it was unknown whether the reversioner would during those three years exercise his right, under s. 8 of the Act, of resisting the claim. That was a decision in a case in which there were different owners of the two tenements, and not a case of two termors under the same owner, and, therefore, is no authority that an easement can be acquired by prescription by one termor against another termor under the same owner. *Fahey* v. *Dwyer* (8), the other case upon which CHITTY, J., relied, does purport to be a decision as to the possibility of the acquisition of a prescriptive right of way by one tenant against another tenant of the same landlord. The headnote to that case is:

> "A prescriptive right of way may be acquired in respect of one tenement, by user for forty years, against another held for a term of years under the same landlord; and such right is not necessarily determined upon the expiration of the lease, when the tenant of the servient tenement continues in occupation upon the same terms as before."

Upon examining that case we find that the decision was based upon a misconception of the previous case of *Beggan* v. *M'Donald* (2). In delivering the judgment, LAWSON, J., said:

> "We think that in this case the defendant is entitled to maintain the verdict which he has got. He has a right of way, which he has been in the enjoyment of, as of right, for a period of forty years, as found by the jury. I see no reason why the Prescription Act should not apply as between two tenants of adjoining lands. Mr. Gibson has argued that it cannot. That is met by the case of *Frewen* v. *Philipps* (9) and the observations of KINDERSLEY, V.-C. in *Daniel* v. *Anderson* (10). There is no reason why it should not apply as between two tenants so as to bind them, though the landlord should not be bound. But if there was any difficulty about the case, *Beggan* v. *M'Donald* (2) appears to remove it; for it decided that a period of forty years' enjoyment is absolute and indefeasible, and that *Bright* v. *Walker* (5) applies only to a twenty years' enjoyment."

CHITTY, J., based his opinion upon those cases. LAWSON, J., was misled, in applying *Frewen* v. *Phillips* (9), by the headnote to the report into supposing that it decided that the fact that two tenements are occupied under distinct leases both held under the same landlord is not material, and that one tenant or lessee acquires, notwithstanding the unity of seisin, an easement as against the other. The case did not decide that, but only that under s. 3 of the Act an indefeasible

A right to light can be acquired by twenty years' enjoyment, although both tenements belong to the same owner; that decision had nothing to do with the acquisition of a right of way or water, and did not decide that such a right could be acquired under the Act by one tenant against another tenant of the same owner.

Beggan v. *M'Donald* (2), as I have already explained, does not apply to the claim of an easement by prescription by one tenant against another tenant of the B same owner. Therefore that case is not an adequate foundation for the conclusion at which CHITTY, J., arrived; and for the reasons which I have given I cannot approve of that opinion. In *Wheaton* v. *Maple & Co.* (6) we find the rule laid down, and very clearly stated, by LINDLEY, L.J. He there deals with the possibility of tenants acquiring easements against each other by prescription, and says ([1893] 3 Ch. at p. 63):

C

> "It is true that it has been said that, after an uninterrupted enjoyment of light for twenty years, a covenant not to interrupt will be presumed. . . . But I am not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements, or a lost covenant by such a person not to interrupt in the case of light, and I am certainly D not prepared to introduce another fiction to support a claim to a novel prescriptive right. The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with anyone except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years. Although, therefore, a grant by a lessee of the Crown, commensurate with his lease, might be inferred as a fact, if there was evidence to justify the inference, there E is no legal presumption, as distinguished from an inference in fact, in favour of such a grant. This view of the common law is in entire accordance with *Bright* v. *Walker* (5), where this doctrine of presumption is carefully examined."

That, indeed, deals with the question of implied grant, and not with the Prescription Act, but in another part of his judgment he does deal with the Prescription F Act, and says (ibid. at pp. 64, 65):

> "I come now to the last question—viz., whether s. 3 has conferred an easement as against the Crown's lessees. So far as mere language is concerned, and apart from the nature of the subject-matter with which the section is dealing, I should see no difficulty in applying s. 3 to all English subjects, whether lessees of the Crown or other people; I should see no difficulty in G reading 'absolute and indefeasible' as meaning absolute and indefeasible against all persons to whom the section is applicable. But if the section is so read, the consequence will necessarily be to create, by mere occupation and enjoyment, a class of easements which at common law could never have been acquired by prescription, but only by express agreement or grant. An easement for a term of years may, of course, be created by grant; but such an H easement cannot be gained by prescription, and, not being capable of being so acquired, it does not fall within the scope of [the Prescription Act, 1832]. The expression 'absolute and indefeasible,' as applied to easements of all kinds, coupled with the declared object of the Act, which is to shorten the time of prescription, shows that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden for I ever on the servient tenement. This view of the statute was clearly expressed, soon after it was passed, in *Bright* v. *Walker* (5), and, although some passages in PARKE, B.'s judgment in that case have been criticised, and even dissented from, the broad view which underlies the judgment has never been disapproved."

That is a clear authority for the proposition that, when the easement is not one of light, and the claim is made under the Prescription Act, the claim to an easement can be made in respect of the fee alone. That is a sufficient answer to the de-

fendant's claim in this case. That opinion of the Court of Appeal is inconsistent with the view of CHITTY, J., expressed in *Harris* v. *De Pinna* (7). I am, therefore, of opinion that the decision of WALTON, J., was wrong, and that this appeal must be allowed. A

ROMER, L.J.—I am of the same opinion. In *Wheaton* v. *Maple & Co.* (6) it was pointed out that under the Prescription Act an easement could not be acquired for a term of years. It must, with regard to both the dominant and servient tenement, be acquired in respect of the fee. In this case the easement is claimed under s. 2 of the Act, and the enjoyment referred to in that section must be enjoyment as of right, and in that respect it is different from the easement of light dealt with by s. 3 of the Act. When such an easement as this is sought to be established, how can the enjoyment be said to be as of right when there is a common owner of the fee of both tenements? As was pointed out by LORD CAIRNS, in *Gayford* v. *Moffatt* (3), the occupation of the tenant is in law that of his landlord, and when he goes on adjoining land of his landlord, he does not do so as of right in respect of an alleged dominant tenement, the land being the freeholder's own land. Upon that short ground I think that this appeal must succeed. B C

MATHEW, L.J.—I am of the same opinion. The simple point raised on this appeal has not been satisfactorily answered by the defendant. That point is that there was a common owner of the two tenements, and that, therefore, the alleged easement could not be acquired. An easement at common law can only be acquired by prescription when the dominant and servient tenements belong to different owners. There must be enjoyment as of right in respect of the dominant tenement over the servient tenement. That rule of law has been clearly laid down in *Wheaton* v. *Maple & Co.* (6). How can the enjoyment be as of right when both tenements are owned by the same person? Test the question by the case where it is said that there is a presumption of a lost grant. There cannot be a lost grant by the owner of the land to himself. That seems to me to be conclusive of the whole question. Under the Prescription Act it is said that there can be a statutory easement which could not be acquired at common law. There is, however, a distinction between an easement of this kind and an easement of light, which has been pointed out; and an easement of this kind cannot be acquired under the Act where there is common ownership of the two tenements. I agree that this appeal must be allowed. D E F

Appeal allowed. G

Solicitors: *Ullithorne, Currey & Jennings*, for *C. B. Hodgson*, Carlisle; *J. A. Broughton*, Carlisle.

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

A

CLOUSTON & CO., LTD. *v.* CORRY

[PRIVY COUNCIL (Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Robertson and Sir Arthur Wilson), August 2, 3, December 3, 1905]

B [Reported [1906] A.C. 122; 75 L.J.P.C. 20; 93 L.T. 706; 54 W.R. 382; 22 T.L.R. 107]

Master and Servant—Wrongful dismissal—Defence that dismissal justified by servant's misconduct—Question for jury.

In an action for wrongful dismissal, if the defendant pleads that the misconduct of the servant justified the determination of the contract of service, C the question whether the misconduct proved established the right to dismiss the servant is a question of fact for the jury. It is not the function of the judge at the trial to determine as a matter of law that the dismissal was justifiable and to enter a verdict for the defendant or direct a non-suit.

Notes. Followed: *Thompson* v. *British Berna Motor Lorries* (1917), 33 T.L.R. D 187. Considered: *Laws* v. *London Chronicle* (*Indicator Newspapers*), *Ltd.*, [1959] 2 All E.R. 285. Referred to: *Skeate* v. *Slaters*, [1914] 2 K.B. 429; *Brown* v. *Dagenham Urban District Council* (1929), 140 L.T. 615.

As to summary dismissal of a servant, see 25 HALSBURY'S LAWS (3rd Edn.) 485–488; and for cases see 34 DIGEST 67 et seq.

Appeal from a decision of the Court of Appeal of New Zealand (WILLIAMS, E EDWARDS, DENNISTON, CHAPMAN, and COOPER, JJ., STOUT, C.J. dissenting) in a case in which the respondent was plaintiff and the appellants were defendants.

Lush, K.C., and *Northcote* appeared for the appellants.
Cohen, K.C., and *T. T. Paine* for the respondents.

Dec. 1, 1906. **LORD JAMES OF HEREFORD.**—This is an appeal from a F decision of the Court of Appeal of New Zealand, directing judgment to be entered for the plaintiff (the present respondent) for £875 and costs. The material facts of the case appear to be as follows.

Prior to September, 1902, the plaintiff had carried on business in New Zealand as an agent for the purchase of barley, and a dealer in farm produce. He also conducted an insurance office business. The appellant company carried on a G similar business in the same district. On Sept. 18, 1902, an agreement was entered into between the plaintiff and the defendant company, whereby the plaintiff undertook faithfully to serve the defendant company for five years as manager of the grain and produce department of the business of the company. He also undertook to obey all commands and instructions given to him, and to use his best endeavours to bring to the defendants the business agencies and clients of the H firm to which he had belonged. In return the defendants undertook to pay the plaintiff £500 per annum and a percentage on the profits made on business introduced by him. The plaintiff entered upon his duties under this agreement, and continued in the defendants' service until Nov. 17, 1903, when he was dismissed. It is for this dismissal, alleged to be wrongful, the action was brought. The statement of claim set out the above facts, and contained a claim for £3,000 I damages. The statement of defence justified the dismissal of the plaintiff on the grounds: First, that the plaintiff had disobeyed the orders of the directors of the defendant company; secondly, that the plaintiff had on Nov. 9, 1903, been arrested in the streets of a township called Havelock, on a charge of drunkenness and disorderly conduct, and fined for such offences.

The trial took place in March, 1904, before the Chief Justice of the Supreme Court of New Zealand and a jury. In support of the allegations in the statement of defence that the defendants were justified in dismissing the plaintiff, evidence was given to show that the plaintiff had, as agent for the defendants, made

purchases of goods contrary to the orders given him by the directors of the defendant company; and, secondly, that the plaintiff had in the month of November, 1903, grossly misconducted himself at Havelock and had been convicted by a magistrate of drunkenness. The first ground of justification was during the argument before their Lordships very properly abandoned by counsel for the appellants (the defendants), inasmuch as the second ground of defence presented facts of a much more serious character than the first. The evidence given by the defendants as to the plaintiff's drunkenness and the use of foul language at Havelock was very strong and virtually admitted by the plaintiff. He also said: "I have commonly been drunk," and it was further alleged that the habitual drunkenness was known to certain officers of the defendant company. In respect of this misconduct, the plaintiff was charged before and convicted by a magistrate at Havelock, and a report of the proceedings appeared in the Press. At the conclusion of the evidence the counsel for the defendants submitted—(i) That unless the jury disbelieved the evidence as to the conduct at Havelock they must find a verdict for the defendants. (ii) That certain purchases admittedly made by the plaintiff were made in direct violation of the orders given to him by the board of directors of the defendant company, and that on that ground also the verdict should be entered for the defendants. The learned Chief Justice declined to accede to this submission, but leave was reserved to the full court to enter a non-suit, or to enter a verdict for the defendant company. The following questions were left to the jury: (i) Did the plaintiff disobey the order and direction of the defendant company in the purchase of chaff from Woodward? (ii) If so, was the defendant company justified in dismissing the plaintiff? (iii) Was the defendant company justified in dismissing the plaintiff for his conduct at Havelock on Nov. 9 and 10, 1903? (iv) What damages, if any, is the plaintiff entitled to recover? To the first of the above questions the jury answered, Yes. To the second and third, No. To the fourth, £875.

After the verdict had been given the learned Chief Justice expressed considerable doubt as to the course which he ought to pursue, but in the result allowed the verdict to be entered for the plaintiff for £875, reserving

> "full power for the court to enter a verdict for the defendants if it should turn out that the matter is wholly one of law."

The Chief Justice added:

> "The facts in this case are not in dispute, and if it is the function of a judge to determine that the dismissal was justifiable, then the court is to have power to do so and to enter a verdict for the defendants, and also to grant a nonsuit if it should be the opinion of the court that the plaintiff's conduct justified the defendants in dismissing him."

The defendants duly gave notice of motion, pursuant to leave reserved, to enter judgment for them—(i) Upon the ground that upon the facts admitted by the plaintiff the learned judge ought either to have entered judgment for the defendant company or to have directed the jury to find for them, or to have directed a nonsuit. (ii) Upon the ground that the learned judge refused to direct the jury as requested by the defendants' counsel that if they believed the defendants' evidence (which was uncontradicted) they must find a verdict for the defendant company. (iii) That the learned judge misdirected the jury in directing them that, the facts being admitted, the question whether such facts justified the dismissal of the plaintiff was a question for the jury. (iv) In the alternative, that there should be a new trial on the ground that the verdict was against the weight of the evidence.

By consent it was ordered that the motion founded on these notices should be removed into the Court of Appeal for hearing. The case was argued in the Court of Appeal of New Zealand before the Chief Justice and Williams, Edwards, Denniston, Chapman, and Cooper, JJ. The case was very fully considered, and

A elaborate and learned judgments were given by the members of the court. The Chief Justice was of opinion that his direction at the trial was wrong, and that the verdict should have been entered for the defendants. The other members of the court were of opinion that the case was rightly submitted by the Chief Justice to the jury, and that the verdict they arrived at was correct, and ought not to be disturbed. From the judgment the defendant company obtained leave to appeal B to His Majesty in Council. Both in the arguments of counsel and in the elaborate judgments delivered by the judges of the Court of Appeal very many cases were referred to. Reliance cannot be placed upon all of them, for very much depends upon the exact words used in the judgments given, and summaries composed by the reporters of trials at nisi prius may not always convey the exact ruling of the presiding judge. It is difficult also to determine whether the words quoted C in the reports represent words of advice or of absolute direction. Still, there are cases which can be quoted in support of either side of the question involved, and between some of them it is apparently impossible to avoid a conflict. It seems unnecessary to pass all these cases again in review, but their Lordships have fully considered them, and are aided by them in arriving at the conclusion which they now express.

D In an action brought to recover damages for alleged wrongful dismissal from service, a defence, which in former days would have been embodied in a plea of justification, is set up. Allegations of misconduct, drunkenness, the use of foul language in public, resulting in conviction, are made, supported by strong evidence virtually admitted by the plaintiff to be true. Upon such facts the question is raised what is the power and the duty of the presiding judge. Ought he to withdraw E the case from the jury and with his own hand enter a verdict for the defendant, or ought he to leave the case to the jury, asking them if they think the facts proved justified the dismissal of the plaintiff? In the present case the tribunal to try all issues of fact was a jury. The sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct F in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. Certainly when the alleged misconduct consists of drunkenness there must be considerable difficulty in determining the extent or conditions of intoxication which will establish a justification for dismissal. The intoxication G may be habitual and gross, and directly interfere with the business of the employer or with the ability of the servant to render due service. But it may be an isolated act committed under circumstances of festivity and in no way connected with or affecting the employer's business. In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts—and is a question of fact. If this be so, the questions raised in the present H case had to be tried by the jury.

But in cases where the trial must so take place the presiding judge has important duties to fulfil. It is for him to say whether there is any evidence to submit to the jury in support of the allegation of justifiable dismissal. If no such evidence has, in his opinion, been given, he should not submit any issue in respect of such allegations. The judge may also direct, guide, and assist the jury. He may I direct by informing them of the nature of the acts which as a matter of law will justify dismissal. He may guide them by calling their attention to the facts material to the determination of the issues raised, and he may assist them in a manner and to an extent there is no reason to define. There have been judges —more numerous in the past than in the present—who possessed and exercised the power of addressing a jury in terms of apparent impartiality, and yet of placing before them views which seldom failed to secure the verdict desired by the judge to be recorded. For these reasons their Lordships are of opinion that

the learned Chief Justice was correct in submitting the issues of fact to the jury, and that in this respect the judgment given by the majority of the Court of Appeal is also correct.

Solicitors: *Blyth, Dutton, Hartley & Blyth*; *Paines, Blyth & Huxtable.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

R. *v.* JOHNSON

[King's Bench Division (Lord Alverstone, C.J., Kennedy and Ridley, JJ.), April 11, 1905]

[Reported [1905] 2 K.B. 59; 74 L.J.K.B. 585; 92 L.T. 654; 69 J.P. 236; 53 W.R. 655; 21 T.L.R. 423; 49 Sol. Jo. 460]

Certiorari—Magistrates—Erroneous decision on matter within jurisdiction—Erroneous assumption of jurisdiction.

If there is an erroneous decision of justices on a matter within their jurisdiction either in fact or in law, certiorari will not lie, but if there is an erroneous assumption of jurisdiction in point of law based upon evidence which is not evidence of any legal matter that may be considered by them, then certiorari will lie.

Licensing—Permitted hours—Exemption—Order of exemption—Judicial order—Made without jurisdiction—Certiorari.

An order made under s. 26 of the Licensing Act, 1872 [see now Licensing Act, 1953, s. 106], by justices, exempting a licensed victualler from the provisions of the Act with respect to closing his premises on certain days and during certain times, is a judicial order, and if made without proper evidence, and so without jurisdiction, can be brought up on certiorari.

Notes. Section 26 of the Licensing Act, 1872, was repealed by the Licensing (Consolidation) Act, 1910. For the present equivalent provisions, see Licensing Act, 1953, s. 106 (33 Halsbury's Statutes (2nd Edn.) 238).

As to certiorari, see 11 Halsbury's Laws (3rd Edn.) 52 et seq.; and for cases see 16 Digest (Repl.) 443 et seq. As to licensing exemptions, see 22 Halsbury's Laws (3rd Edn.) 661–663; and for cases see 30 Digest (Repl.) 79–81.

Cases referred to:

(1) *R.* v. *Bolton* (1841), 1 Q.B. 66; Arn. & H. 261; 4 Per. & Dav. 679; 10 L.J.M.C. 49; 5 J.P. 370; 5 Jur. 1154; 113 E.R. 1054; 16 Digest (Repl.) 468, *2876.*

(2) *Boulter* v. *Kent Justices*, [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288; 61 J.P. 532; 46 W.R. 114; 13 T.L.R. 538, H.L.; 30 Digest (Repl.) 75, *579.*

(3) *Hagmaier* v. *Willesden Overseers*, [1904] 2 K.B. 316; 73 L.J.K.B. 638; 90 L.T. 683; 68 J.P. 343; 20 T.L.R. 494; 2 L.G.R. 965; sub nom. *Hogmaier* v. *Willesden Overseers*, 52 W.R. 654; 48 Sol. Jo. 494, D.C.; 33 Digest 311, *298.*

(4) *R.* v. *Sharman, Ex parte Denton*, [1898] 1 Q.B. 578; 67 L.J.Q.B. 460; 78 L.T. 320; 62 J.P. 296; 46 W.R. 367; 14 T.L.R. 269; 42 Sol. Jo. 326; 30 Digest (Repl.) 49, *374.*

(5) *R.* v. *Sunderland Justices*, [1901] 2 K.B. 357; 70 L.J.K.B. 946; 85 L.T. 183; 65 J.P. 598; 17 T.L.R. 551; 45 Sol. Jo. 575, C.A.; 30 Digest (Repl.) 25, *164.*

(6) *R.* v. *Stockport Justices* (1896), 60 J.P. 552, D.C.; 30 Digest (Repl.) 25, *163.*

(7) *R.* v. *Manchester Justices*, [1899] 1 Q.B. 571; 68 L.J.Q.B. 358; 80 L.T. 531; 63 J.P. 360; 47 W.R. 410; 15 T.L.R. 201; 43 Sol. Jo. 278, D.C.; 16 Digest (Repl.) 463, *2830*.

(8) *Laceby* v. *Lacon & Co.*, [1899] A.C. 222; 68 L.J.Q.B. 480; 80 L.T. 473; 63 J.P. 371; 47 W.R. 497; 15 T.L.R. 283; 43 Sol. Jo. 348, H.L.; 30 Digest (Repl.) 40, *307*.

Also referred to in argument:

R. v. *Bowman*, [1898] 1 Q.B. 663; 14 T.L.R. 303; sub nom. *R.* v. *Bowman, etc., Justices and Duncan, Ex parte Patton*, 67 L.J.Q.B. 463; 78 L.T. 230; 62 J.P. 374, D.C.; 30 Digest (Repl.) 36, *275*.

R. v. *Cotham*, [1898] 1 Q.B. 802; 67 L.J.Q.B. 632; sub nom. *R.* v. *Pilkington, etc., Justices and Wallace, Ex parte Williams*, *R.* v. *Cotham, etc., Justices and Webb, Ex parte Williams*, 78 L.T. 468; 62 J.P. 435; sub nom. *R.* v. *Cotham, etc., and Webb, Ex parte Cotham, etc., and Webb*, 46 W.R. 512; 14 T.L.R. 367; 42 Sol. Jo. 470, D.C.; 30 Digest (Repl.) 41, *320*.

R. v. *Nicholson*, [1899] 2 Q.B. 455; 68 L.J.Q.B. 1034; 64 J.P. 388; 48 W.R. 52; 15 T.L.R. 509; 43 Sol. Jo. 744; sub nom. *R.* v. *Nicholson, etc., Bolton Justices*, *R.* v. *Greenhalgh, etc., Bolton Justices, Ex parte Bamber*, 81 L.T. 257, C.A.; 30 Digest (Repl.) 73, *561*.

R. v. *Cheshire Justices* (1838), 8 Ad. & El. 398; 1 Per. & Dav. 88; 1 Will. Woll. & H. 635; 8 L.J.M.C. 1; 2 J.P. 741; 2 Jur. 964; 112 E.R. 889; 16 Digest (Repl.) 467, *2863*.

R. v. *Surrey Justices* (1870), L.R. 5 Q.B. 466; 39 L.J.M.C. 145; 34 J.P. 614; 16 Digest (Repl.) 473, *2926*.

R. v. *Taunton St. Mary (Inhabitants)* (1815), 3 M. & S. 465; 105 E.R. 685; 16 Digest (Repl.) 475, *2944*.

R. v. *Newborough* (1869), L.R. 4 Q.B. 585; 10 B. & S. 586; 38 L.J.M.C. 129; 17 W.R. 861; sub nom. *R.* v. *Carnarvonshire Justices*, 20 L.T. 818; 16 Digest (Repl.) 468, *2879*.

Cardiffe Bridge Case (1700), 1 Salk. 146; 91 E.R. 135; sub nom. *R.* v. *Glamorganshire (Inhabitants)* 12 Mod. Rep. 403; 1 Ld. Raym. 580; sub nom. *R.* v. ——, 1 Com. 86; 16 Digest (Repl.) 447, *2545*.

R. v. *Uttoxeter* (1719), 1 Bott. 292.

R. v. *Arkwright* (1848), 12 Q.B.D. 960; 3 New Mag. Cas. 74; 18 L.J.Q.B. 26; 12 L.T.O.S. 271; 13 J.P. 4; 13 Jur. 300; 116 E.R. 1130; 16 Digest (Repl.) 473, *2924*.

Rules Nisi for writs of certiorari and mandamus to bring up and quash orders made by licensing justices in respect of certain licensed premises.

On June 16, 1904, applications were made to the licensing justices for Upton-on-Severn for exemption orders under s. 26 of the Licensing Act, 1872, and orders were granted in respect of the Lion Hotel and eleven other houses. In opposition to the rules nisi, which were granted in respect of the exemption of the Lion Hotel, the justices stated in an affidavit that, on the application for the order in question, they heard evidence that it was desirable to make the order for the accommodation of a considerable number of persons following lawful trade and callings in the immediate neighbourhood of the licensed premises in question, that they had granted the application on the evidence called before them, and that they had not been influenced by other considerations. The order was as follows:

"We, the undersigned justices of the peace, usually acting at the Petty Sessions for the Petty Sessional Division of Upton-on-Severn, within which the premises the Lion Hotel, hereinafter mentioned, are situate, and having heard evidence to show that it is necessary and desirable so to do for the accommodation of a considerable number of persons following the lawful trade or calling of farmers, tradesmen, fruit and pea dealers, market gardeners in the immediate neighbourhood of such lawful trade and calling aforesaid, do hereby consent to the grant

and do grant an order exempting Isaac Rendell Budden, of the Lion Hotel, Upton-on-Severn, being a person duly licensed to sell intoxicating liquor at the Lion Hotel, from the provisions of the Licensing Acts, 1872–1902, with respect to the closing of the said premises between the hours of 10 and 11 o'clock at night from the date hereof until Sept. 30, 1904. Given under our hand this 16th day of June, 1903.—CHAS. C. JOHNSON, R. S. BAGNALL."

By s. 26 of the Licensing Act, 1872:

"The local authority of any licensing district, upon the production of such evidence as such authority may deem sufficient to show that it is necessary or desirable so to do for the accommodation of any considerable number of persons attending any public market or following any lawful trade or calling, or attending any theatre, may grant, if such authority think fit to any licensed victualler or licensed keeper of a refreshment house [or any person licensed to sell beer or cider by retail to be consumed upon the premises], in respect of premises in the immediate neighbourhood of such market or of the place where the persons follow such lawful trade or calling or of any such theatre an order exempting such person from the provisions of this Act with respect to the closing of his premises on such days and during such time except between the hours of one and two of the clock in the morning as may be specified in such order. The holder of an order under this section shall not be liable to any penalty for not closing his premises on such days and during such time as may be specified in such order; but he shall not be exempt from any other penalty under this or any other Act or otherwise. . . ."

Amphlett, K.C., and *Reginald Coventry* showed cause against the rule.
J. B. Matthews supported the rule.

LORD ALVERSTONE, C.J., read s. 26 of the Licensing Act, 1872, and continued: In this case the justices have purported to exempt twelve out of fourteen of the public-houses that applied in this comparatively small township of Upton-on-Severn for a period of several months from keeping their premises closed between ten and eleven o'clock. They have purported to repeal the provisions of the Licensing Act without, as it seems to me, any evidence whatever of the facts or of the matters which they were allowed to take into consideration under the section.

I think it would be well that I should state what I understand the law to be with regard to certiorari generally in these cases. If there is an erroneous decision of justices on a matter within their jurisdiction, either in fact or in law, no certiorari lies. If there is an erroneous assumption of jurisdiction in point of law based upon evidence which is not evidence of any legal matter that may be considered by them, certiorari will lie, and the existence of the want of jurisdiction may be established by affidavit. I believe that follows from *R.* v. *Bolton* (1), and a number of other cases subsequent to it, where we had to consider this matter, and I assume that those propositions are what we have to consider for the purpose of to-day. Now, as a sort of subordinate class as counsel showing cause have contended, there certainly do exist, and have grown up several classes of cases where certiorari has been held not to lie, as, for instance, the notable one in *Boulter* v. *Kent Justices* (2), where the justices were acting as a licensing committee, and the case (I only give it as an example) where the justices were approving the names for a jury list (*Hagmaier* v. *Willesden Overseers* (3)). There are others which can be traced through the books which have been held not to be matter for certiorari, but I must say that, apart from authority, where the justices are sitting in petty sessions, and are to act upon evidence which is to be brought before them in petty sessions, if they go beyond their jurisdiction I should have thought it would require very strong grounds to come to the conclusion that certiorari would not lie where an order has been made which they have only been able to make by exceeding their jurisdiction.

A In the present case the facts bring it within one of those two propositions which I have stated, and the question is within which one. The first is one which is in favour of counsel showing cause—error of law and fact on a matter within their jurisdiction. Counsel says, with perfect force and I think soundly, you cannot question the weight of the evidence, you cannot question whether they ought to have drawn a different conclusion of fact. If there had been any evidence B at all before these justices of the matters which might fairly be considered within this section then I think that this appeal ought to be dismissed. The first point is "any considerable number of persons attending any public market." I do not think it wants much experience—it certainly does not want much Worcestershire experience—for one to say what those words relate to. It is well known that markets begin, some of them, very early in the morning, and others are carried C on until a late hour at night, either for the reception or the delivery of articles of food in the metropolis and other places. The business in fact is done in the late hours of night and the early hours of morning. It is not suggested that there was in this case any suggestion of evidence of anything beyond the use of the words "market gardeners," which is nothing to do with "market" in that sense. Then, "or following any lawful trade or calling." What does that mean? Applying D what I hope is common sense to the matter, it seems to me pretty plain that there are trades and businesses which require to begin very early in the morning and to be carried on until late at night. Take, for instance, railway porters at some great station, or the arrival of goods at some great depot, where it is necessary that refreshment should be forthcoming, and if this had been a case in which the magistrates had had any evidence before them of it being necessary for a E particular public-house to be open to accommodate a class of people carrying on a lawful trade, again we should not have interfered. Finally, "or attending any theatre," because there is another most laudable class of people who attend theatres, that has been repealed, but for the purpose I am dealing with it does not matter whether it has been repealed or not. There is a class of people who go to plays, and it was thought that they might have refreshment after the per- F formance at the theatre.

In these circumstances, it seems to me it would be an abuse of language to suggest that when the magistrates said that there were a number of farmers, tradesmen, fruit and pea dealers and market gardeners—putting them in as a class—they meant a market or any particular trade. What they did mean was that they hoped by means of this section to allow the inhabitants of this small district G to get drink between ten and eleven o'clock; and, further than that, it is frankly stated that any other publican who applied would have the same privilege given to him. It may have been very just, but it shows perfectly plainly that they were not acting upon a consideration of this particular section. Therefore, unless the authorities prevent us from dealing with the matter, I come clearly to the conclusion that the magistrates assumed to themselves a jurisdiction which they H have not got—namely, a jurisdiction to extend the hours because the general number of inhabitants of the place desire to take drink, and not because the necessities of the market or trade or calling or theatre required it. I think that observation is clearly strengthened when you notice that it is to be particular premises, particular hours, and particular days, showing that it is not meant to be I a general order for every day of the week, but it is to be an order made in reference to what I may call the local circumstances of the particular house and the local requirements of the persons entitled to come and make the claim, and the adjudication further is to be made by two justices of the peace in petty sessions assembled.

I should have thought that, apart from authority, there was no doubt that certiorari would lie under those circumstances. Is the state of the authorities such that we ought not to act? A great many cases have been cited to us, but I am bound to say I think that, without saying there is any decision upon the matter,

there is so much opinion on it which accords with my own judgment that I think we ought not to act contrary to that opinion unless a court of superior authority to our own says we are wrong. *R.* v. *Sharman* (4) was in one sense an authority against the rule, but, on the other hand, if the judgment is looked at it obviously is a case which does not lead me to think that if WRIGHT, J., had decided this case he would have said that no certiorari lay, because he expressly excepts the case of justices who are sitting as a court and making a judicial order. It has been so regarded in all cases where that has been discussed. But I think, for the purpose of to-day, I need only refer to three judgments which seem to me to lay down the proper principle.

I call attention to the judgment of A. L. SMITH, M.R., in *R.* v. *Sunderland Justices* (5). It will be remembered that in that case they were overruling the decision of this court, we being bound by *R.* v. *Stockport Justices* (6), that a question of bias could be entertained, and that the particular facts showed bias. A. L. SMITH, M.R., referring to *Boulter* v. *Kent Justices* (2), which has been relied upon in this case, said ([1901] 2 K.B. at p. 368, 369):

> "I see no ground for extending the effect of that decision to the present case. The decision in *Boulter* v. *Kent Justices* (2) related only to proceedings before the licensing meeting. The House of Lords held that the licensing meeting was not a court of summary jurisdiction, and possibly it may follow, therefore, that a certiorari would not lie to bring up proceedings before the licensing meeting. In the case of *R.* v. *Manchester Justices* (7), CHANNELL, J., held that a certiorari would lie to bring up an order made by justices as the confirming authority under the Licensing Acts. I agree with him in the conclusion at which he there arrived, and in the grounds which he gave for it. Apart from *Boulter* v. *Kent Justices* (2) I think it would be clear that a certiorari would lie in this case."

And VAUGHAN WILLIAMS, L.J., says (ibid. at p. 370):

> "Speaking for myself, I wish to go further and to say that I do not think that it necessarily follows from the decision in *Boulter* v. *Kent Justices* (2), that a writ of certiorari will not lie in respect of proceedings before the licensing meetings, on the ground that a certiorari will only lie to bring up the order of a court properly so called. It is not necessary to decide this point, but I can only say, speaking for myself, that, having regard to the general principles of the common law, I should have been disposed to think that, wherever a body such as justices have, under the provisions of a statute, to grant or withhold a certificate, such as a certificate for a licence, and it appears from the statute that they have to exercise a judicial discretion in so doing, a certiorari would lie to bring up the proceedings before them in the case of erroneous exercise or excess of jurisdiction, whether they could or could not be said to have acted as a court in the strict sense of the term."

I think that means erroneous exercise of jurisdiction; it is not erroneous exercise or excess of jurisdiction; or probably it is an exhaustive way of stating the way in which the question of want of jurisdiction may be raised.

I wish to found my judgment also upon the reasons of my brother CHANNELL'S judgment in *R.* v. *Manchester Justices* (7). It seems to me we have there three very learned judges, by the opinion of two of whom we are in one sense bound, coming to the conclusion that if it be in the nature of a judicial proceeding certiorari would lie. That counsel showing cause does not seriously disagree with. I think the fact that the evidence is taken before the justices as a court, I presume upon oath, at any rate taken before them as sitting justices in petty sessions, is another argument in support of the view that I am taking, and the provision that they shall have only such evidence as they shall deem sufficient does not justify them in treating as evidence of one set of facts evidence which has no bearing whatever upon the matters which may be submitted to their jurisdiction.

In the case in the House of Lords of *Laceby* v. *Lacon & Co.* (8) the only thing that was said by the Lord Chancellor was that it would be sufficient to decide the question when it arose, but he certainly did not express any opinion contrary to the view I have stated. I, therefore, come to the conclusion that the magistrates in this case did exceed the jurisdiction that was conferred upon them by the section, acting on evidence which was no evidence in relation to the only issues which could be raised before them under the section. They were making an order in the nature of a judicial order, and that order being made without jurisdiction, the rule for a certiorari should be made absolute. The rule for a mandamus will of course be discharged.

KENNEDY, J.—The Lord Chief Justice has so entirely expressed my view that I do not think it necessary to add anything.

RIDLEY, J.—I agree for the same reasons.

Rule for certiorari made absolute.

Solicitors: *F. Brooks*, for *George Coventry*, Upton-on-Severn; *Blundell, Gordon & Co.*, for *S. Thornely*, Worcester.

[*Reported by* W. de B. Herbert, Esq., *Barrister-at-Law.*]

SAMUEL *v.* NEWBOLD

[House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Robertson and Lord Atkinson), June 21, 22, July 17, 1906]

[Reported [1906] A.C. 461; 75 L.J.Ch. 705; 95 L.T. 209; 22 T.L.R. 703; 50 Sol. Jo. 650]

Moneylender—Harsh and unconscionable transaction—Excessive rate of interest—Power of court to re-open transaction and grant relief—Extent of discretion—Moneylenders Act, 1900 (63 & 64 *Vict.*, 51), *s.* 1 (1).

By s. 1 (1) of the Moneylenders Act, 1900: "Where proceedings are taken in any court by a moneylender for the recovery of any money lent . . . or the enforcement of any agreement or security . . . in respect of money lent . . . and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses . . . are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may re-open the transaction, and take an account between the moneylender and the person sued and may . . . relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable . . . "

The relief extended to a borrower by the Moneylenders Act, 1900, is not limited to those cases in which before that Act the Court of Chancery would have given relief. The policy of the Act is to enable the court to prevent oppression, leaving it to the discretion of the court to weigh each case on its merits and to look behind a class of contracts which lend themselves peculiarly to an abuse of power.

Per Lord Atkinson: The Moneylenders Act, 1900, confers upon the courts of this country a new jurisdiction, and gives to borrowers a form of relief different in kind and range from that heretobefore granted by any class of tribunal in this country.

Moneylender—Harsh and unconscionable transaction—Excessive rate of interest—Primâ facie evidence of harshness.

An excessive rate of interest may of itself be primâ facie evidence that a transaction is "harsh and unconscionable" within the meaning of s. 1 of the Moneylenders Act, 1900, but the court must take into account the nature of the risk involved and other relevant circumstances.

Re A Debtor (1), [1903] 1 K.B. 705, approved.

Wilton & Co. v. *Osborn* (2), [1901] 2 K.B. 110, doubted.

Notes. Section 1 of the Moneylenders Act, 1900, is now to be construed in the light of s. 10 of the Moneylenders Act, 1927, whereby it is enacted that if the interest charged is more than 48 per cent. the court shall, unless the contrary be proved, presume that the interest charged is excessive, and that the transaction is harsh and unconscionable. The burden of proof is thus transferred from the borrower to the moneylender when the rate of interest exceeds 48 per cent.

Considered: *Carringtons, Ltd.* v. *Smith*, [1906] 1 K.B. 79; *Abrahams* v. *Dimmock*, [1914] 2 K.B. 372. Referred to: *Bonnard* v. *Dott* (1905), 92 L.T. 822; *Sadler* v. *Whiteman*, [1910] 1 K.B. 868; *Jacobs* v. *Joicey* (1919), 35 T.L.R. 362; *Crossingham* v. *Park*, [1927] All E.R.Rep. 175; *Reading Trust, Ltd.* v. *Spero*, [1929] All E.R.Rep. 405; *Collings* v. *Charles Bradbury, Ltd.*, [1936] 3 All E.R. 369; *Nadarajan Chettiar* v. *Walauwa Mahatmee*, [1950] A.C. 481.

As to relief of borrowers and actions by moneylenders, see 27 Halsbury's Laws (3rd Edn.) 42 et seq.; and for cases see 35 Digest 212 et seq. For the Moneylenders Act, 1900, s. 1, see 16 Halsbury's Statutes (2nd Edn.) 370 et seq.; and for the Moneylenders Act, 1927, s. 10, see ibid. p. 392.

Cases referred to:

(1) *Re A Debtor, Ex parte The Debtor*, [1903] 1 K.B. 705; 72 L.J.K.B. 382; 88 L.T. 401; 51 W.R. 370; 19 T.L.R. 288; 47 Sol. Jo. 334; 10 Mans. 130, C.A.; 35 Digest 212, *376*.

(2) *Wilton & Co.* v. *Osborn*, [1901] 2 K.B. 110; 70 L.J.K.B. 507; 84 L.T. 694; 17 T.L.R. 431; 35 Digest 212, *375*.

(3) *Gwynne* v. *Heaton* (1778), 1 Bro.C.C. 1; 28 E.R. 949; 25 Digest 274, *980*.

(4) *Bowes* v. *Heaps* (1814), 3 Ves. & B. 117; 35 E.R. 423; 25 Digest 277, *1007*.

Also referred to in argument:

Earl of Chesterfield v. *Janssen* (1751), 1 Atk. 301; 2 Ves. Sen. 125; 26 E.R. 191, L.C.; 35 Digest 39, *328*.

Earl of Aylesford v. *Morris* (1873), 8 Ch. App. 484; 42 L.J.Ch. 546; 28 L.T. 541; 37 J.P. 227; 21 W.R. 424, L.C. & L.J.; 25 Digest 269, *940*.

Nevill v. *Snelling* (1880), 15 Ch.D. 679; 49 L.J.Ch. 777; 43 L.T. 244; 29 W.R. 375; 25 Digest 268, *932*.

Middleton v. *Brown* (1878), 47 L.J.Ch. 411; 38 L.T. 334; 25 Digest 266, *904*.

Appeal from a decision of the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.), reported [1905] 1 Ch. 260, affirming a decision of Kekewich, J.

Upjohn, K.C., and *Hohler* for the appellants.

P. Ogden Lawrence, K.C., and *M. Macnaghten* for the respondents.

Their Lordships took time for consideration.

July 17, 1906. The following opinions were read.

LORD LOREBURN, L.C.—The appellants, Braham Samuel and Philip Samuel, trading as moneylenders under the name of P. Saunders, brought an action against the respondent James William Newbold, as the executor of one Alton, deceased, upon a promissory note for £3,300 made by the said Alton, on Oct. 3, 1903, in their favour. The defence, in substance, was raised under the Moneylenders Act, 1900. Both KEKEWICH, J., and the Court of Appeal held that the Act did apply, and that the appellants were not entitled to more than the sum of £2,000, the money actually advanced, with 10 per cent. interest.

This case is undoubtedly of importance, because the construction of the Act in question, which I understand has given rise to differences of opinion, comes up directly for the consideration of your Lordships. The facts of the case are in substance as follows. Alton was in 1903 a wealthy man. When he died in the following year his net estate was over £40,000. There appears to be no doubt that, owing to intemperate habits, or, it may be, other disease, he was a person liable to be imposed upon, and singularly improvident in affairs of business. I will assume, however, that the appellants were not aware of this. In the summer of 1903 one Sagar introduced Alton to the appellants, and Alton borrowed from them on a promissory note the sum of £1,000 on terms of repaying them the £1,000 and £400 more for interest by five monthly instalments of £250 and the balance of £150 on Jan. 6, 1904, with a provision that in the event of default being made in the payment of any instalment the whole amount then remaining unpaid should become payable forthwith. It is unnecessary to say more than that the rate of interest, under the circumstances, was exorbitant, and the transaction inexplicable in the case of a wealthy man, except upon the supposition that he was unfit to manage business. That first transaction, however, was ultimately settled, and for the moment I say no more of it. In September of the same year the same intermediary Sagar was instrumental in procuring a fresh application by Alton to the plaintiffs for a fresh loan. This time the proposal was that Alton should borrow £2,000 upon the footing of repaying it, together with £1,300 for interest, by twelve monthly payments of £275 each, and in the event of default in any one payment or part thereof, the whole amount remaining unpaid to become immediately due and payable. This transaction was completed by Mr. Alton giving to the appellants a promissory note for £3,300 on those terms, dated Oct. 3, 1903. It was, like the preceding transaction, inexplicable except on the footing that Alton was unfit to manage business. The rate of interest was, we were told, 104 per cent. per annum, if the instalments were punctually paid. In fact, owing to Alton's death, which occurred in November, 1903, default was made in one of the instalments, and, according to the terms of the loan, the whole sum of £3,300 became payable. Had it been paid the appellants would have received interest at the rate of 418 per cent. per annum, or thereabouts.

There are two further circumstances in this case which require notice. One is that in September, 1903, the appellants obtained a confidential report from an inquiry agency in regard to the financial position of Alton before advancing the £2,000. This report stated that Alton was regarded as a man of responsibility, and was understood to be a large shareholder and director in the firm of Alton & Co., Ltd., brewers; that he was reputed to be well to do, but at times inclined to be slow with his payments. He was, however, the owner of property and was considered a desirable man to deal with in the ordinary way of business. And, the report added,

> "it is not thought that any unreasonable risk would be incurred in granting credit to the extent named."

The other circumstance is that Sagar had been for years known to the appellants and did business with them on the terms of receiving commission from them. He received commission from the appellants on the July transaction. He also received commission from the appellants in regard to the October transaction, and he was a co-adventurer with them in lending the money to Alton to the

extent of £500. Sagar also received from Alton a commission for procuring him the loan of £2,000 in October. If it were necessary for the decision of this case there is ample evidence that the appellants were perfectly aware that Sagar was receiving a commission from Alton. And there is strong ground for believing that, notwithstanding Mr. Samuel's denial, Sagar was a co-partner with the appellants from the commencement, in the transaction of Oct. 3, 1903.

Apart from any question raised under the Moneylenders Act, 1900, your Lordships might well conclude that the appellants were guilty of fraud which disentitles them to the benefit of their contract with Alton. But this case has been decided on the Moneylenders Act, and argued on that basis before this House. Upon that basis, also, I consider that the appellant's appeal fails. Under the Moneylenders Act, 1900, s. 1 (1), a court may re-open a transaction and take an account between the moneylender and the person sued upon two conditions. The first condition is that the interest charged in respect of the sum actually lent is excessive, or that the amount charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, is excessive. There cannot be any doubt that the interest charged in this case is, under the circumstances, excessive. The second condition is that the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief. A serious question has been raised in this case as to the meaning and effect of these words. It has been contended that the court cannot look at the simple point whether the transaction is "harsh and unconscionable," but that the language immediately following qualifies the meaning of the words which I have quoted. It is said that it is not enough if the transaction be harsh and unconscionable unless it be so in the sense in which courts of equity are said to have applied that language in granting relief to expectant heirs and others in a like situation. According to this argument, the Act says no more than that persons borrowing from moneylenders shall have the same protection as expectant heirs formerly had, provided that the interest or charges are excessive. In my opinion this contention cannot be maintained, nor ought a court of law to be alert in placing a restricted construction upon the language of a remedial Act. The section means exactly what it says—namely, that if there is evidence which satisfies the court that the transaction is harsh and unconscionable, using those words in a plain and not in any way technical sense, the court may re-open it, provided, of course, that the case meets the other condition required. A transaction may fall within this description in many ways. It may be so because of the borrower's extreme necessity and helplessness, or because of the relation in which he stands to the lender, or because of his situation in other ways. These are only illustrations, and, as in the case of fraud, it is neither practicable nor expedient to attempt any exhaustive definition. What the court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact and according to its sense of justice the transaction was harsh and unconscionable.

We are asked to say that an excessive rate of interest could not be of itself evidence that it was so. I do not accept that view. Excess of interest or charges may of itself be such evidence, and particularly if it be unexplained. If no justification be established, the presumption hardens into a certainty. It seems to me that the policy of this Act was to enable the court to prevent oppression, leaving it in the discretion of the court to weigh each case upon its own merits and to look behind a class of contracts which lend themselves peculiarly to an abuse of power. I agree also with the Court of Appeal that the order is to be without prejudice to the right of the defendant as executor of Alton, deceased, to bring any action in respect of the transaction of July, 1903.

LORD MACNAGHTEN.—I agree. I think this is a very idle appeal. I do not think that there is any difficulty either as regards the facts or as regards the law. It seems to me that the construction of the Moneylenders Act, 1900, is plain enough, and that the evidence before your Lordships is more than sufficient

to show that this case is within the mischief which the Act was designed to remedy.

Before considering the precise terms of the Act, I would venture to make one or two observations. The first thing I think which must strike anyone on reading the Act is that the jurisdiction created or conferred by it is not committed exclusively to the division of the High Court already conversant with somewhat analogous questions. Any branch of the High Court—any county court—any court in the kingdom to which the moneylender may resort for the purpose of enforcing his extreme rights is armed with power to protect the moneylender's victim. The next observation that I would make is that, although the Court of Chancery from the earliest times was familiar with questions more or less analogous, it never assumed to deal with them on the principle on which this Act grants relief. In certain cases which, in modern times at any rate, have been confined to dealings with expectant heirs, including the whole class of persons for convenience sake comprehended under that designation, the Court of Chancery gave relief on terms. On the plaintiff submitting to do equity by repaying what was justly due, the court set aside the transaction which it considered unrighteous, and ordered that the securities impeached should stand as a security for the money actually advanced with interest. But the court never remodelled the bargain. "The Chancery," as a distinguished judge said many years ago, "mends no man's bargains." So the Act involves a new departure in principle and the working of the machinery is entrusted—I will not say to more vulgar hands—but at least to a less select body; and yet it is argued that there is an atmosphere of Chancery about the Act.

The question which it is said that this appeal was brought to determine is whether the view of RIDLEY, J., in *Wilton & Co.* v. *Osborn* (2) or the view of the Court of Appeal in *Re A Debtor* (1) was right. RIDLEY, J., with whom CHANNELL, J., seems to have agreed, thought that the relief which the Act extends to a borrower must be limited to those cases in which before the Act the Court of Chancery would have given relief, and that the only standard to be applied under s. 1 is that adopted by the courts of equity before the Acts. Speaking for myself, I must say that, while listening with great interest to the exhaustive exposition addressed to the House by the learned counsel for the appellants, I could not help thinking what a mockery it would be if that were all that the Act has done. What an intolerable strain would be thrown upon inferior courts unfamiliar with the doctrines and the practices of courts of equity if they were condemned or privileged to listen to lengthy arguments and venerable precedents before deciding a question which any man of common sense is just as capable of deciding as the most learned judge in the land, if he is not hampered by authorities which required no little training to discriminate and appreciate at their true value. But does the Act require anything of the sort? It says that if

> "there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive,"

and that

> "the transaction is harsh and unconscionable or is otherwise such that a court of equity would give relief, the court may re-open the transaction and . . . relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of principal and interest as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable."

It seems to me that there are two cases contemplated by the Act. One where the interest is excessive and the transaction harsh and unconscionable; the other where the interest is excessive and the transaction is such that without the necessity of proving the transaction to be harsh and unconscionable—without going into that question at all—a court of equity would give relief. It seems to me that those two cases are meant to be distinct. I think that this is the grammatical construction of the language used. I think that it is shown by the introduction of the

word "is" in the second limb of the sentence, and I think that the circumstance that the second alternative is excluded in the application of the Act to Scotland points in the same direction. It would be, of course, inapplicable to the Scottish system of jurisprudence. But in the application of the Act to Scotland nothing is introduced in its place, and the case under the first limb of the sentence is complete without anything more. The court then must be satisfied that the interest is excessive, and as an alternative that the transaction is harsh and unconscionable. I do not for a moment doubt that the interest may be so excessive or exorbitant as of itself to show that the transaction is harsh and unconscionable, but I do not think that the court has to take two steps and make two inquiries. I think that there is but one step and but one inquiry. In dealing with the first alternative the court must be satisfied that the transaction is harsh and unconscionable, that is, as I think the latter part of the section shows, unreasonable and not in accordance with the ordinary rules of fair dealing. The rate of interest may be so monstrous as to show that by itself. There may be, as LORD THURLOW, L.C., said in *Gwynne* v. *Heaton* (3) (1 Bro.C.C. at p. 9),

> "an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it."

That, I think, is the case here. But I think that the present case also falls under the second alternative. Undoubtedly there were surreptitious dealings between the moneylender and Sagar, quite enough of themselves to avoid the transaction according to the principles of a court of equity. The moneylender admits that he paid the borrower's agent a commission for introducing the business to him; that is in plain words for leading or luring the victim into his toils. One word as to the facts. On Oct. 3, 1903, at the invitation of Mr. Sagar, whom he had "known for years," and to whom he was about to pay a handsome commission for his intervention, besides giving him a share in the profits of the enterprise, he goes to Mr. Sagar's office, and there he finds Mr. Alton sitting, and, as he admits, not without traces of past intemperance on his countenance. He knew that Mr. Alton was perfectly solvent, and that there was not the slightest risk in the transaction. He gives Mr. Alton a cheque for £2,000 and takes a bill for £3,300. Mr. Alton, he tells us, said, "All right," and signed the bill. The moneylender says, "that is all that passed, and I gave him the cheque and wished him good morning." It is no wonder that Mr. Sagar was not called to explain the transaction. But the transaction is absolutely inexplicable if Mr. Alton is to be credited with any sense or any vestige of business capacity. Even assuming that Mr. Alton was in some distress, it must be remembered, as SIR WILLIAM GRANT, M.R., said: "It is not every bargain which distress may induce one man to offer that another is at liberty to accept": (*Bowes* v. *Heaps* (4), 3 Ves. & B. at p. 119). I agree that the appeal must be dismissed with costs.

LORD JAMES OF HEREFORD.—I feel that, apart from the decision upon the particular case before your Lordships, it is very desirable that a judgment upon the construction of the Moneylenders Act, 1900, should be clearly and distinctly expressed. I am glad that the Court of Appeal has declared that the construction put upon the Act by the judges of the King's Bench Division was incorrect. The views expressed by those judges went far to render the Act nugatory, and it is important that all doubt upon the subject should be removed.

The objects of the Act can easily be traced from its contents. The ends sought to be remedied by it were generally recognised. A class of men well known under the term "moneylenders" were, under different names and disguises, carrying on the business of lending money. No usury laws remained to restrain them, and so in many instances they lent money at as high a rate of interest as could be wrung from the necessities of the borrower. Terms were imposed which caused default, however technical, to add to the burden to be borne by the debtor. No

A sufficient legal remedy existed. The old Chancery jurisdiction was too narrow to meet the case. It was not with remaindermen and reversioners that the modern moneylender dealt. The needy, helpless, perhaps unwary borrower was of a different class from those who had in former days applied to the Court of Chancery for relief. It was principally in the county courts that the moneylender sought to enforce his contract, and those courts had no power to grant direct relief B against oppressive contracts. True it was that humane judges would sometimes mark their sense of the unsatisfactory state of the law by minimising the payments to be made to such an extent that many judgments given in accordance with the existing law became nugatory in their effect. To remedy such evils by affording sufficient legal protection against them the legislature was moved to action. It certainly did not intend to leave the old law as it was. The intention certainly C was to give the debtor greater legal protection against the moneylender than then existed. This appears from the statute itself. The title and the provisions of the Act all show that the Act is an amending Act, and that VAUGHAN WILLIAMS, L.J., was correct when he spoke of it as an "amplifying" Act. The basis of the jurisdiction of the court when granting relief is "that the interest charged in respect of the sum actually lent is excessive" . . . then also the transaction D must be harsh and unconscionable, or otherwise such that a court of equity would grant relief. On these grounds the transaction may be re-opened and the relief given by the statute is important to be noted:

> "the court may relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, E charges, and interest as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable."

Two learned judges—RIDLEY and CHANNELL, JJ.—held that a contract to pay interest, however high and excessive, could not be re-opened unless it was for other reasons "harsh and unconscionable" within the old practice of courts of F equity, which apart from fraud granted relief only when contracts affecting estates in remainder had been made. Such, too, was the argument at your Lordships' Bar. But the learned counsel for the appellants had to admit, as I understood him, that his argument went beyond the express words of the section, and he recognised that, in order to support his reading, some words had to be inserted and some struck out. This argument and the judgments to which I have referred G appear to me to be erroneous. But I am relieved from a further minute dissection of the terms of the section, because I desire to adopt to the fullest extent the judgment delivered by the Court of Appeal in the case of *Re A Debtor* (1). That judgment distinctly overruled the view expressed by RIDLEY, J., in *Wilton & Co.* v. *Osborn* (2), to the effect that the only standard of relief to be applied under s. 1 of the Act was that which was adopted by the courts of equity before the passing H of the Act. But the Court of Appeal expressly dissented from such a limited construction of the effect of the Act. SIR RICHARD HENN COLLINS, M.R., said ([1903] 1 K.B. at p. 709):

> "RIDLEY, J., held on the construction [of s. 1] that the legislature must be taken to have limited the relief to be given to a borrower to that relief which I a court of equity would have given before the Act. I cannot agree with that construction. In my opinion, the relief which may be given under the Act cannot thus be limited. . . . I think that the words 'harsh and unconscionable' are distinct from and independent of the words which follow. Relief may be given if the bargain is harsh and unconscionable by reason of excessive interest or other excessive charges."

In the same case ROMER, L.J., said (ibid. at p. 710):

> "In my judgment, the words 'harsh and unconscionable' stand by themselves."

COZENS-HARDY, L.J., said (ibid. at p. 711):

> "I should be sorry to lay down any rule which would fetter the discretion of the court. . . . I should be sorry to say that the rate of interest charged and the other charges might not be so excessive as to render the transaction 'harsh and unconscionable.'"

As the Court of Appeal has in the present case acted on and accepted this view, the weight of authority is overwhelmingly in favour of construing the Act without introducing into it arbitrary limitations, and this construction, I submit to your Lordships, is correct. The result at which I have arrived may, therefore, be summarised as follows. [But see now the Moneylenders Act, 1927, s. 10]. Excessive interest of itself is sufficient to render a contract harsh and unconscionable. Proof of excessive interest may of itself, therefore, be sufficient to entitle the debtor to relief. What amounts to excessive interest is to be determined by the tribunal in each case, the question of risk being a material matter for consideration. When excessive interest is apparently established any facts that tend to show that such excess does not render the contract "harsh and unconscionable" should be proved in evidence by the lender. This burden is on him. Such appearing to me to be the construction that should be put upon the Moneylenders Act, 1900, and applying it so construed to the facts of the present case, I entertain no doubt of the correctness of the judgments delivered by KEKEWICH, J., and by the Court of Appeal. [HIS LORDSHIP went through the facts of the case, and continued:] The Court of Appeal have held that there was no appreciable risk in the lending of this money, and that the appellants were fully aware of the absence of risk. It seems scarcely possible to contest this finding upon the evidence before the court. But if the appellants desired that different conclusions should be arrived at, it was for them to give evidence that would account for the excessive interest charged. Nothing was done in this direction. The Court of Appeal further held that the rate of interest was excessive having regard to the risk or absence of risk, and that the terms, having regard to what the moneylenders knew of Alton, were harsh and unconscionable. With this finding I entirely concur. The word "excessive" applied to interest is, of course, a relative and elastic term, impossible of absolute definition. But we know the general rate of interest in commercial transactions, and in loans on perfect security. We know the rate of interest which juries are in the habit of giving in cases of awarding damages. But in respect of ordinary loans deviation from these guides, dependent upon the facts of each case, must doubtless be expected, and ought to be allowed. But such a deviation must be reasonable in relation to the facts. In the present instance the minimum return of 100 per cent. is, in relation to the risk run, clearly excessive. KEKEWICH, J., and the Court of Appeal have so held, and in their judgment I concur. Only one step remains. This unexplained excessive interest of itself makes the contract harsh and unconscionable, and the case thereby is, in my judgment, clearly brought within the provisions of the Act. I submit that the appeal must be dismissed.

LORD ROBERTSON concurred.

LORD ATKINSON.—I concur. The Moneylenders Act, 1900, in my opinion confers upon the courts of this country a new jurisdiction, and gives to borrowers a form of relief different in kind and range from that theretofore granted by any class of tribunal in this country. The relief given is not that heretofore administered by courts of equity, but differs from it in character, nature, and extent. The relief being thus different, it appeared primâ facie to be an unsound mode of construction of the statute which would confine the grounds for giving that enlarged relief to those heretofore recognised as sufficient in courts of equity, and, in addition, merely alter the law to the extent of widening the limited class who had hitherto been able to seek relief in Chancery, so as to make it include all borrowers. I concur with the Court of Appeal that the words "harsh and

A unconscionable" are not qualified by those words which immediately follow—namely, "such that a court of equity would give relief." The statute, I think, did more than extend and widen the character and nature of the relief which might hitherto have been granted, or increase the number of possible applicants for equitable relief. It also extended the grounds on which this enlarged relief might be given.

B I am quite unable to accede to the argument pressed upon your Lordships that interest may not be so excessive as to amount to primâ facie evidence that advantage was taken, or a market was made, of the borrower's necessity or weakness, or that an unconscionable use has been made of the power over him which the lender was in a position to exercise, so as to entitle the borrower to relief under the statute, or that the transaction was not reasonably consistent with C any course of fair dealing, and therefore the borrower is entitled to relief. It will, of course, be always competent for the lender to show that, despite the excessive rate of interest, the transaction was in fact fair and reasonable, but to permit a lender to succeed in retaining the benefit of a bargain securing to him gains apparently so inordinate as those which the lender attempted to secure in this case, without giving satisfactory proof of the character which I have mentioned, D would, in my opinion, altogether defeat the object of this remedial legislation. In the present case the transaction seems to me on the evidence altogether inexplicable on any system of fair dealing. The borrower was solvent, and known to be solvent. The risk was trifling, the rate of interest extravagant, the clause of forfeiture quite unnecessary for the protection of the lenders' interest, and exorbitant in its character. The associate of and co-operator with the lenders, who E negotiated the business, practically made the contract, received commission from both sides, and shared the spoils, was, though present in court, not examined. Nor was any evidence given to show how the borrower, assuming that he was sane, ever came to submit to terms so onerous as those imposed upon him. In my view, therefore, the transaction primâ facie came within the terms of the statute, and the mischief that it was designed to remedy, and I agree that the appeal should F be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *B. Barnett*; *Fowler & Co.*, for *Eddowes & Sons*, Derby.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

GORDON *v.* GORDON

[Court of Appeal (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.), February 18, 23, 1904]

[Reported [1904] P. 163; 73 L.J.P. 41; 90 L.T. 597; 52 W.R. 389; 20 T.L.R. 272; 48 Sol. Jo. 297]

Contempt of Court—Party in contempt—Right to take proceedings in same cause —Appeal against order in cause.

A decree nisi for the dissolution of a marriage on the ground of the wife's adultery directed that the child of the marriage should remain in the custody of the husband until further order, and should not be removed out of the jurisdiction of the court. On the same day an order was made ex parte in chambers that the child should be forthwith delivered to the husband. At that time the wife was abroad with the child. After the decree nisi had been made absolute she returned to England with the child, and was for the first time served personally with the orders with reference to the custody of the child. She then took out a summons asking that the decree nisi and the ex parte order might be varied and the custody of the child given to her. During the hearing of the summons the wife gave an undertaking not to remove the child out of the jurisdiction of the court. On Mar. 10, 1903, the summons was dismissed and the wife was ordered to pay the costs out of her separate property, notwithstanding that it was subject to a restraint on anticipation. She was also ordered to deliver the child to the husband forthwith. It was then discovered that she had sent the child out of the jurisdiction two or three days before Mar. 10, and had since gone abroad and remained abroad with the child ever since. On Mar. 12 an order was made for her committal for contempt of court and directing a writ of attachment to issue against her. On May 12 the wife gave notice of appeal from so much of the order of Mar. 10 as directed the costs to be paid out of her separate estate, and it was contended that the court had no jurisdiction to make it. On a preliminary point that, as the wife was in contempt, her appeal could not be heard,

Held: the general rule that a party in contempt could not be heard, or take any proceeding, in the same cause until he had purged his contempt applied to proceedings voluntarily instituted by himself in which he made some claim and not to a case where all he sought was to be heard in respect of some matter of defence, or where, as in the present case, he appealed against an order in the cause which he alleged to be illegal as having been made without jurisdiction; therefore, the court would hear the wife's appeal.

Notes. Restrictions on anticipation attached to the enjoyment of any property by a woman were abolished by the Married Women (Restraint upon Anticipation) Act, 1949 (28 Halsbury's Statutes (2nd Edn.) 733).

As to the position of a party in contempt, see 8 Halsbury's Laws (3rd Edn.) 42, 43; and for cases see 16 Digest (Repl.) 103–108.

Cases referred to:

(1) *Chuck* v. *Cremer* (1846), 1 Coop. temp. Cott. 205; 47 E.R. 820, L.C.; 16 Digest (Repl.) 105, *1195*.

(2) *Garstin* v. *Garstin* (1865), 4 Sw. & Tr. 73; 34 L.J.P.M. & A. 45; 13 W.R. 508; 164 E.R. 1443; 16 Digest (Repl.) 104, *1184*.

(3) *Barker* v. *Dawson* (1836), 1 Coop. temp. Cott. 207.

Also referred to in argument:

King v. *Bryant* (1838), 3 My. & Cr. 191; 7 L.J.Ch. 167; 2 Jur. 106; 40 E.R. 897, L.C.; 16 Digest (Repl.) 106, *1205*.

Wilson v. *Bates* (1838), 3 My. & Cr. 197; 7 L.J.Ch. 131; 2 Jur. 319; 40 E.R. 900, L.C.; 16 Digest (Repl.) 105, *1192.*

Fry v. *Ernest* (1863), 3 New Rep. 63; 9 L.T. 321; 9 Jur.N.S. 1151; 12 W.R. 97; 16 Digest (Repl.) 105, *1199.*

Green v. *Green* (1828), 2 Sim. 394; 1 Coop. temp. Cott. 206; 57 E.R. 836; 16 Digest (Repl.) 105, *1190.*

Parry v. *Perryman* (1838), 1 Coop. temp. Cott. 207; 47 E.R. 821; 16 Digest (Repl.) 105, *1198.*

Ricketts v. *Mornington* (1834), 7 Sim. 200; 4 L.J.Ch. 21; 58 E.R. 813; 16 Digest (Repl.) 106, *1218.*

Re Brady (1828), 1 Mol. 254; 16 Digest (Repl.) 60, **226.*

Hawkins v. *Hall* (1838), 1 Beav. 73.

Anon. v. *Lord Gort* (1823), 1 Hog. 77.

Morrison v. *Morrison* (1845), 4 Hare, 590; 9 Jur. 103; 67 E.R. 783; 16 Digest (Repl.), 106, *1206.*

Plumbe v. *Plumbe* (1839), 3 Y. & C.Ex. 622; 9 L.J.Ex. Eq. 9; 3 Jur. 1144; 160 E.R. 850; 16 Digest (Repl.) 107, *1221.*

Cattell v. *Simons* (1843), 5 Beav. 396.

Re Madrid and Valencia Rail. Co., Ex parte Chadwick (1850), 16 L.T.O.S. 166; 15 Jur. 597; 16 Digest (Repl.) 106, *1208.*

Chatterton v. *Thomas* (1867), 36 L.J.Ch. 592; 16 Digest (Repl.) 107, *1224.*

Futvoye v. *Kennard* (1859), 2 Giff. 110.

Barnardo v. *Ford, Gossage's Case*, [1892] A.C. 326; 61 L.J.Q.B. 728; 67 L.T. 1; 56 J.P. 629; 41 W.R. 333; 8 T.L.R. 728; 36 Sol. Jo. 681; 1 R. 17, H.L.; 16 Digest (Repl.) 280, *492.*

Cavendish v. *Cavendish and Rochefoucauld* (1866), 15 W.R. 182; 16 Digest (Repl.) 104, *1185.*

Curtis v. *Curtis* (1846), 5 Moo.P.C.C. 252; 10 Jur. 165; 13 E.R. 487, P.C.; 16 Digest (Repl.) 106, *1213.*

Howard v. *Newman* (1828), 1 Mol. 221; 16 Digest (Repl.) 105, **414.*

Ex parte Fernandez (1861), 10 C.B.N.S. 3; 30 L.J.C.P. 321; 4 L.T. 324; 7 Jur.N.S. 571; 9 W.R. 832; 142 E.R. 349; 16 Digest (Repl.) 149, *317.*

Hewitt v. *M'Cartney* (1807), 13 Ves. 560; 33 E.R. 404, L.C.; 16 Digest (Repl.) 106, *1211.*

Lord Wenman v. *Osbaldiston* (1719), 2 Bro. Parl. Cas. 276; 1 E.R. 941, H.L.; 16 Digest (Repl.) 103, *1174.*

Appeal against an order of SIR FRANCIS JEUNE, P., that certain costs should be paid out of the separate property of the wife, Margaret Gordon, notwithstanding that it was subject to a restraint on anticipation.

On Nov. 25, 1901, on the petition of the husband, a decree nisi was pronounced for the dissolution of the marriage of Margaret Gordon and her husband. It was ordered that the only child of the marriage should remain in the custody of the husband until further order, but it was directed that the child should not be removed out of the jurisdiction without the sanction of the court. The child was, however, then with the wife, who was abroad. On the same day an order was made ex parte in chambers directing that the child should be forthwith delivered up and should remain in the custody of the husband until further order of the court. On June 2, 1902, the decree nisi was made absolute, and in August the wife was married to the co-respondent. In October, 1902, she returned to England, bringing the child with her, and was for the first time served personally with the orders with reference to the custody of the child. On Oct. 15 she took out a summons entitled in the suit calling on the husband to show cause why so much of the decree nisi as ordered that the child should remain in the custody of the husband until further order of the court and the order of Nov. 25, 1901, should not be varied, and in lieu thereof that the custody of the child should be given to her. She afterwards by her counsel gave an undertaking not to remove the child

out of the jurisdiction without the permission of the court. On Mar. 10, 1903, the President dismissed the summons [see [1904] P. 141], and ordered that the wife

> "do pay to the petitioner his costs of and incident to the summons, such costs to be payable out of the [wife's] separate property, notwithstanding that such property is subject to a restraint on anticipation."

He further ordered that the child should be forthwith delivered up by the wife to the husband, and that it should remain in the custody of the husband until further order and should not be removed out of the jurisdiction of the court without its sanction. When an attempt was made to serve this order on the wife it was discovered that she had gone away with the child. On Mar. 12, 1903, the President made an order pronouncing the wife

> "to be contumacious and in contempt for breach of and non-compliance with her undertaking . . . not to take the child out of London,"

and he ordered her to be attached for such contempt. On the same day another order was made that the wife do stand committed to Holloway Prison for her contempt in not complying with the order of Nov. 25, 1901, directing that the child should not be removed out of the jurisdiction of the court without its sanction, and the next day a writ of attachment was issued against her and a warrant granted for her arrest, but, as she remained abroad with the child, she was not arrested. On May 12, 1903, she gave notice of appeal against so much of the order of Mar. 10 as ordered payment of costs out of her separate property, notwithstanding that it was subject to a restraint on anticipation. In opposition to the appeal an affidavit was made by the husband's solicitor, in which he said:

> "Notwithstanding the undertaking of the [wife] not to remove the said child out of the jurisdiction of the court, and in defiance thereof, she, two or three days before the decision of the court, surreptitiously sent the child out of the country, and on the day the court gave judgment she herself left England, and she has since remained abroad with the said child and has been joined by the co-respondent, and they are living abroad with the said child."

That affidavit was not contradicted. On the hearing of the wife's appeal,

Duke, K.C., and *Priestley, K.C.*, for the petitioner, took the preliminary objection that, she being in contempt, the court would not hear the appeal until she had purged her contempt.

Bargrave Deane, K.C., and *Method* for the wife.

VAUGHAN WILLIAMS, L.J.—A preliminary objection has been taken to this appeal—namely, that the wife is in contempt and, therefore, her appeal ought not to be heard. The appeal is against so much of the order of Mar. 10, 1903, as directs that the costs incident to a summons in chambers taken out by the wife and adjourned into court should be payable out of her separate property, notwithstanding that such property is subject to a restraint on anticipation. The contempt which is relied upon as debarring the wife from appealing against that part of the order is thus set forth in the affidavit of Sir George Lewis:

> "Notwithstanding the undertaking of the [wife] not to remove the said child out of the jurisdiction of the court, and in defiance thereof, she, two or three days before the decision of the court, surreptitiously sent the child out of the country, and on the day the court gave judgment she herself left England."

The undertaking was given antecedently to the hearing of the summons in court, and the question which we have to determine is whether the objection that the wife is in contempt ought to prevail.

I think it ought not to prevail. We have heard a great deal about cases which were decided in the Courts of Chancery and of the rules and principles which were laid down by various judges, including Lord Cottenham, in reference to this matter of contempt, and when it should and when it should not debar a would-be

A appellant, or applicant, from being heard. The greater part of the cases are set out in the notes to *Chuck* v. *Cremer* (1), but I do not think it is necessary for me to go through those cases. I think that there are general principles which apply to this case, and are not affected by the decisions to which our attention has been particularly called. What I mean is that, taking it generally, it has not been disputed in the discussion before us that this rule that a person who is B in contempt cannot be heard, primâ facie applies to voluntary applications on his part, to cases where he comes and asks for something, and not to cases in which all that he is seeking is to be heard in respect of matters of defence. I do not for one moment suggest that it is every matter of defence which entitles a person in contempt to be heard. For instance, if an order has been made in the exercise of the discretion of the court, and someone who thinks himself oppressed C by that order appeals, saying that the court has exercised its discretion wrongly, that person, if he is in contempt, cannot be heard to say anything of the sort until he has purged his contempt. *Garstin* v. *Garstin* (2) is an instance of that kind. But when you come to an order which it is suggested may have been made without jurisdiction, if, upon looking at the order one can see that that is the ground of the appeal, it seems to me that such a case has always been treated D as one in which the court will entertain the objection to the order, though the person making the objection is in contempt. It was admitted, and could not be otherwise than admitted, that if the objection was to the very order which had created the contempt and the objection was one of the character which I have described, the fact that the person taking the objection was in contempt would not deprive him of the right to be heard. I do not propose to consider the rule E laid down by LORD COTTENHAM in *Barker* v. *Dawson* (3), for the reason that the order of events here, as stated in Sir George Lewis' affidavit, was different from that with reference to which LORD COTTENHAM laid down the rule that a person in contempt could not be heard. In the present case the contempt was committed before, not after, the order appealed from, and his rule has, therefore, no application to the present case.

F That being so, the simple point which we have to decide is this. Here is an order, the objection to which obviously does not depend upon an exercise of the discretion of the court. It is said that it is unlawful to make such an order in respect of the separate property of a woman which is subject to a restraint on anticipation—that is to say, unlawful for the court by which the order was made and on the occasion on which it was made—and it is said that we ought not to G look at the order because this divorced wife is in contempt. In my judgment, that is not so. Having regard to the nature of the objection, in my opinion the wife merely comes here to say: "This order which has been made against me is an illegal order, and it appears to be so upon the face of the order itself." That being so, I am of opinion that no rule has been brought to our notice which should prevent her from being heard. I wish to add that, supposing this order H is in fact an illegal order, and we were to refuse to hear the wife now, it by no means follows that there would not be any opportunity hereafter of questioning the order. But be that how it may, I think that, having regard to the fact that the objection is to the legality of the order, it would not be right to allow an order to be enforced without first determining the question of its legality. I think, under these circumstances, we ought to hear the appeal.

I

STIRLING, L.J.—I also think that the appeal ought to be heard. The counsel for the husband have relied very much on the decision of LORD COTTENHAM in *Chuck* v. *Cremer* (1). If I thought our decision involved a departure from what was there laid down by LORD COTTENHAM, I should desire to consider the matter further, but when the sequence of events is ascertained it appears to me that the present case is not identical with *Chuck* v. *Cremer* (1). In that case the order of events was this. The defendant moved that an injunction granted ex parte might be dissolved; his application was unsuccessful, and he gave notice of

motion by way of appeal. Previously to the notice of the appeal motion being given, an attachment was issued against the defendant for not having put in his answer. Upon the motion being opened, it was objected that the defendant was in contempt, and could not be heard. The Lord Chancellor gave effect to the objection, but he said that:

> "a party was entitled to be heard if his object was to get rid of the order, or other proceeding which placed him in contempt, and he was also entitled to be heard for the purpose of resisting or setting aside for irregularity any proceedings subsequent to his contempt."

Here, according to the affidavit which the husband has himself put forward, the contempt began two or three days before the order in question was made. Therefore, if we allow the appeal to be heard, we shall in no way contravene what LORD COTTENHAM there said. Here the question is not merely one of irregularity in the order, but one of want of jurisdiction in the court. Having regard to that, I entirely agree that the appeal ought to be heard.

COZENS-HARDY, L.J.—I agree. Until recently no court had jurisdiction to direct the payment of costs out of the separate estate of a married woman subject to restraint on anticipation, but the Married Women's Property Act, 1893, has by s. 2 in terms enacted that in certain cases the court shall have jurisdiction from time to time to direct payment of costs out of the separate estate of a married woman which is subject to a restraint on anticipation. This is plainly a limited jurisdiction, and the only object of this appeal, as I understand it, is to raise the contention that this is not one of the limited class of cases in which that jurisdiction is given to the court by s. 2 of the Act. That being so, I entirely agree with my learned brethren that the preliminary objection ought to be disallowed. But I desire to limit my judgment to a case in which the appellant contends that the order complained of is outside the jurisdiction of the court, as distinguished from the case of an order which, although it is within the jurisdiction of the court, ought not, it is said, to have been made. So far as I can see, there is no principle opposed to the view which we are taking, nor do I think that there is any authority against it. Speaking for myself, I have been unable to discover what principle, if any, is at the root of the distinction, which has been taken in some of the cases cited to us, between contempt committed before and contempt committed after the making of the order which it is sought to set aside.

The appeal was then heard and allowed.

Solicitors: *Dangerfield & Blythe*; *Lewis & Lewis*.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law*.]

A

McMANUS *v.* FORTESCUE

[Court of Appeal (Sir Richard Henn Collins, M.R., Cozens-Hardy and Fletcher Moulton, L.JJ.), February 1, 1907]

[Reported [1907] 2 K.B. 1; 76 L.J.K.B. 393; 96 L.T. 444; 23 T.L.R. 292]

B

Auctioneer—Sale of goods—Condition of sale—Reserve price—Acceptance of bid below reserve price—No binding contract of sale—Liability of auctioneer to bidder—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 58 (2).

Where goods are sold by auction subject to a reserve price, every bid and every fall of the hammer on a bid constitutes an offer and an acceptance C conditional on the bid being up to the reserve price.

Where, therefore, an auctioneer knocked down goods to a bidder who, the auctioneer later found, had bid less than the reserve price,

Held: the auctioneer had no authority to sell at less than the reserve price, and there was no binding contract of sale, and no action lay against the auctioneer for breach of duty in refusing to sign a memorandum of contract or D otherwise complete the sale, or for breach of warranty of authority.

Notes. Considered: *Fay* v. *Miller, Wilkins & Co.*, [1941] 2 All E.R. 18. Referred to: *London Corpn.* v. *Lyons, Son & Co., Ltd.*, [1935] All E.R.Rep. 540.

As to the authority of an auctioneer, see 2 Halsbury's Laws (3rd Edn.) 71 et seq.; as to the bidding, and as to an auctioneer's liabilities in relation to the purchaser, see ibid., pp. 81 and 86. For cases see 3 Digest (Repl.) 4, 20 and 45. E For the Sale of Goods Act, 1893, s. 58 (2), see 22 Halsbury's Statutes (2nd Edn.) 1017.

Cases referred to:

(1) *Rainbow* v. *Howkins*, [1904] 2 K.B. 322; 73 L.J.K.B. 641; 91 L.T. 149; 53 W.R. 46; 20 T.L.R. 508; 48 Sol. Jo. 494, D.C.; 3 Digest (Repl.) 4, *17*.

(2) *Warlow* v. *Harrison* (1859), 1 E. & E. 309; 29 L.J.Q.B. 14; 1 L.T. 211; F 6 Jur.N.S. 66; 8 W.R. 95; 120 E.R. 925, Ex. Ch.; 3 Digest (Repl) 13, *100*.

Also referred to in argument:

Johnston v. *Boyes*, [1899] 2 Ch. 73; 68 L.J.Ch. 425; 80 L.T. 488; 47 W.R. 517; 43 Sol. Jo. 457; 3 Digest (Repl.) 20, *154*.

Peirce v. *Corf* (1874), L.R. 9 Q.B. 210; 43 L.J.Q.B. 52; sub nom. *Pierce* v. *Corf*, G 29 L.T. 919; 38 J.P. 214; 22 W.R. 299; 3 Digest (Repl.) 10, *72*.

Appeal by the plaintiff from a decision of Phillimore, J., with a jury.

The defendants carried on business as auctioneers. On June 30, 1905, the defendants offered for sale by auction certain property described in a printed catalogue and conditions of sale on behalf of the guardians of the poor for the parish of Hammersmith. Condition (2) of the conditions of sale provided that:

H "Each lot will be offered subject to a reserve price, and the vendors reserve the right of bidding up to such reserve price. The highest bidder for each lot shall be the purchaser. If any dispute shall arise concerning a bidding, the lot in question shall be put up again and re-sold, or the auctioneers may determine the dispute."

I The lot in question was a corrugated iron building, and the plaintiff, who was present at the auction, made a bid of £85. This was the highest bid, and at this sum the auctioneer knocked it down to him. Before a memorandum of the sale was made and signed by the auctioneer in his book, he opened the sealed envelope containing the reserve price and discovered that the reserve placed on the lot was £200. Thereupon the auctioneer withdrew the lot and refused to sign any note or memorandum of the sale, or to accept from the plaintiff the deposit of 25 per cent. in respect thereof which by the conditions of sale was payable on each lot purchased.

In his statement of claim the plaintiff alleged that by his bid he authorised and gave a mandate to the auctioneer to act as his agent and sign a memorandum of a contract of sale of the lot and otherwise to complete the contract on his behalf; that the auctioneer, by knocking down the lot to the plaintiff, accepted the authority and mandate; but that the auctioneer, in breach of his duty under that authority and mandate, neglected and refused to sign a memorandum of the contract or otherwise complete the same on behalf of the plaintiff, and the plaintiff was in consequence unable to obtain possession of the lot and lost the benefit of it. At the trial of the action before PHILLIMORE, J., the judge held that the auctioneer was under no such duty as alleged to the plaintiff. The plaintiff then made an application for leave to amend the statement of claim by adding a claim for breach of warranty of authority. The judge refused to allow the amendment on the ground that even if it were allowed the plaintiff could get only nominal damages, and gave judgment for the defendants. The plaintiff appealed applying for judgment or a new trial.

By s. 58 of the Sale of Goods Act, 1893,

> "In the case of a sale by auction . . . (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid."

C. A. Russell, K.C., and *Disturnal* for the plaintiff.
McCall, K.C., and *G. A. Scott*, for the defendants, were not called on.

SIR RICHARD HENN COLLINS, M.R.—This is an action against auctioneers, and the plaintiff's claim is founded on the contention that when the auctioneer at a sale by auction lets the hammer fall in acceptance of a bid he thereby becomes the agent of the purchaser to put his signature to a memorandum of the contract. It is true that the auctioneer let the hammer fall on a bid by the plaintiff, but that is not enough to substantiate the plaintiff's claim, and it was contended that the auctioneer came under a duty to the plaintiff, as purchaser, to sign the name of the vendor to a memorandum of the contract of sale so as to make it satisfy the statutory requirements. That is the way in which the case was launched at the trial before PHILLIMORE, J., with a jury. The learned judge held that the plaintiff had failed to show any duty owing to him by the auctioneer to sign a note or memorandum on behalf of the vendor so as to give the plaintiff a right of action upon the contract.

The lot which the plaintiff claimed to have bought at the auction was put up for sale subject to a reserve price, and it was knocked down to the plaintiff at a sum less than the reserve price. When PHILLIMORE, J., had held that the plaintiff had failed to show the existence of any such duty owing to him by the auctioneer as I have referred to, an alternative claim was put forward on behalf of the plaintiff to damages for breach of warranty of authority, and an application was made for permission to make the necessary amendment in the statement of claim. On that application PHILLIMORE, J., held that, even if the statement of claim were amended as desired, the damages recoverable would only be nominal, and he therefore refused to allow the proposed amendment. The plaintiff is now appealing against that. I am of opinion that the learned judge was right in his refusal. The auction was subject to certain conditions of sale, and the material condition which we have to consider is condition (2), which says that each lot will be offered subject to a reserve price, and the vendors reserve the right of bidding up to such reserve price. It seems to me that at the root of the matter there lies this, that every bid at this auction was a conditional offer, subject to its being up to the reserve price. The fall of the hammer on such a bid was an acceptance by the auctioneer on behalf of the vendor of that offer. That conditional offer was not turned by such acceptance into an unconditional offer. The offer was conditional on the bid being up to the reserve price, and the acceptance

by the auctioneer was therefore also conditional on the bid being up to the reserve price. There was or was not a contract of sale according to whether or not the bid had reached the reserve price.

That clearly seems to me to be the primâ facie meaning of the words in the second condition of sale. What has the plaintiff done to set aside that primâ facie meaning? No evidence has been given of any custom explaining away what is the primâ facie meaning of an offer and an acceptance by the auctioneer at an auction subject to such a condition of sale. Nor has any authority been cited to us which shows that the fall of the hammer did away with this condition of the sale. In this view of the case the suggested duty of the auctioneer to the plaintiff never existed, and the claim for breach of warranty of authority must also fail because the vendors' authority to the auctioneer was only to bind them if there was an unconditional offer coming up to the reserve price, and here there was no such offer. For these reasons I think that the appeal must be dismissed. As to *Rainbow* v. *Howkins* (1), I do not think that it conflicts in any way with what I have just said. If it were an authority in support of the plaintiff's contention, I should not like to act on it without hearing further discussion. At present I express no opinion on it.

COZENS-HARDY, L.J.—I am of the same opinion, and I wish to add only one remark. The action was launched on the basis of *Warlow* v. *Harrison* (2), but that case is distinguishable. There the property was put up for sale without reserve, and the judgment of the Exchequer Chamber was founded on that fact. In the present case the sale was subject to a reserve price, and the reserve price was not reached.

FLETCHER MOULTON, L.J.—I am of the same opinion. The employment of an auctioneer is the employment of an agent, and it comes under the general rule of the law of agency that the principal can restrict the power of his agent, if such restriction is not contrary to the powers which such an agent is held out to the public as possessing. Auctioneers are as often employed to sell subject to a reserve price as to sell without reserve. When an auction takes place subject to a reserve, according to the instructions of the principal, the auctioneer receives no power, express or implied, to sell except subject to the reserve. That principle is in harmony with the authorities and the general law of agency. Here the plaintiff's offer was admittedly less than the reserve, and therefore the auctioneer had no authority to make a contract of sale binding on his principal. The plaintiff's claim must fail, because he alleges that, in consequence of the auctioneer refusing to sign a memorandum of the sale and so to complete the contract, he, the plaintiff, was unable to obtain possession of lot No. 2, and so suffered damage. The plaintiff's action is based on the view that the auctioneer had authority to bind the vendors to sell at a price lower than the reserve price, and that, as the auctioneer refused to sign a memorandum which would bind the vendors, the plaintiff lost the benefit of the purchase. The answer to that is that the auctioneer had no authority to sell below the reserve price, and therefore the plaintiff did not lose the benefit of his purchase by the auctioneer refusing to sign. The action must therefore fail. I agree with what the Master of the Rolls has said as to biddings at a sale by auction subject to a reserve price. When the hammer falls on a bid at such an auction, the auctioneer thereby agrees on behalf of the vendor to sell at the amount of the last bid, provided that such bid is equal to the reserve that has been made. Therefore there was no false representation by the auctioneer as to his authority from the vendors, and, even if the amendment asked were made, the action must fail.

Appeal dismissed.

Solicitors: *Robinson & Bradley*; *T. H. Hiscott.*

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

A

KIRBY *v.* HUNSLET ASSESSMENT COMMITTEE

[House of Lords (The Earl of Halsbury, Lord Macnaghten and Lord Robertson), December 18, 1905]

[Reported [1906] A.C. 43; 75 L.J.K.B. 129; 94 L.T. 36; 70 J.P. 50; 22 T.L.R. 167; 1 Konst. Rat. App. 225; 4 L.G.R. 144]

B

Rates—Assessment—Machinery—"Tenant's machinery"—Inclusion in valuation.

Buildings occupied as engineering works contained machines which formed no part of the freehold, but were placed there to make the buildings fit for the purpose for which they were used. The machines were not affixed to the freehold, and were admitted to be "tenant's machinery." On an appeal to quarter sessions by the tenant against a poor rate the court held that the correct basis of assessment was to ascertain the rent which a hypothetical tenant would give for the works as a combination of land, buildings, and machinery on a demise which included the machinery, so that he would get, as part of the consideration for the rent the right to use the machines upon the premises during his tenancy, and that on that footing the machines would be properly taken into account as enhancing the rental and the rateable value of the buildings.

C

D

Held: machinery, though not affixed to the freehold, might be taken into account in valuation for rating where it was used for the purposes of the industry being carried on in the factory, and, therefore, the basis of assessment adopted by quarter sessions was right.

E

Notes. As to the valuation of hereditaments containing machinery and plant see now s. 24 of the Rating and Valuation Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 130) which altered the former law.

Considered: *Great Northern Rail Co.* v. *Hitchin Union* (1906), 1 Konst. Rat. App. 116; *Greenwood and Batley* v. *Bramley Union* (1912), 76 J.P. 126. Applied: *Smith* v. *Willesden Union Assessment Committee* (1919), 89 L.J.K.B. 137. Considered: *Townley Mill Co.* (1919), *Ltd.* v. *Oldham Assessment Committee*, [1937] 1 All E.R. 11. Referred to: *Richard Thomas & Co.* v. *County Valuation Committee and Assessment Committee*, [1944] 1 All E.R. 417; *L.C.C.* v. *Wilkins (Valuation Officer)*, [1956] 3 All E.R. 38.

F

As to plant and machinery in valuation for rating, see 32 Halsbury's Laws (3rd Edn.) 81; and for cases see 38 Digest (Repl.) 626 et seq.

G

Cases referred to:

(1) *R.* v. *Southampton Dock Co.* (1851), 14 Q.B. 587; 6 Ry. & Can. Cas. 428; 4 New Sess. Cas. 460; 20 L.J.M.C. 155; 16 L.T.O.S. 460; 15 J.P.Jo. 145; 15 Jur. 268; 117 E.R. 227; 38 Digest (Repl.) 622, *893*.

(2) *R.* v. *Birmingham and Staffordshire Gas Light Co.* (1837), 6 Ad. & El. 634; 1 Nev. & P.K.B. 691; Nev. & P.M.C. 276; Will. Woll. & Dav. 224; 6 L.J.M.C. 92; 1 J.P. 68; 112 E.R. 243; 38 Digest (Repl.) 626, *927*.

H

(3) *R.* v. *Guest* (1838), 7 Ad. & El. 951; 2 Nev. & P.K.B. 663; Will. Woll. & Dav. 651; 7 L.J.M.C. 38; 1 J.P. 84; 2 J.P. 70; 112 E.R. 728; 38 Digest (Repl.) 627, *929*.

I

Also referred to in argument:

Tyne Boiler Works Co. v. *Longbenton Overseers* (1886), 18 Q.B.D. 81; 56 L.J.M.C. 8; Ryde, Rat. App. (1886–90) 241; sub nom. *Tyne Boiler Works Co., Ltd.* v. *Tynemouth Union*, 55 L.T. 825; 51 J.P. 420; 35 W.R. 110; sub nom. *R.* v. *Tyne Boiler Works Co., Ltd.*, 3 T.L.R. 134, C.A.; 38 Digest (Repl.) 628, *935*.

R. v. *Haslam* (1851), 17 Q.B. 220; 4 New Sess. Cas. 720; 17 L.T.O.S. 182; 15 J.P. 642; 15 Jur. 972; 117 E.R. 1264; 38 Digest (Repl.) 627, *930*.

A *Chidley* v. *West Ham* (*Churchwardens*) (1874), 32 L.T. 486; 39 J.P. 310; 38 Digest (Repl.) 627, *933*.

R. v. *Lee* (1866), L.R. 1 Q.B. 241; 7 B. & S. 188; 35 L.J.M.C. 105; 13 L.T. 704; 30 J.P. 132; 12 Jur.N.S. 225; 14 W.R. 311; 38 Digest (Repl.) 659, *1120*.

Boden & Co. v. *Chard Overseers*, *Gifford*, *Fox & Co.* v. *Same* (1890), 63 L.T. 249, D.C.; affirmed, 6 T.L.R. 431, C.A.; 38 Digest (Repl.) 628, *936*.

B *Crockett* v. *Northampton Assessment Committee* (1902), 72 L.J.K.B. 320; 18 T.L.R. 451; Ryde & K. Rat. App. 269, D.C.; 38 Digest (Repl.) 628, *936*.

R. v. *Hogg* (1787), Cald. Mag. Cas. 266; 1 Term. Rep. 721; 1 Bott, 159; 99 E.R. 1341; 38 Digest (Repl.) 626, *926*.

Appeal by the ratepayer from a decision of the Court of Appeal (SIR RICHARD C HENN COLLINS, M.R., ROMER and MATHEW, L.JJ.), affirming a judgment of the King's Bench Division (LORD ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.), on a Special Case stated by the recorder of Leeds on an appeal to quarter sessions against a poor rate.

Balfour Browne, *K.C.*, and *W. C. Ryde* for the ratepayer.

Cripps, *K.C.*, *J. Scott Fox*, *K.C.*, and *W. J. Jeeves*, for the assessment com- D mittee, were not called on to argue.

THE EARL OF HALSBURY.—I am of opinion that the judgment appealed against is right. Considerable difficulty has, doubtless, been caused through the confusing of two different things. The question of what is, and what is not, attached to the freehold is fraught with important consequences in our law, and E undoubtedly if the statute had been always understood to refer simply to the rateable value of the four walls of the building and its roof, I could understand a great deal of the argument which has been suggested to us. It would have been, I should have thought, extremely difficult to arrive at the proper assessment of such things, because the business of human life is not conducted by putting an hypothesis of what a thing would fetch if it were occupied otherwise than as F it is; and the problem which the overseers have to solve in arriving at the assessment is difficult enough without putting the additional difficulty upon them, that they are to try to find out what a building would fetch in the shape of rent if it was different from what it is, or if it were used differently from what it is, or if it were furnished differently from what it is. It is enough, to my mind, to say that for a period of certainly more than half a century, erroneously according G to the learned counsel who last addressed us, but undoubtedly, judges of the greatest eminence have recognised the fact that although a particular set of machinery may, by reason of the peculiarity of the manufacture or what not, be not affixed to the freehold so as to become part of the land or hereditament, yet if the thing is being so occupied, if the buildings are being so employed, and the machinery in those buildings is being so used as to make the factory appropriate to the H particular industry carried on therein, the machinery itself is not to be disregarded in assessing the value of that thing, occupied as it is and used as it is, with the accommodation and furniture which is necessary for it to carry on the manufacture that is there being conducted.

If that is so, it seems to me that we have nothing to do with the idea which prevailed in the mind of the learned counsel—to speculate upon what particular I sort of contracts of tenancy would be likely to be made between the landlord and the tenant, still less with what contracts are actually made between the landlord and the tenant. The overseer has a comparatively simple problem to solve, although it is difficult enough sometimes; he sees the place being conducted as a brewery or an ironfoundry or what not; he looks at the buildings, he looks at the furniture which is necessary for carrying on the business as a brewery or foundry; he does not in his own mind analyse, and to my mind he ought not to analyse, what would be likely to be the initial arrangements between the intending brewer and the owner of the freehold to see who should provide this or that engine or

what not; but he looks at the buildings as they are, and as they are being occupied, and as they are being used, and he says to himself: "Looking at the whole of the place, such and such is the rent which would probably be paid by a tenant from year to year for such an establishment as this." In doing that he ought not to strip the whole of the place of everything but the four walls which contain the whole system of manufacture therein contained, and simply value either the ground upon which the building is placed or the four walls and roof which are the containing elements of all the manufacture that goes on in it. It seems to me that the difficulty which would be imposed upon the overseer would be insurmountable if he were called upon to say: "Before I can value the hereditament used as it is, I must make an inquiry and see how much the landlord has agreed to do and how much the tenant is going to do." In the present case it is applied to the question of machinery, but I do not know that you could limit that system of assessment even to the question of machinery. You might have to go into a great variety of other things, and find out what accommodation was provided otherwise, by the landlord for this, that, and the other. If that were so, I think that the Parochial Assessments Act, 1836, would become a dead letter, and you would have a fanciful arrangement of assessment according to the particular fancy of each overseer as to what the landlord ought or ought not to do, or what the tenant ought or ought not to insist upon, which, to my mind, would certainly be the reverse of doing that which the Parochial Assessments Act was supposed to have done—namely, to simplify the duties of the overseers.

I decline to enter into what I may call the original equities which might have guided this matter. It is enough for me that a long series of decisions for certainly half a century have established the bald proposition which is all that I am insisting upon—namely, that although the machinery may not be part of the freehold, yet it is to be taken into account, and in saying that, I do not want to muffle it in a phrase, but what I mean by that is that to increase the amount of the rate which is exacted from the tenant you may enter into that question and form a judgment upon it although, as a matter of fact, the machinery may not be attached to the freehold. That is all that I mean to decide in this case; and I believe that it is enough for the decision of this case. I think that the new point which has been raised now—the question having been debated very considerably in a great number of parishes in this country—and has never been raised before—namely, that you must first ascertain how much the tenant is going to get from his landlord, before you can arrive at the assessment, may be dismissed as undoubtedly being necessarily involved in the decisions which have been come to before now, and necessarily disregarded. To my mind therefore, the whole question is reduced to a very simple one: Can you or can you not enhance to any extent the amount of the assessment which you make upon buildings in which there is machinery adapted for the purpose of the manufacture where the manufacture is carried on in them, although the machines do not, as a matter of actual fact, form part of the freehold of the buildings. I am of opinion that, after the long line of decisions which have been arrived at, you can do so. Under these circumstances, it appears to me that this appeal ought to be dismissed with costs.

LORD MACNAGHTEN.—I entirely agree. I should only like to remind your Lordships of what was said by Lord Campbell, C.J., in *R.* v. *Southampton Dock Co.* (1). After the passage, which has already been read to your Lordships, cited from another case, which was in fact a repetition of what was said in *R.* v. *Birmingham and Staffordshire Gas Light Co.* (2) and *R.* v. *Guest* (3) which have also been referred to, and are cited by his Lordship, he goes on to say (14 Q.B. at pp. 610, 611):

"In this last case [*R.* v. *Guest* (3)] all the arguments pressed upon us to show that such fixtures are stock-in-trade and not to be taken into account in

A

a rate on the realty, were urged, but urged in vain. It is of the greatest importance that a rule upon such a subject, which has been laid down and acted upon, should be adhered to; and we see no reason why this rule should be now disturbed."

B That was a judgment delivered more than fifty years ago.

LORD ROBERTSON.—I agree.

Appeal dismissed.

Solicitors: *Vincent & Vincent*, for *Day & Yewdall*, Leeds; *Pitman & Sons*, for *Elmsley, Son & Smith*, Leeds.

C [*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

D

Re MOSS. Ex Parte HALLETT

E [KING'S BENCH DIVISION (Bigham and Darling, JJ.), May 22, 1905]

[Reported [1905] 2 K.B. 307; 74 L.J.K.B. 764; 92 L.T. 777; 53 W.R. 558; 49 Sol. Jo. 538; 12 Mans. 227]

Bankruptcy—Guarantee—Covenants by surety to pay interest on loan and premiums on policy of insurance on principal debtor's life—Bankruptcy of principal debtor—Extinguishment of debt—Right of surety to prove in F *respect of liability under covenants—Bankruptcy Act*, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 37.

H. covenanted jointly and severally with the debtor to pay to C. interest on a loan made by C. to the debtor, so long as any part of the principal sum should remain due, and also to pay the premium on a policy of insurance on the debtor's life. On the bankruptcy of the debtor, C. proved for the G amount of his loan, valuing the policy at £100. H. filed a proof for the amount of his liability in respect of the premium and interest under the covenant, but the trustee in bankruptcy rejected the proof.

Held: (i) on the debtor's bankruptcy the principal sum was no longer due within the meaning of the covenant and so H's liability to pay interest no longer existed; (ii) the policy having been valued, the liability of H. to pay H the premiums also ceased accordingly, H. was not entitled to prove in the bankruptcy in respect of either the interest or the premiums on the policy accruing after the bankruptcy.

Notes. The Bankruptcy Act, 1883, s. 37, has been repealed and replaced by the Bankruptcy Act, 1914, s. 30, (2 HALSBURY'S STATUTES (2nd Edn.) 364, 365).

I Referred to: *Re Pyke, Davis* v. *Jeffreys* (1910), 55 Sol. Jo. 109; *Re British Salicylates, Ltd.*, [1918–19] All E.R. Rep. 400.

As to a surety's right of proof against principal debtor, see 2 HALSBURY'S LAWS (3rd Edn.) 473; and for cases see 4 DIGEST (Repl.) 297 et seq. As to extent of surety's liability, see 18 HALSBURY'S LAWS (3rd Edn.) 444 et seq; and for cases see 26 DIGEST (Repl.) 83 et seq. As to surety's rights against principal debtor, see 18 HALSBURY'S LAWS (3rd Edn.) 474; and for cases see 26 DIGEST (Repl.) 126; and as to discharge of liability of principal debtor, see 18 HALSBURY'S LAWS (3rd Edn.) 518; and for cases see 26 DIGEST (Repl.) 199 et seq.

Case referred to:

(1) *Deering* v. *Bank of Ireland* (1886), 12 App. Cas. 20; 56 L.J.P.C. 47; 56 L.T. 66; 35 W.R. 634, H.L.; 4 Digest (Repl.) 331, **1238*.

Also referred to in argument:

Re Browne and Wingrove, Ex parte Ador, [1891] 2 Q.B. 574; 61 L.J.Q.B. 15; 65 L.T. 485; 40 W.R. 71; 7 T.L.R. 747; 8 Morr. 264, C.A.; 4 Digest (Repl.) 334, *3031*.

Re Fitzgeorge, Ex parte Robson, [1905] 1 K.B. 462; 74 L.J.K.B. 322; 92 L.T. 206; 53 W.R. 384; 49 Sol. Jo. 204; 12 Mans. 14; 26 Digest (Repl.) 89, *617*.

Re London Chartered Bank of Australia, [1893] 3 Ch. 540; 62 L.J.Ch. 841; 69 L.T. 593; 42 W.R. 14; 9 T.L.R. 596; 37 Sol. Jo. 670; 3 R. 696; 26 Digest (Repl.) 202, *1545*.

Stacey v. *Hill*, [1901] 1 K.B. 660; 70 L.J.K.B. 435; 84 L.T. 410; 49 W.R. 390; 17 T.L.R. 311; 45 Sol. Jo. 325; 8 Mans. 169, C.A.; 26 Digest (Repl.) 203, *1552*.

Appeal from a decision of His Honour Judge Tindal Atkinson at Hertford County Court.

On Oct. 24, 1901, the appellant lent the debtor £700, and, by an indenture of that date, the debtor assigned to the appellant, by way of security, a policy of insurance on the life of the debtor granted by the Economic Life Assurance Society for £2,000. This loan bore interest at 10 per cent., and was repayable on Jan. 24, 1902.

On Dec. 11, 1901, one Philip Henry Cooke advanced to the debtor £500 on the terms of an indenture of that date, made between the debtor of the first part, the appellant of the second part, and Cooke of the third part. By this indenture the debtor covenanted to pay the said advance on Mar. 11, 1902, with interest at 10 per cent. per annum, and the debtor and the appellant jointly and severally covenanted with Cooke to pay him interest thereon so long as any principal money remained due; and by the said indenture the debtor assigned to Cooke, by way of security for the repayment of the advance, all his interest in the above-mentioned policy of insurance, subject to the mortgage of Oct. 24. The debtor and the appellant, by the indenture of Dec. 11, 1901, further covenanted jointly and severally with Cooke to pay the premium on the said policy of insurance, and, if it became void, to forthwith effect a new policy in lieu thereof for £1,000. The indenture also provided that if the debtor or the appellant failed to keep on foot the policy, or omitted to effect any new policy and keep the same on foot, that Cooke should be at liberty to do so, and be entitled to charge 10 per cent. thereon, and that these sums should be payable to him by the debtor or the appellant on demand. On Dec. 13, 1901, the debtor gave the appellant a guarantee in writing to pay off the principal and interest referred to in the indenture of Dec. 11 out of certain funds therein specified, and to give a legal charge or mortgage thereon. On June 18, 1903, the appellant called on the debtor to give him a charge under the above guarantee, and the debtor refused.

On May 22, 1903, Cooke assigned to one Tootal the interest accruing to him under the indenture of Dec. 11, 1901.

On Nov. 28, 1903, a receiving order was made against the debtor. Cooke proved for the amount advanced, and valued the policy at £100. The appellant filed a proof for £2,100 19s. 10d., of which the trustee rejected two items amounting to £1,413 16s. 2d., being the estimated amount of the liability in respect of the premiums, and interest under the indenture of December, 1901, on the following among other grounds: (i) that the liability to pay premiums and interest accruing after the date of the receiving order was not provable within s. 37 of the Bankruptcy Act, 1883; (ii) that Cooke having proved for the principal debt and having valued the policy of insurance in respect of which such premiums and interest were payable, and that the appellant was not entitled to prove also as surety; and (iii) that the claims involved a double proof.

The county court judge affirmed the rejection of the appellant's proof by the trustee in bankruptcy and the appellant appealed.

Tindale Davis for the appellant.
Herbert Jacobs, for the trustee, was not called on.

BIGHAM, J.—The first question in this case is whether the appellant is entitled to prove in the bankruptcy in respect of his covenant to pay Cooke interest so long as any of the principal sum advanced by Cooke to the bankrupt remains due. The principal debtor is a bankrupt, and when he became a bankrupt it was not true to say that the principal money remained due. The sole liability left was the liability of the trustee in the bankruptcy to pay a dividend in respect of the debt. In my opinion, the appellant's liability to Cooke has gone, and it cannot be said that any part of that debt is due. I agree with the reasons given by the learned county court judge.

> "The liability of the debtor on his covenant to pay the principal sum, being provable in the bankruptcy, will be discharged when the order of discharge has been granted him. It would seem a strange conclusion that, the obligation to pay the principal sum being discharged, the liability of the appellant to pay the interest is still to continue. If so, when will this liability cease, unless, without any obligation to do so, the appellant pays the balance of the principal sum after deducting the dividend received by Cooke? In my judgment, a proof having been made in respect of the principal sum in the bankruptcy, there cannot be another proof for interest springing from the debt already the subject of proof. The principal sum no longer remains payable under the covenant in the deed of Dec. 11, 1901, and in my judgment the liability of the appellant under this covenant has determined."

The second question is whether the appellant is still bound by the covenant to keep up the premiums on the policy. Cooke has valued the policy in his proof at £100. That is just as if he had sold it to a stranger, indeed, for all we know, he may have done so. If he chooses to keep up the payment of the premiums he may, or, if he prefers, he may surrender the policy. Here again, I am in complete agreement with the reasoning of the learned county court judge.

> "Cooke has valued his policy at £100, and must, therefore, be deemed to have realised his security. He has proved for the balance of the debt after deducting the value of his security, and he cannot have a further proof in respect of the personal covenant of the debtor to pay premiums to maintain the security at its full value for securing the balance (*Deering* v. *Bank of Ireland* (1)). If Cooke cannot prove so as to make the debtor's estate contribute to keep in force a policy which is already deemed to have been realised, I think it is possible that the appellant in respect of his right to indemnity can resort to the estate to contribute to the maintenance of this security for the balance already proved and in respect of which a dividend will be paid, and which will be discharged altogether when an order of discharge is made. Cooke having proved in respect of the balance, the appellant cannot have another proof to indemnify him in respect of his liability to maintain the security for the payment of the same balance. The whole matter can be summed up in a few words. The estate of the bankrupt cannot be called on to contribute to the maintenance of a security in respect of a debt which is extinguished by the bankruptcy. It must not be overlooked that, if the appellant can prove in respect of the premiums, he will obtain from the estate contributions to the maintenance of the security which he has already valued in his proof for the £700 due to him under the deed of October 24th, 1901."

I think that the decision of the county court judge was right on both points, and that this appeal must be dismissed.

DARLING, J.—I am of the same opinion. It is admitted that when the bankrupt obtains his discharge no action to recover the principal sum advanced will lie against him, and I cannot see how it can be contended that money which at law is not recoverable can be said to be money due from the debtor under the covenant. If there is no principal money due, it follows that there is no interest payable. On the other point I agree with what has been said by BIGHAM, J.

Appeal dismissed.

Solicitors: *R. Jennings*; *Bate & Co.*

[*Reported by* J. ANWYL THEOBALD, ESQ., *Barrister-at-Law.*]

FITZMAURICE *v.* HESKETH

[PRIVY COUNCIL (The Earl of Halsbury, L.C., Lord Davey, Lord Robertson and Lord Lindley, with the Archbishop of Canterbury (Dr. Davidson), the Bishop of Lincoln (Dr. King) and the Bishop of Ripon (Dr. Boyd Carpenter) as Ecclesiastical Assessors), March 2, 1904]

[Reported [1904] A.C. 266; 73 L.J.P.C. 53; 90 L.T. 216; 20 T.L.R. 302]

Ecclesiastical Law—Offence—"Immoral act"—Fraud—Clergy Discipline Act, 1892 (55 *& 56 Vict., c.* 32), *s.* 2.

The collection of alms under false and fraudulent pretences is an "immoral act" within the meaning of s. 2 of the Clergy Discipline Act, 1892.

Notes. As to offences against morality and offences under the Clergy Discipline Act, 1892, see 13 HALSBURY'S LAWS (3rd Edn.) 216, 229; and for cases see 19 DIGEST (Repl.) 366. For the Clergy Discipline Act, 1892, s. 2, see 7 HALSBURY'S STATUTES (2nd Edn.) 273.

Case referred to in argument:

Beneficed Clerk v. *Lee*, [1897] A.C. 226; 66 L.J.P.C. 8; 75 L.T. 461; 13 T.L.R. 125, P.C.; 19 Digest (Repl.) 366, *1595*.

Appeal from a decision of the Consistory Court of the diocese of Manchester.

The appellant, Fitzmaurice, a beneficed clergyman, was convicted at petty sessions of being a rogue and a vagabond under the Vagrancy Act, 1824, as a gatherer or collector of alms under false and fraudulent pretences, and was sentenced to three months' hard labour. The quarter sessions on appeal confirmed the conviction. Complaint was lodged in the Consistory Court of the diocese of Manchester, charging the appellant with having been guilty of immorality within the meaning of s. 2 of the Clergy Discipline Act, 1892. He was then inhibited from his living by the Bishop of Manchester, and at the subsequent hearing before the Consistory Court was found guilty and deprived of his preferment.

By the Clergy Discipline Act, 1892, s. 2:

"If a clergyman either is convicted by a temporal court of having committed an act constituting an ecclesiastical offence and the foregoing section [which refers to indictable offences and matrimonial offences] does not apply to him, or is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality and not being a question of doctrine or ritual, he may be prosecuted by any of the parishioners of the parish in which such clergyman holds preferment, or by the bishop of the diocese, or by any person approved by the bishop, and tried in the consistory court of the diocese in which he holds preferment. . . ."

By s. 12 of the Clergy Discipline Act, 1892, the expressions "immoral act," "immoral conduct," and "immoral habit" are declared to include

"such acts, conduct, and habits as are proscribed by the 75th and 109th Canons issued by the Convocation of the Province of Canterbury in the year 1603."

By Canon 75:

"No ecclesiastical person shall at any time other than for their honest necessities resort to any taverns or alehouses, neither shall they board or lodge at any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking or riot, spending their time idly by day or by night playing at dice, cards, or tables, or any unlawful game; but at all times convenient they shall hear or read somewhat of the Holy Scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty and endeavouring to profit the Church of God, having always in mind that they ought to excel all others in purity of life, and should be examples to the people to live well and Christianly under pain of ecclesiastical censures to be inflicted with severity according to the qualities of their offences."

By Canon 109:

"If any offend their brethren, either by adultery, whoredom, incest, or drunkenness, or by swearing, ribaldry, usury, and any other uncleanness and wickedness of life, the churchwardens or questmen and sidesmen, in their next presentments to the ordinaries, shall faithfully present all and every of the said offenders to the intent that they and every of them may be punished by the severity of the laws according to their deserts; and such notorious offenders shall not be admitted to the Holy Communion till they be reformed."

Bartley for the appellant.

Cripps, K.C., and *Hansell*, for the respondent, were not called upon to address their Lordships.

THE EARL OF HALSBURY, L.C.—Their Lordships have no doubt, and they have the assent of the right reverend prelates to that view, that this was an immoral act within the meaning of the statute, and was properly held to be so. They will, therefore, advise His Majesty that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *C. Everett*; *Rowcliffes, Rawle & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

GRIFFITH *v.* OWEN

[CHANCERY DIVISION (Parker, J.), November 2, 3, 5, 19, 1906]

[Reported [1907] 1 Ch. 195; 76 L.J.Ch. 92; 96 L.T. 5; 23 T.L.R. 91]

Trust—Constructive trust—Tenant for life—Mortgage of settled property—Sale by mortgagee to tenant for life under power of sale—Property held by tenant for life as trustee for remaindermen.

The mortgagee of settled land sold it under a valid power of sale to the tenant for life of the land for the price of the mortgage debt.

Held: the fiduciary relationship existing between the tenant for life and the remaindermen threw on the former the burden of proving that the transaction was not inequitable; such a purchase involved the destruction of the subject-matter of the settlement, and called for the application of the principle laid down in *Keech* v. *Sandford* (1) (1726), Sel. Cas. Ch. 61; and, therefore, the tenant for life held the property as trustee for the remaindermen.

Notes. As to equitable relief in cases of fiduciary relationship, see 14 HALSBURY'S LAWS (3rd Edn.) 624 et seq., and cases there cited.

Cases referred to:

(1) *Keech* v. *Sandford* (1726), Sel. Cas. Ch. 61; 2 Eq. Cas. Abr. 741; Cas. temp. King, 61; 25 E.R. 223, L.C.; 43 Digest 633, *720*.

(2) *Re Biss, Biss* v. *Biss*, [1903] 2 Ch. 40; 72 L.J.Ch. 473; 88 L.T. 403; 51 W.R. 504; 47 Sol. Jo. 383, C.A.; 43 Digest 632, *708*.

(3) *Phillips* v. *Phillips* (1885), 29 Ch.D. 673; 54 L.J.Ch. 943; 53 L.T. 403; 33 W.R. 863, C.A.; 43 Digest 633, *718*.

(4) *Randall* v. *Russell* (1817), 3 Mer. 190; 36 E.R. 73; 43 Digest 635, *736*.

(5) *Longton* v. *Wilsby* (1897), 76 L.T. 770; 43 Digest 635, *738*.

(6) *Kennedy* v. *De Trafford*, [1896] 1 Ch. 762; 65 L.J.Ch. 465; 74 L.T. 599; 44 W.R. 454, C.A.; affirmed [1897] A.C. 180; 66 L.J.Ch. 413; 76 L.T. 427; 45 W.R. 671, H.L.; 43 Digest 666, *977*.

Also referred to in argument:

Ex parte Grace (1799), 1 Bos. & P. 376; 126 E.R. 962; 43 Digest 632, *710*.

Robinson v. *Pett* (1734), 3 P.Wms. 249; 2 Eq. Cas. Abr. 454; 24 E.R. 1049; sub nom. *Robinson* v. *Lorkin*, 2 Barn.K.B. 435, L.C.; 43 Digest 775, *2151*.

Griffin v. *Griffin* (1804), 1 Sch. & Lef. 352; 43 Digest 633, *722i*.

Bevan v. *Webb*, [1905] 1 Ch. 620; 74 L.J.Ch. 300; 93 L.T. 298; 53 W.R. 651; 43 Digest 636, *740*.

Mathew v. *Brise* (1845), 15 L.J.Ch. 39; 7 L.T.O.S. 1; sub nom. *Matthews* v. *Brise*, 10 Jur. 105, L.C.; 43 Digest 883, *3258*.

Fox v. *Mackreth* (1791), 2 Cox, Eq. Cas. 320; 30 E.R. 148; sub nom. *Mackreth* v. *Fox*, 4 Bro. Parl. Cas. 258, H.L.; 43 Digest 780, *2206*.

Witness Action.

By his will dated Feb. 21, 1879, John Jones the elder (hereinafter called "the testator") devised Nelson House and Manchester House, at Colwyn Bay, to his daughter, Sarah Jane Owen, for life, and, after her decease, to her children equally between them, and he devised Wellington House and Bodorgan House and a cottage, all situated at Colwyn Bay, to the children of his son, John Jones, equally between them. He appointed John Roberts to be his executor, and directed that all his just debts should be paid as soon as conveniently could be after his decease. The testator died on Mar. 8, 1879. His only children were the above-mentioned Sarah Jane Owen and John Jones the younger (hereinafter called Jones), and at the date of his death he possessed substantially no property except the houses which he devised by his will. Sarah Jane Owen married Thomas Owen the defendant, in April, 1876, and the only issue of the marriage appeared

to be the plaintiffs Hannah Mary Owen (who became by marriage Hannah Mary Griffith), E. R. Owen, W. G. Owen, and G. M. Owen, who were born respectively in 1876, 1878, 1879 and 1881. The defendant alleged that there was a fifth child of the marriage, born alive, who died shortly after birth, and that he was heir-at-law of such child. The plaintiffs denied these allegations, which were, by direction of his Lordship, to be dealt with by an inquiry before the master. At the date of the death of the testator Nelson House, Manchester House and Bodorgan House were mortgaged to one E. Morris to secure a mortgage debt of £1,350. Shortly after the death of the testator, Jones, Sarah Jane Owen, and the defendant met together and discussed the will, with the result that they arranged that the will should not be proved, but that its provisions should be effectuated without going through the formalities of probate. None of the plaintiffs were aware that the testator had made a will, or that they had any interest in the above-mentioned premises until a few weeks before the commencement of this action, when the will was discovered among his papers by Jones. At the time of the death of the testator the rent of Manchester House was £60, of Nelson House £25, and of Bodorgan House £25, and it was proposed to apportion the mortgage debt on the footing that these rentals were inter se of a proper amount. Finally, the question was submitted to arbitration, and by his award, dated Oct. 23, 1879, the arbitrator awarded that Manchester House and Nelson House should bear seven-eighths of the total debt and Bodorgan House two-ninths. The statement of account from the mortgagee showed that a total balance was due to the mortgagee of £1,489 7s. 9d. for principal, interest and costs, hence the amount of the mortgage secured on Manchester House and Nelson House was as apportioned about £1,135. In the negotiation between the mortgagee, on the one hand, and the defendant and Jones, on the other, the mortgagee thought that he was dealing with all parties interested in the equity of redemption in the mortgaged property. On Mar. 3, 1880, the mortgagee conveyed (under a power of sale which had become operative) Manchester House and Nelson House to the defendant for £1,135 and Bodorgan House to Jones for £324. On Mar. 4, 1880, the defendant conveyed Nelson House to a purchaser for £380. In 1881 the defendant refused an offer of £1,200 for Manchester House, which he retained till action brought. Sarah Jane Owen died in 1882. The children of the marriage of the defendant with S. J. Owen claimed from the defendant a declaration (i) that the defendant acquired the two messuages, Nelson House and Manchester House, on his alleged purchase as trustee for the plaintiffs as to the remainder to which the plaintiffs were entitled expectant on the death of S. J. Owen, subject to the defendant being indemnified in respect of the price paid on the alleged purchase, with interest thereon; and (ii) that the defendant was still a trustee for the plaintiffs of the Manchester House and of the proceeds of sale of Nelson House; an order on the defendant to convey Manchester House to the plaintiffs; an account against the defendant in respect of the rents and profits of Manchester House, and (until its sale) of Nelson House; an account of the purchase money of Nelson House and interest thereon, and other relief.

Buckmaster and *E. P. Hewitt* for the plaintiffs.
Romer, K.C., and *George Lawrence* for the defendant.

Cur. adv. vult.

Nov. 19, 1906. **PARKER, J.**, read the following judgment. In this action the plaintiffs claim to have it declared that the defendant acquired and holds as trustee for them certain houses in Colwyn Bay which in 1880 were conveyed to him by mortgagees in exercise of a power of sale contained in the mortgage. The plaintiffs contend (i) that on the principle of the leading case of *Keech* v. *Sandford* (1), the defendant, who, in right of his wife, was tenant for life in possession of the property subject to the mortgage, was incapable of purchasing the same otherwise than for the benefit of himself and the persons entitled in remainder;

(ii) that as their father and guardian he was under a similar incapacity, and (iii) that the transaction was not under the circumstances to be mentioned hereafter a real purchase, and even if looked on as a real purchase was, to the defendant's knowledge, a purchase at such an undervalue that it cannot be upheld against the other persons interested in the equity of redemption. The defendant, on the other hand, contends that the propositions of law raised by the plaintiffs are erroneous, and further denies that the transaction was on his part other than a bona fide purchase at full value. The defence contained the allegation that the defendant did not himself purchase from the mortgagees, but from John Jones the younger, who had purchased from them. He asserted this again and again in the witness-box, but on this point I do not believe his evidence, and, indeed, his counsel did not attempt to argue the point. The defence also contained pleas on the statutes of limitation, laches, delay, acquiescence, and the rules of the court against state demands, but these pleas were abandoned at the trial.

The principle of *Keech* v. *Sandford* (1) is primarily applicable to renewals of leases, and depends partly on the nature of leasehold property and partly on some fiduciary relationship on duty existing on the part of the person whom it is sought to declare a trustee towards the persons who seek to have the trust declared. In the case both of leases renewable by right or custom and of leases not so renewable, the renewal is primâ facie considered to have been obtained by virtue of the interest which the person obtaining the renewal has in the property, and accordingly the renewed lease is primâ facie looked on as a graft on the original interest, and subject to the same trusts or limitations. In some cases the person who obtains the renewal is allowed, in others he is not allowed, to show that in spite of the nature of the property there is in the particular circumstances nothing inequitable in his claiming the renewed lease for his own benefit. Whether he is or is not allowed to do this depends on the particular fiduciary relationship or duty existing on his part (see the judgment of Sir Richard Henn Collins, M.R., in *Re Biss, Biss* v. *Biss* (2)). Thus a trustee is never allowed to do this, but a mortgagee is. I think it clear, however, that where once the fiduciary relationship or duty is established on the part of the person obtaining the renewal, the onus of proving that there is nothing inequitable in his claim to retain the benefit for himself rests on him. The principle of *Keech* v. *Sandford* (1) has been extended to purchases of reversions on leasehold property when the leaseholds are renewable by custom, *Phillips* v. *Phillips* (3), following certain dicta in *Randall* v. *Russell* (4), but it has been held not to apply to the purchase of reversions on leaseholds where there is no right or custom of renewal (see *Randall* v. *Russell* (4) and *Longton* v. *Wilsby* (5)). Though the decision in *Phillips* v. *Phillips* (3) is stated to be an extension of the principle of *Keech* v. *Sandford* (1), the analogy between the two cases is somewhat imperfect. It cannot be said that the person buying the reversion on a lease primâ facie does so by virtue of any interest in the leaseholds. Otherwise the extension of the doctrine of *Keech* v. *Sandford* (1) would cover purchases of reversions in any case whether the lease was renewable by custom or otherwise, for the fact that there is a custom to renew cannot, I think, make any difference in this respect.

It seems to me that the real ground of the extension is that stated by Sir William Grant in *Randall* v. *Russell* (4). He said (3 Mer. at p. 197):

> "If Mrs. Russell had purchased from the college, it might be said that she thereby interrupted, or cut off the chance of future renewals and, consequently, made use of her situation to prejudice the interests of those who stood behind her, and there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests"

an equity which was established in *Phillips* v. *Phillips* (3). If this be so, the principle could not be applicable to purchases of reversions on leases renewable of right as distinguished from custom, because there being no merger the persons

interested in the leaseholds could not be prejudiced. On the other hand, if it were proved affirmatively that the purchase of a reversion had only been obtained by virtue of the purchaser being interested in the leaseholds, e.g., because the landlord was giving all his leaseholders an opportunity to enfranchise their holdings, I do not see any reason why, if there existed on the part of the purchaser the necessary fiduciary relationship or duty, the principle of *Keech* v. *Sandford* (1) should not be applied whether the lease were renewable of right or not renewable at all.

From this standpoint, both the decisions as to the renewal of leaseholds and those as to the purchase of reversions may be looked on as instances of that more general equity which governs the personal capacity of persons on whose part there is some fiduciary relationship or duty in matters affecting the interests of those towards whom the fiduciary relationship or duty exists. In the present case I am asked to apply the principles underlying *Keech* v. *Sandford* (1) to the purchase by a trustee, or tenant for life, from a mortgagee exercising his power of sale of property the equity of redemption in which is the subject of the settlement. It is obvious that where, as in the present case, the purchase is for a sum which does not exceed the money due on the mortgage, the whole subject-matter of the settlement is destroyed by the purchase, and this seems to me to bring the case within the principle of *Keech* v. *Sandford* (1) as applied to purchases of reversions. It is said, and, no doubt, truly said, that no case can be found where the principle has been applied to such a purpose, but I cannot suppose that a trustee of an equity of redemption could in equity be allowed in such a case to retain the property for his own benefit, and it seems to me that the duty of the tenant for life towards the remaindermen, which precludes him from destroying their chance of renewing a leasehold by a purchase of the reversion for his own benefit ought equally to preclude him from destroying the subject-matter of the settlement altogether by purchasing for his own benefit from mortgagees who have an overriding power of sale. Though there seems to be no case on the subject, I observe that throughout the arguments in *Kennedy* v. *De Trafford* (6) there is no suggestion that such a purchaser would not be within the principle if the necessary fiduciary relationship or duty on the part of the purchaser were once established, though the decision in that case turned on the absence of such relationship or duty. It was further suggested in the course of the argument that even if the principle of *Keech* v. *Sandford* (1) is applicable, it would be open to the tenant for life to rebut what in *Re Biss* (2) is described as the presumption of personal incapacity. The Master of the Rolls in that case treats the tenant for life as a person who on grounds of public policy would not be allowed to rebut the presumption in cases arising out of the renewal of leaseholds. As will appear hereafter, I do not think it is necessary to consider whether this applies to the present case, nor need I consider whether the fact that the tenant for life was guardian of his infant children has imposed on him any further or additional disability.

[HIS LORDSHIP stated the terms of the will, and continued:] The testator appointed an executor, but his will contained no residuary bequest or devise, and his only property at his death, which occurred early in March, 1879, consisted of the several houses mentioned in his will. At his death all these houses were in mortgage, Nelson House, Manchester House, and Bodorgan House being comprised in a single mortgage for £1,350 and vested in one Edward Morris, and Wellington House and Blucher House being subject to several mortgages which were about to be paid off out of a sum of £600 which Edward Morris was to advance on a mortgage of those houses. At the date of the testator's death his daughter Sarah Jane Owen had four children, who are the plaintiffs in the present action and were then infants, and his son John Jones the younger also had several infant children. After the testator's funeral his will was read over by Mr. Webster, who had previously acted as his solicitor in the presence of Sarah Jane Owen and her husband Thomas Owen, the present defendant, and of John Jones the younger.

Notwithstanding the evidence to the contrary of the defendant Thomas Owen, I am satisfied that he and his wife as well as John Jones were made fully aware of the contents of the will. After the reading of the will the defendant and his wife discussed with John Jones the younger what was best to be done, and it was determined that effect should be given to the will without going through the formality of probate, and that for this purpose the mortgage debt of £1,350 should be apportioned between Nelson House and Manchester House on the one hand, and Bodorgan House on the other, the basis on which the apportionment should be made being left for future consideration, and the mortgagee being approached in the meantime in order that his consent to the apportionment should be obtained. Accordingly on Mar. 20, 1879, John Jones the younger wrote to the mortgagee a letter. This letter describes what was proposed substantially in the way I have stated it above, and in it John Jones announces his intention of paying off that part of the £1,350 mortgage which is apportioned to Bodorgan House and Wellington House. I also infer from this letter that the defendant had already communicated with the mortgagee, though he did not recollect this.

Up to this point it seems reasonably clear that both John Jones the younger and the defendant were acting in the interests of their respective families, their object being to give effect to the will, the only difficulty being the apportionment of the single charge which covered property which under the will passed to different persons. From this point the matter passed into the hands of the solicitors for the parties concerned, Messrs. Bridgeman & Co. acting for John Jones, Messrs. Birch, Cullimore, and Douglas acting for the defendant, and Messrs. Talbot and Woosman acting for Edward Morris the mortgagee. In April there appears to have been an interview between Messrs. Bridgeman & Co. and John Jones on the matter, and on April 17, 1879, Messrs. Bridgeman & Co. wrote to John Jones as follows:

> "Dear Sir,—Re John Jones deceased—Colwyn property.—We received your letter this morning and will proceed to negotiate for the purchase by yourself and brother-in-law, Mr. Owen, for the three houses in mortgage to Mr. Edward Morris on the basis that you are each to take such property as devised by the will of your late father and pay the total amount of purchase money and costs in proportion to the rents now received from same which we believe is as follows—Nelson House £25, Manchester House £60, Bodorgan House £25, total £110, and this being divided into eleven parts you will have to pay two and a half elevenths and Mr. Owen eight and a half elevenths of the whole sum."

On the same day they wrote in similar terms to the defendant. These letters contain the first suggestion of a purchase from the mortgagee, though it had probably been already mentioned at the interview between John Jones and Mr. Bridgeman. It is not clear why the suggestion was made, but whatever the explanation I am satisfied that neither John Jones nor the defendant ever contemplated paying the mortgagees more than what was due to them on their mortgage, and that John Jones still considered himself to be acting in the interests of his children, and was indifferent how the matter was carried through provided that he secured for them the property to which they were entitled under his father's will, subject to the mortgage thereon, or a proper apportioned part thereof.

It is more difficult to state with any certainty what was the real attitude of the defendant Owen in the matter. He proved a most unsatisfactory witness, and did not adhere under cross-examination to any consistent story. It appears, however, that he at once began to look around for a sub-purchaser of Nelson House and Manchester House at such prices as would have a surplus after paying off that part of the mortgage debt properly attributable to those houses. He was positive in the box that he did this in the interest of his wife, denying all knowledge of his children being interested in any way. As above appears I find as a

A fact that he did know of his children's interest, and I think the proper inference is that in looking out for a sub-purchaser he, like John Jones, considered that he was acting in the interests of his family; in other words, that he, too, looked on the suggestion made by Messrs. Bridgeman & Co. as to a purchaser not as superseding, but as a method of giving effect to, the provisions of the will.

On April 17, 1879, Messrs. Bridgeman & Co. wrote to the mortgagees' solicitors B stating that John Jones and the defendant Owen desired to buy the properties, that the matter was a complicated one, and could be best discussed at a personal interview. They enclosed a copy of the will of John Jones the elder. Messrs. Bridgeman & Co. accordingly had an interview with the mortgagees' solicitors, the result of which was that the mortgagees consented to sell the properties to John Jones and Thomas Owen for the amount due on the mortgage. There is no C evidence of any valuation or bargaining as to price, nor is there any evidence that the mortgagees had any intention of selling the property prior to being approached by Messrs. Bridgeman & Co., but it appears that the last instalment of interest on the mortgage was in arrear, and that the power of sale contained in the mortgage had therefore become exercisable. The defendant Owen answered Messrs. Bridgeman & Co.'s letter of Apr. 17. The answer is not forthcoming, but D it led to a suggestion by Bridgeman & Co. that John Jones should purchase all the properties on his own account and thus be able to dictate his own terms if the defendant desired to take over Manchester House and Nelson House. The defendant Owen also took the letter of Apr. 17 to Messrs. Birch, Cullimore, and Douglas, who, on Apr. 19, not unnaturally wrote to Bridgeman & Co. for an explanation of the proposed arrangement, their difficulty being that it could hardly E be proposed to sell the properties at an undervalue, and if sold for full value it was not obvious how the surplus moneys should be dealt with. The explanation asked for was given verbally at an interview between Mr. Birch and Bridgeman & Co. prior to Apr. 24 when, according to Mr. Birch, who was called as a witness, he was told it had been arranged to purchase the properties from the mortgagees for the amount due for principal, interest, and costs, and that this was in order F to give effect to the provisions of the will—John Jones purchasing the property left to his children, and the defendant the properties in which his family was interested. This appears to have satisfied Mr. Birch, who did not further inquire as to values, and on Apr. 24, 1879, Messrs. Bridgeman & Co. wrote to Mr. John Jones as follows:

G "Dear Sir,—Re Colwyn property, yourself, and Owen.—We have seen Mr. Birch, who, on behalf of his client, approves of the arrangement sketched out between ourselves and Messrs. Talbot & Co. [the mortgagees' solicitors] and the next thing to be done is for yourself and Mr. Owen to agree as to the division of the yard behind the three houses, drainage, rights of way up to the passage, and other incidental matters. We have therefore instructed H Mr. Farrington to make a survey of the property and will thank you to send him the ground plan of the property in your possession, as it will no doubt greatly assist him. On receipt of tracings from Mr. Farrington we have arranged with Messrs. Birch & Co. for yourself and Mr. Owen to each mark out the division of the land that you would like, and if there is any difference of opinion you can either settle the matter between yourselves or in con- I junction with the solicitors on each side on the spot. Mr. Birch also approves of the proposed apportionment of the cost of purchasing the property in accordance with the present rentals and all other outgoings and incomings to be dealt with in the same ratio."

Again on May 30, 1879, Messrs. Birch, Cullimore, and Douglas wrote to Messrs. Bridgeman & Co.:

"Dear Sirs—John Jones, Colwyn.—We understand Mr. Owen agrees to the proposed arrangement for winding-up this matter, but the question is as to

the mode of providing the purchase money. This will no doubt be decided in a day or two, and we will then let you hear. But we see no reason why Messrs. Talbot and Woosman need have any anxiety about it."

In my opinion the arrangements sketched out between Messrs. Bridgeman & Co. and the mortgagees' solicitors and the proposed arrangement for winding-up the matter mentioned in these letters is the arrangement for purchasing the property in order to give effect to the provisions of the will of the testator John Jones.

There was a considerable delay in completing the transaction, such delay being due to difficulties between John Jones and Thomas Owen as to the boundaries of the several properties which adjoined each other, and the properties which adjoined each other, and the division of the common yard. I accept John Jones's statement that immediately after the testator's death he entered into possession or receipt of the rents of the properties left to his children, and that the defendant Owen, who in right of his wife was tenant for life, similarly entered into possession or receipt of the rents and profits of Nelson House and Manchester House. There was a cellar in Wellington House which had been let with and was approached through Manchester House, and the defendant Owen appears to have been highly incensed because John Jones walled up the approach, thereby, as he put it, stealing the cellar. There were further difficulties as to the apportionment of the moneys due on the mortgage between the various properties. During the delay further interest accrued due on the mortgage, and certain payments on account of interest were made by John Jones and the defendant Owen respectively to the mortgagees, care being taken, under the advice of their solicitors, that some interest should be left unpaid so that the power of sale might not cease to be exercisable.

Ultimately the disputes between John Jones and the defendant with regard to boundaries were arranged through Mr. Farrington, a surveyor employed for the purpose, and the dispute as to the apportionment was referred to the decision of Mr. Lockwood. The correspondence as to the reference treats the matter to be referred as the properties in which the mortgage debt and interest are to be borne by John Jones and the defendant respectively; but the actual agreement for reference contained a recital that these gentlemen had agreed with the mortgagees to purchase the property. The award, which is dated Oct. 23, 1879, determines that the mortgage debt and interest shall be borne as to two ninths by John Jones and seven ninths by the defendant. Notwithstanding the award there was still further delay in completing the matter, partly from the fact that the defendant could not find the money. The transaction was, however, ultimately completed on Mar. 30, 1880, the defendant having by this time found a sub-purchaser of Nelson House for £380 and arranged to raise the residue on the greater part thereof by a mortgage of Manchester House to Mr. Birch.

On completion the properties were conveyed to John Jones and the defendant respectively, in the manner and with the recitals usual in the case of mortgagees selling under their power of sale. At the same time the defendant conveyed Nelson House to his sub-purchaser for £380, and mortgaged Manchester House to Mr. Birch or his firm for £750 or thereabouts. Mr. Birch also appears to have made arrangements for an advance to John Jones of £650 on Wellington House and Blucher House and £300 on Bodorgan House, though there is no evidence as to whether these advances were actually made or by whom. Both John Jones and the defendant, after the completion of the transaction, dealt with the properties acquired by them as their own. John Jones shortly afterwards sold Bodorgan House for £800, and subsequently sold both Wellington House and Blucher House. He made money out of the transaction, but has not accounted to his children, but is ready to do so. His children, however, know all about the matter, and, the relations between them and their father being of the friendliest, they do not press for any payment. The defendant Owen still holds

Manchester House, which is now said to be worth £6,000 or £7,000, and he claims to retain it as his own property.

With regard to the value of the several properties at the date when the transaction took place, we have the following material facts. Nelson House was sold immediately for £380, the defendant having asked £400 for it and been refused, and a bona fide offer of £1,200 was shortly afterwards made for Manchester House, but refused by the defendant, while Mr. Birch advanced £750 on mortgage of the property. The inference is that Nelson House and Manchester House were together worth at least £1,580, whereas the defendant paid for them only some £1,246. Passing to the evidence of the experts called at the trial, I arrive at a similar conclusion. I give greater credence to the plaintiff's expert evidence than to that adduced for the defendant; but even on this latter evidence the property appears to have been worth considerably more than was given for it. It was situate in one of the best parts of Colwyn Bay, which was then a growing town, and I am satisfied that both John Jones and the defendant believed that the equity of redemption was of considerable value. I can find no trace of any bargaining as to price, and I think the reasonable inference is that the mortgagees consented to exercise their powers to give effect to the arrangement between John Jones and the defendant as representing the parties interested in the equity of redemption.

The result is, in my opinion, that the defendant has by no means discharged the onus which I have held to lie on him. Indeed, I have come to the conclusion on the whole of the facts before me, and in cases of conflicting evidence having regard to the credibility of the several witnesses as shown by their behaviour in the witness box, that both John Jones and the defendant did not consider that they were acquiring the properties for themselves at the expense of their children, but looked on themselves as acting in the interests of their respective families and giving effect to the provisions of the will of John Jones the elder, the difficulty being a proper apportionment of the mortgage, and this difficulty being obviated by the consent of the mortgagees to convey under their power of sale on payment of their principal interest and costs. In my judgment, therefore, the action succeeds. The minutes of the actual judgment will be signed by junior counsel for the parties. They will contain a declaration substantially as asked in the statement of claim, except that the word plaintiff in the first paragraph of the prayer should be changed into "children of Mrs. Sarah Jane Owen," there being some doubt whether there was not another child who died an infant leaving the defendant its heir-at-law. As to this there should be an inquiry. The defendant since the death of his wife has been in effect mortgagee in possession, and he is entitled to be allowed all sums expended by him in permanent improvements, whether so expended before or after his wife's death. There will be directed the appropriate account on this footing. There will also, as agreed between counsel at the hearing, be an inquiry whether the defendant ought to be allowed any, and what, sum in respect of moneys expended by him in the maintenance of the plaintiffs, respectively. The further consideration had better be adjourned, with liberty to apply. The defendant must pay the costs up to and including the judgment.

Order accordingly.

Solicitors: *Cunliffes & Davenport*, for *Chamberlain & Johnson*, Llandudno; *Meredith, Roberts & Mills*, for *Birch, Cullimore & Douglas*, Chester.

[*Reported by* R. C. CARTER, ESQ., *Barrister-at-Law.*]

Re GOUGH AND ASPATRIA, SILLOTH AND DISTRICT JOINT WATER BOARD

[Court of Appeal (Lord Alverstone, C.J., Sir Richard Henn Collins, M.R., and Romer, L.J.), January 22, 1904]

[Reported [1904] 1 K.B. 417; 73 L.J.K.B. 228; 90 L.T. 43; 68 J.P. 229; 52 W.R. 552; 20 T.L.R. 179; 48 Sol. Jo. 207]

Compulsory Purchase—Compensation—Special adaptability—Land taken for waterworks reservoir.

In assessing compensation for land compulsorily taken by a water board for the purpose of building a reservoir thereon, the natural and peculiar adaptability of the land for building a reservoir is a fit and proper matter for consideration as an element in the value thereof, although there may be no evidence of any possible purchasers for that purpose besides the water company.

Decision of Wright, J., [1903] 1 K.B. 574, affirmed.

Notes. Considered: *Re Lucas and Chesterfield, Gas and Water Board*, [1908] 1 K.B. 571; *Vyricherla Narayana Gajapatiraju Bahadur Garu (Sri Raja)* v. *Revenue Divisional Officer, Vizagapatam*, [1939] 2 All E.R. 317. Referred to: *Sidney* v. *North Eastern Rail. Co.*, [1914–15] All E.R.Rep. 341.

As to compensation based on the special adaptability of the land taken, see 10 Halsbury's Laws (3rd Edn.) 95, and for cases see 11 Digest (Repl.) 133–135.

Cases referred to:

(1) *Re Riddell and Newcastle and Gateshead Water Co.* (1879), 90 L.T. 44, n., C.A.; 11 Digest (Repl.) 133, *178*.

(2) *Re Countess Ossalinsky and Manchester Corpn.* (1883), Browne & Allan's Law of Compensation, 2nd Edn. 659, D.C.; 11 Digest (Repl.) 133, *179*.

Appeal by the Aspatria, Silloth, and District Joint Water Board from the decision of Wright, J., reported [1903] 1 K.B. 574, upon an award stated by an umpire in the form of a Special Case for the opinion of the court.

By the Aspatria, Silloth, and District Water Act, 1901, the Aspatria, Silloth, and District Joint Water Board was incorporated and constituted to construct works, take the waters authorised by the Act, and supply water within a certain district. On Oct. 14, 1901, the board served a notice to treat upon the claimant as owner in fee simple of some land proposed to be taken by the board. The parties having failed to agree as to the amount of the purchase money and compensation to be paid, arbitrators were appointed by the parties, and an umpire by the Board of Trade, and, as the arbitrators differed, the matter was referred to the umpire. In the course of the arbitration the parties came to an agreement as to certain works which the board wished to carry out, and it was arranged that, instead of acquiring the fee simple of a piece of land on which was the Overwater Lake, the board should acquire a perpetual easement for the construction and maintenance of a bank 440 yards in length and the right to cover the land with water or denude it of water, subject to certain conditions, so that the Overwater Lake should be comprised in what was called the Overwater Reservoir. The umpire found that the lands over which the easement was to be acquired were, "owing to the natural configuration thereof, peculiarly adaptable in conjunction with Overwater Lake for the construction of a reservoir." He also found that, owing to the natural configuration of other lands which were the intended site of the Chapel House Reservoir, such lands were peculiarly adaptable for the construction of a reservoir. The main question for the opinion of the court was whether, in estimating the value of the land and easements to be acquired by the water board for the Overwater and Chapel House Reservoirs, the natural and peculiar adaptability for the construction of a reservoir of the lands in question was or was not a fit and proper matter for consideration as an element

in the value thereof in the assessment of compensation. If the court should be of opinion that in estimating the value of the land and easements to be acquired for the Overwater and Chapel House Reservoirs the natural and peculiar adaptability for the construction of a reservoir of the lands in question was not a fit and proper matter for consideration as an element in the value thereof in the assessment of compensation, the sum awarded by the umpire was to be reduced by the sum of £1,636. Wright, J., held that the natural value of the site for the purposes of water supply was a matter which ought to be taken into consideration in the assessment of compensation, and the water board appealed.

Balfour Browne, K.C., and *Roskill*, K.C., for the board.

Sir Ralph Littler, K.C., and *W. G. Clay*, for the claimant, were not called on to argue.

LORD ALVERSTONE, C.J.—The point argued here is one of very great importance, but, so far as this court is concerned, I think that the law is settled. If it is to be altered, it must be in the House of Lords.

The umpire has found that the natural configuration of the land is peculiarly adaptable for the construction of a reservoir, and has for that reason awarded £1,636 beyond what has been called the ordinary normal value of the land. It is contended that he has acted wrongly; that he ought not to have given compensation based on the purpose to which the land is to be put by the water board, there being no evidence that any other purchaser would have paid that additional value. I think that the point is decided in *Re Riddell and Newcastle and Gateshead Water Co.* (1), in which I appeared as counsel, and probably also in *Re Countess Ossalinsky and Manchester Corpn.* (2). In the present case Wright, J., has held that the claimant could not sell the water, and, therefore, has no claim for compensation in that respect. That point was not argued in the Queen's Bench in *Re Riddell and Newcastle and Gateshead Water Co.* (1), and, therefore, in the Court of Appeal we were in a little difficulty. I thought at the time that there was ground for arguing that on the face of the award the arbitrator had included as an element of value the natural adaptability of the site, and I contended that that would not be taking the value of the land as it was in the hands of the vendor. But Bramwell, L.J., clearly thought that the adaptability of the site was an element which enhanced the value of the land in the hands of the vendor. He said that the arbitrator had awarded £17,600 as compensation in respect of the lands, tenements, rights, easements, and premises required to be purchased, and £5,000, if he had power to give it, as compensation for damage done to the claimant's remaining land by the power of the company to alter the natural course of the water, and he then said that the land had a peculiar value on account of its fitness for a reservoir, or for building land, or for a skating rink, or for tea gardens, or what not, all things the value of which must be taken into consideration, and, knowing that Mr. Clutton was the arbitrator, it was impossible to suppose that he had not taken them into account. Brett and Cotton, L.JJ., gave judgment to exactly the same effect—viz., that it was a mistake to omit to consider any additional value to the land in consequence of the suitability of the site.

It may be of interest to those who have followed this branch of the law that, in consequence of the decision of the Court of Appeal, I consulted Thesiger, L.J., who was a master of the law of compensation, and he told me that the judgment of the Court of Appeal had only followed the recognised practice of surveyors for many years. So deep was the impression made upon me by that case that I consulted other gentlemen of experience in this matter, who said that the rule laid down by the Court of Appeal was not a new one. For this reason I have always regretted that *Re Riddell and Newcastle and Gateshead Water Co.* (1) has not been included in any law report,* because I think that it really recognised

* A report will appear in the All E.R. Reprint in the volume relating to the year 1879.

that rule. *Re Countess Ossalinsky and Manchester Corpn.* (2) is another example of the same rule. I think that WRIGHT, J., has decided in accordance with the principle laid down in the cases cited, when he said:

> "If there is a site which has peculiar natural advantages for the supply of water to a particular valley or a particular area, or to all valleys or areas within a certain distance, if those valleys are what might be called natural customers for water by reason of their populousness and of their situation—if the site has peculiar natural advantages for supplying in that sense—apart from any value created or enhanced by any Act of Parliament or scheme for appropriating the water to a particular local authority, then I think it ought to be taken that there is a natural value in the site for the purposes of water supply, and that it should be taken into consideration."

For these reasons I think that the appeal must be dismissed.

SIR RICHARD HENN COLLINS, M.R.—I am of the same opinion. The question is really one of fact. It is said on behalf of the water board that it follows as a matter of law from the facts as found by the umpire that the element of value arising from the peculiar adaptability of the site for a reservoir ought not to be included. In holding that it ought to be included, the umpire has accepted a primâ facie presumption that the element of value existed and should be paid for—a presumption based upon a long series of authorities, and one in accordance with good sense. Underlying all that is the presumption that there is a reasonable possibility of a market for the land. The whole question of value has relation to the existence of a possible market, and anyone who wishes to exclude an element of value which should primâ facie be taken into account should show that there is no reasonable probability of the land coming into the market. I agree that the appeal fails.

ROMER, L.J.—I agree.

Appeal dismissed.

Solicitors: *Metcalfe, Birkett & Rowlatt*, for *Mounsey, Bowman & Graham*, Carlisle; *Hargreaves & Crowther*, for *Frank Richardson*, Aspatria.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

PAQUIN, LTD. *v.* BEAUCLERK

[House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord Robertson and Lord Atkinson), February 22, 23, March 26, 1906]

B [Reported [1906] A.C. 148; 75 L.J.K.B. 395; 94 L.T. 350; 54 W.R. 521; 22 T.L.R. 395; 50 Sol. Jo. 358]

Husband and Wife—Contract by wife—Wife acting as agent of husband—Need to prove knowledge of other contracting party.

The respondent, a married woman living with her husband, bought from the appellants certain articles of dress. Nothing was said on either side to C indicate whether the goods were to be supplied on the respondent's credit or on that of her husband; the respondent merely gave her married name and address and later paid for some of the goods by cheques signed by her in that name. The respondent having failed to pay for articles supplied to her, in an action against her by the appellants for the price of the goods,

Held: where a married woman sought to prove that she had entered into D a contract as the agent of her husband it was sufficient if she established by evidence that she had in fact acted as his agent in the transaction, and it was unnecessary for her to prove that she had disclosed to the other contracting party that she was acting as her husband's agent or had mentioned any facts from which an inference to that effect would naturally and reasonably be drawn, or that otherwise he had obtained knowledge of that fact; on E the evidence the House was equally divided on the question whether or not it could properly be found that the respondent had acted as her husband's agent; and, therefore, the decision of the Court of Appeal in favour of the respondent was affirmed, the appeal being dismissed without costs.

Court of Appeal—Entry of judgment—Power to draw inferences of fact—No order for new trial—Evidence such that only one conclusion can properly F *be drawn.*

Per Lord Loreburn, L.C.: While the Court of Appeal is not at liberty to usurp the province of a jury, yet, if the evidence be such that only one conclusion can properly be drawn, the court may enter judgment without sending the case for a new trial.

G **Notes.** Section 1 (b) of the Law Reform (Married Women and Tortfeasors) Act, 1935 (which Act repealed s. 1 of the Married Women's Property Act, 1893) provided that a married woman should be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt, or obligation in all respects as if she were a feme sole, but s. 4 (2) (b) declared that nothing in the Act exempted the husband of a married woman from liability in respect of any contract entered into, or debt or obligation incurred, by her after the marriage H in respect of which he would have been liable if the Act had not been passed.

Distinguished: *Lea Bridge District Gas Co.* v. *Malvern*, [1917] 1 K.B. 803.

As to the contracts of a wife during coverture, see 19 Halsbury's Laws (3rd Edn.) 852 et seq., and for cases see 27 Digest (Repl.) 168 et seq. For the Law Reform (Married Women and Tortfeasors) Act, 1935, see 11 Halsbury's Statutes (2nd Edn.) 811. As to the powers of the Court of Appeal on the hearing of an I appeal, see 30 Halsbury's Laws (3rd Edn.) 468, and for cases see Digest (Practice) 779.

Cases referred to:

(1) *Millar* v. *Toulmin* (1886), 17 Q.B.D. 603; 55 L.J.Q.B. 445, C.A.; on appeal sub nom. *Toulmin* v. *Millar* (1887), 12 App. Cas. 746; 57 L.J.Q.B. 301; 58 L.T. 96, H.L.; Digest (Practice) 783, *3462*.

(2) *Allcock* v. *Hall*, [1891] 1 Q.B. 444; 60 L.J.Q.B. 416; 64 L.T. 309; 39 W.R. 443; 7 T.L.R. 260, C.A.; Digest (Practice) 783, *3464*.

(3) *Debenham* v. *Mellon* (1880), 5 Q.B.D. 394; 49 L.J.Q.B. 497; 42 L.T. 577; 28 W.R. 501, C.A.; affirmed, 6 App. Cas. 24; 50 L.J.Q.B. 155; 43 L.T. 673; 45 J.P. 252; 29 W.R. 141, H.L.; 27 Digest (Repl.) 182, *1363*.

(4) *Stogdon* v. *Lee*, [1891] 1 Q.B. 661; 60 L.J.Q.B. 669; 64 L.T. 494; 55 J.P. 533; 39 W.R. 467, C.A.; 27 Digest (Repl.) 228, *1830*.

(5) *Bentley* v. *Griffin* (1814), 5 Taunt. 356; 128 E.R. 727; 27 Digest (Repl.) 180, *1345*.

(6) *Jewsbury* v. *Newbold* (1857), 26 L.J.Ex. 247; 29 L.T.O.S. 128; 27 Digest (Repl.) 176, *1296*.

(7) *Eastern Steamship Co.* v. *Smith*, [1891] A.C. 310.

Also referred to in argument:

Palliser v. *Gurney* (1887), 19 Q.B.D. 519; 56 L.J.Q.B. 546; 51 J.P. 520; 35 W.R. 760; 3 T.L.R. 778, D.C.; 27 Digest (Repl.) 170, *1246*.

Scott v. *Morley* (1887), 20 Q.B.D. 120; 57 L.J.Q.B. 43; 57 L.T. 919, 52 J.P. 230; 36 W.R. 67; 4 T.L.R. 56; sub nom. *Re Morley, Ex parte Morley, Scott* v. *Morley*, 4 Morr. 286, C.A.; 27 Digest (Repl.) 169, *1242*.

Jolly v. *Rees* (1864), 15 C.B.N.S. 628; 3 New Rep. 473; 33 L.J.C.P. 177; 10 L.T. 298; 28 J.P. 534; 10 Jur. N.S. 319; 12 W.R. 473; 143 E.R. 931; 27 Digest (Repl.) 184, *1390*.

Calder v. *Dobell* (1871), L.R. 6 C.P. 486; 40 L.J.C.P. 224; 25 L.T. 129; 19 W.R. 978, Ex.Ch.; 1 Digest (Repl.) 669, *2353*.

McHenry v. *Davies* (1870), L.R. 10 Eq. 88; 39 L.J.Ch. 866; 22 L.T. 643; 18 W.R. 855; 6 Digest (Repl.) 89, *701*.

Re Grissell, Ex parte Jones (1879), 12 Ch.D. 484; 48 L.J.Bcy. 109; 40 L.T. 790; 44 J.P. 55; 28 W.R. 287, C.A.; 4 Digest (Repl.) 32, *274*.

Re Gardiner, Ex parte Coulson (1887), 20 Q.B.D. 249; 57 L.J.Q.B. 149; 58 L.T. 119; 36 W.R. 142; 5 Morr. 1; 4 Digest (Repl.) 32, *276*.

Morel Bros. & Co., Ltd. v. *Earl of Westmoreland*, [1903] 1 K.B. 64; 72 L.J.K.B. 66; 87 L.T. 635; 51 W.R. 290; 19 T.L.R. 43, C.A.; affirmed [1904] A.C. 11; 73 L.J.K.B. 93; 89 L.T. 702; 52 W.R. 353; 20 T.L.R. 38, H.L.; 27 Digest (Repl.) 177, *1302*.

Atkins v. *Curwood* (1837), 7 C. & P. 756, N.P.; 27 Digest (Repl.) 185, *1405*.

Reneaux v. *Teakle* (1853), 8 Exch. 680; 155 E.R. 1525; sub nom. *Renaux* v. *Teakle*, 22 L.J.Ex. 241; 17 Jur. 351; 1 W.R. 312; 1 C.L.R. 61; 27 Digest (Repl.) 184, *1388*.

Keighley, Maxsted & Co. v. *Durant*, [1901] A.C. 240; 70 L.J.K.B. 662; 84 L.T. 777; 17 T.L.R. 527; 45 Sol. Jo. 536, H.L.; 1 Digest (Repl.) 457, *1047*.

Appeal from a decision of the Court of Appeal (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), reversing a judgment of Lawrance, J., at the trial.

The action was brought by the appellants, who were a firm of dressmakers in London, to recover the sum of £245 19s., being the price of goods supplied to the respondent. The defence was that the respondent was a married woman living with her husband, and was acting as his agent in ordering the goods, and had no separate estate. At the time of the purchase of the goods, the respondent was the wife of a Mr. V. Holden, but she had since married a Mr. Beauclerk. At the trial the jury disagreed, and Lawrance, J., gave judgment for the plaintiffs for the amount claimed. His decision was reversed by the Court of Appeal and the appellants appealed to the House of Lords.

Rufus Isaacs, K.C., *M. Lush, K.C.*, and *A. W. Groser* for the appellants.
Eldon Bankes, K.C., and *Norman Craig* for the respondent.

Their Lordships took time for consideration.

Mar. 26, 1906. The following opinions were read.

LORD LOREBURN, L.C.—This is an action brought by a firm of dressmakers against a lady, who at all material times was a married woman living with her

husband, to recover the price of certain articles of dress. The articles were ordered in the months of April, May, and June, 1903. When their dealings commenced nothing was said on either side to indicate upon whose credit they were to be supplied, whether that of the husband or of the wife. The appellants debited the lady in the name of Mrs. E. Holden, evidently a mistake for Mrs. V. Holden, and were paid by her cheque for such goods as were paid for. They have never claimed against the husband. It is their custom to debit the lady who gives an order and to ask no questions. They are entitled to carry on their business in this way, but if they do so they must take their chance of the status of those with whom they deal, and of the consequences which the law affixes to that status.

It will be convenient to state first what I understand to be the law applicable to the present case. At common law the general rule, with exceptions not material for the present purpose, is that a married woman is incapable of contracting on her own account and cannot be sued alone. But she might contract as agent for her husband. In equity a married woman possessed at the time of separate estate not subject to restraint against anticipation (I will call it free separate estate) could make contracts enforceable against her separate estate, but not enforceable against herself personally. Such being the state of law and equity, it is manifest that the present appellants could not, apart from statute, have sued the respondent at law at all because she was a married woman. Nor could they have sued her in equity because, in fact, she had no separate estate. It was not argued that she had, and it could not have been argued because all the evidence is that she had none. Accordingly, in order to succeed, the appellants must rest their case upon statute. There are two Acts of Parliament which have been relied upon. One of them is the Married Women's Property Act, 1882. A portion of that Act has been repealed, but s. 1 (2) remains, and under it a married woman can be sued as if she was a feme sole, and may also contract as such. But it has been held, properly, I think, that this right to contract only exists where the married woman has separate property at the time. So far, therefore, as the present case is concerned, the Act of 1882 does indeed authorise the action being brought against a defendant in her own name, but it does not give any effective remedy against her or entitle the plaintiffs to judgment as soon as it appears that she had no separate estate at the time of the alleged contract. The second Act relating to this subject is the Married Women's Property Act, 1893. The only chance of the appellants is to bring their case within the Act of 1893. The Act of 1893 provided that all the present or future separate estate of a married woman should be available to answer every contract into which she might enter, where she entered into it "otherwise than as agent." It does not signify under this Act whether or not she had separate estate at the time. If she was acting as an agent, the Act of 1893 will not apply. If she was acting otherwise than as agent, then the Act will apply.

I think it clear that the appellants are entitled to succeed in the present case if Mrs. Holden ordered these goods on her own account, and equally clear that they must fail if she ordered them as agent of her husband. Counsel for the appellants argued that, in order to prove that she entered into the contract as an agent, a married woman must establish, not merely that she was, in fact, an agent for her husband, but also that the other contracting party knew it, and contracted with her on those terms. I cannot adopt that view. The Act of 1893 does not mean that a married woman's separate estate is to answer her contracts unless both parties to the contract deal on the footing that she is an agent. It means, in my opinion, that the separate estate is not to answer when, in fact, she entered into the contract as an agent. Before the Act was passed a tradesman could fix a husband with liability for a debt contracted by his wife if he could prove either express or implied authority from the husband. It was immaterial whether at the time the contract was made the tradesman knew that the wife had her husband's

authority, or even knew that she was a married woman. The knowledge of the tradesman was immaterial. I think it equally immaterial under the Act of 1893.

It is now necessary to advert to the course of the trial. Evidence was given by the appellants' manager and also by the respondent, and a variety of issues were raised. They were embodied in five questions left by LAWRANCE, J., to the jury. The jury could not agree upon a verdict, and in the end the learned judge, in the hope of sparing the parties the expense of a new trial, entered judgment for the appellants. When the case came before the Court of Appeal that judgment was reversed upon the ground that there was no evidence of the respondent's having entered into a contract otherwise than as an agent. That was the substance of the decision, although some of the learned judges in the Court of Appeal expressed opinions and purported to arrive at findings upon the evidence, some of which seem to be appropriate rather for a jury than for a court. It was argued by counsel for the respondent that, even if there had been some evidence that the respondent contracted otherwise than as an agent, the Court of Appeal would in this case have been at liberty under Ord. 58, r. 4, to draw their own inferences of fact and to enter judgment accordingly. The proper construction of Ord. 58, r. 4, has been the subject of criticism in *Millar* v. *Toulmin* (1) and *Allcock* v. *Hall* (2). In the latter case all the judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn, I agree that the court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough to be acted upon by any reasonable jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value. In the present case I think that the Court of Appeal came to a sound conclusion.

The only decisive question was whether the respondent made this contract as agent for her husband. Or, to put the same thing in other words, had she his authority express or implied? In my opinion, the evidence which was uncontradicted and not impugned by cross-examination leaves it beyond reasonable doubt that she did act with his authority. There was no evidence the other way. That is sufficient to dispose of her case. I desire to add that while agreeing with the Court of Appeal in this particular conclusion of fact, I think, as at present advised, that some of the inferences of fact which were drawn by the judges in the Court of Appeal were matters on which, as the evidence stands, a jury might reasonably have found either way.

LORD MACNAGHTEN.—I agree with the opinion which has just been delivered by the Lord Chancellor. The material facts and circumstances of the case are, I think, beyond controversy, and the question at issue, in my opinion, lies in a very narrow compass. A married woman had dealings with Paquin, Ltd., who carry on a large business in Dover Street as milliners and dressmakers. She was introduced by an old customer. The manager apparently made some inquiries of one or more trade protection societies, and came to the conclusion that the lady might be supplied with goods on credit. On that footing she dealt with the firm and became a regular customer. The articles which she ordered were charged to her account. The bills were sent into her and for a while she paid regularly by her own cheques. After about twelve months' time the lady's husband, who had been living for a good many years with a vast show of wealth, was found to be utterly insolvent. He absconded. And then this action was brought against the lady for the balance remaining unpaid on her account. In answer to interrogatories the lady admitted that when she ordered the goods (referring, I presume, to the inception of the transaction) she did not state whether she ordered them on her own behalf or on behalf of any other person, and she admitted that she did not say that she was a married woman. In fact, as one would expect, she

merely gave her married name and her address. The name and address were given correctly. The manager at the trial stated that he did not make any inquiries about the husband and that he "did not think about him." He said, too, that he had "considerable experience in giving credit to ladies in the West-end," and that they "always treated a lady as a principal, not an agent." I see no reason to doubt the manager's statement. In such a case, to borrow the words of Bramwell, L.J., in *Debenham* v. *Mellon* (3) (5 Q.B.D. at p. 399), I may say:

> "I very much doubt whether the tradesman has any intention of trusting the husband. He hopes and expects that somehow the wife will get the money and pay for the goods without the husband knowing anything about the matter."

The lady swore that she had no separate estate or separate income of any kind. She said that her husband from time to time paid money to an account which he allowed her to open with the London and County Bank for the purpose of defraying household expenses and other claims upon him and the bills for what she bought for her own use. She said that she had her husband's express authority for dealing with Paquin, Ltd., and she added that the dresses which she bought were worn in her husband's presence. This evidence was not contradicted, nor was her testimony shaken in cross-examination.

If this transaction had occurred just before the passing of the Married Women's Property Act, 1893, there cannot, I think, be the slightest doubt what the result of an action by the tradesman would have been. It must have been held that the lady entered into the contract as agent. The husband, and the husband alone, would have been liable. The lady would not have been liable either at law or in equity, and as she had no separate estate at the time she could not have been brought within the Married Women's Property Act, 1882: *Stogdon* v. *Lee* (4). It seems to me that after the passing of the Act of 1893 such a contract is still a contract of agency and nothing else. Whatever was necessary and sufficient before the Act to make a transaction entered into by a married woman a contract of agency is, I think, necessary and sufficient to make a transaction entered into under similar circumstances a contract of agency now. In order to exempt a married woman who is, in fact, an agent from the very serious consequences of a judgment against her in respect of future separate estate, when she has no separate property at the time, it is not required by the Act of 1893 that she should communicate to the person with whom she is dealing the fact that she is her husband's agent, or state that she is not acting on her own behalf, or declare that she is married and cohabiting with her husband, or confess that she has not a sixpence in the world which she can really call her own. It can hardly be expected that such domestic confidences should be whispered across the counter or imparted to some forewoman in the comparative privacy of an inner apartment. I cannot imagine that Parliament could have meant to impose on married women a task so novel and disagreeable, not to say so strange or so odious. The only object of s. 1 of the Act of 1893 was, I think, to correct or reverse the decision of the Court of Appeal in *Stogdon* v. *Lee* (4), and to repeal the provision in the Act of 1882 which threw upon a married woman the burden of showing that her contract did not bind her separate estate.

There is really no hardship on the tradesman who deals with a married woman. He is under no obligation to give credit at all or to continue or extend the credit if credit is given. He may make any inquiry he pleases of the customer or of anybody else. If he chooses to trust a lady with unlimited credit when he is not sure of his ground, he has only himself to blame if anything should go wrong. The learned judge told the jury that the real question was whether the manager knew that the lady was a married woman. I venture to think that that question is not material. The only question, as it seems to me, is whether the contract was entered into by the lady "otherwise than as agent." That is a question of fact. Unless the affirmative is shown the Act does not apply. In the present case,

inasmuch as it has been proved that the lady had her husband's express authority to act as his agent, and did so act, and it is not suggested that there was any misrepresentation on her part, I think that the view of the Court of Appeal is right. No jury, I think, could have properly come to any other conclusion on the evidence. I think that the appeal ought to be dismissed with costs.

LORD ROBERTSON.—In my opinion, the law governing this case is s. 1 of the Married Women's Property Act, 1893, and I quote the words which state the rule set up for married women's contracts:

> "Every contract hereafter entered into by a married woman, otherwise than as agent, shall be deemed to be a contract entered into with respect to and to bind her separate property, whether she is or is not possessed of or entitled to any separate property at the time when she enters into such contract."

The plain result of this enactment is that unless the respondent entered into this contract as agent for her husband she is liable to the appellants. Whether she entered into the contract as agent seems to me the only question in the case; and, the facts being perfectly free from dubiety, that question is one of law.

The facts which are relevant are these. The lady was living with her husband; she had his authority to buy such articles as those in question, and he knew of their purchase, at least after it had been made. On the other hand, it is equally certain that the appellants did not know that the respondent had a husband living, or that she was living in cohabitation with him. The respondent manifested herself to the appellants merely as "Mrs. V. Holden," and they had no further or other knowledge of her status. It is obvious that this name was entirely consistent with her being a widow or a separated married woman, and it was, therefore, insignificant on the question of agency. No circumstance or scintilla is suggested as raising a jury question whether the appellants did or did not in fact know that the respondent had a living husband and was living with him. In these circumstances, what the respondent relies on is the undisclosed fact that she had her husband's authority; and the question of law is whether this is enough to make the contract that of an agent. In my opinion, it is not, and the point may, as I think, be subjected to a very simple test: Did the appellants deal with the respondent as an agent? As already stated, they certainly did not, for they never heard of the existence of a husband. This being so, I find it legally impossible to hold that the respondent contracted as an agent, for unless both parties regarded the appellant as an agent she did not contract as agent. It seems to me that, primâ facie, every person who contracts contracts for himself or herself. The application of this to those who de facto hold the powers of agents is thus stated in SMITH'S MERCANTILE LAW (10th Edn.), p. 173:

> "If any agent contract without disclosing that he has any principal, he is himself the person primâ facie responsible."

In the present case, as the respondent affected and purported to stand on her own feet vis à vis the appellants, and did not apprise them of anything about herself to suggest agency, she must be held to have contracted personally. And s. 1 of the Act of 1893 places beyond dispute the capacity of a married woman to contract personally, and places the case of an agency in antithesis and exception to the primary case of contract—viz., personal contract.

I have stated my views shortly, and I feel that it would be superfluous to protest the irrelevancy of several suggested topics. Thus, it is surely unnecessary to deprecate such phrases as that this lady contracted in her married name (as if she had the choice of two names, either of which she could truthfully give to a tradesman). Again, the question before the House being solely whether this lady is liable, it is nothing to the purpose to prove that an undisclosed principal might also be liable. The only hesitation which I feel about the case is whether it is permissible to withhold it from further trial by jury. But a careful examina-

tion of the evidence has satisfied me that there are no questions of fact remaining in dubio, and that the sharp question of law which I have discussed is decisive of the controversy. I am, therefore, for allowing the appeal, and finding the appellants entitled to judgment, with costs.

LORD ATKINSON.—I have had the advantage of reading the opinion of LORD ROBERTSON, and I concur in it. I do not think that s. 1 of the Married Women's Property Act, 1893, protects, or was intended to protect, from liability a married woman who enters into a contract apparently as principal, though she may, in fact, be only agent for an undisclosed principal. If the other party to the contract should discover that she was in fact an agent for an undisclosed principal, he may, I think, sue the principal just as he could sue him if the married woman were a man or a feme sole, but if he should elect to sue her I do not think that she can escape liability on the plea that she was in fact agent, though at the time when the contract was entered into she neither disclosed that circumstance nor mentioned any facts from which the inference would naturally and reasonably be drawn.

The liability of the husband on the wife's contract is governed by the general principles of the law of principal and agent. He cannot be held responsible for goods supplied to her unless he has expressly or impliedly authorised her to act as his agent or ratified the contract which she has professed to make on his behalf, or conducted himself in such a way that he would be estopped from denying that she was his agent. One mode by which this authority of the wife to act as the agent of the husband can be established is by proof of two facts—(i) that she is living with him; and (ii) that the goods ordered or supplied are of such character and nature as are usually required in those departments of domestic life and economy which the wife ordinarily manages and controls. The tradesman who sues the husband for goods supplied on the order of the wife will, on proof of those two facts, though they may have only come to his knowledge after the contract was made or the goods supplied, have laid before a jury evidence which, if unexplained or unrebutted would justify them in drawing the inference of fact that the wife had authority to act as the agent of the husband: see THESIGER, L.J.'s, judgment in *Debenham* v. *Mellon* (3). That inference may be rebutted in several well-known ways independently of any statute, and, among others, by evidence from which the jury might draw the inference of fact that the goods were supplied on the credit of the wife to the exclusion of the credit of the husband: *Bentley* v. *Griffin* (5); *Jewsbury* v. *Newbold* (6). These last-mentioned matters, however proper for consideration in a suit against the husband, do not, I think, help much to solve the question in controversy in this appeal.

In my view, the question here is not what Mrs. Holden in fact was, but how and in what character did she professedly contract. Primâ facie every person who enters into a contract without disclosing that he or she has a principal contracts for himself or herself. The only facts indicating the nature of the defendant's position or her power or authority to contract, known to the plaintiff company when the contract now sued upon was entered into, which could, in my opinion, be regarded as evidence of any weight on the issues raised in this action are two: (i) the fact that the defendant when first introduced gave her name as Mrs. V. Holden or Mrs. E. Holden; and (ii) the fact that subsequently she paid for wearing apparel supplied to her by cheques signed May Holden. The opening of the account in the plaintiffs' books in the name of Mrs. Holden or Mrs. E. Holden, or the furnishing to her of bills in that name, are, as it has been said, "colourless transactions," not helping to a conclusion either way. The two first-mentioned facts cannot, I think, be regarded as amounting to a disclosure that the defendant had a principal, her husband, nor to a representation, express or implied, that she was contracting as agent on his behalf, and any finding of a jury that they amounted to either should necessarily, in my opinion, be set aside, as having been made without evidence reasonably capable of supporting

it. Nor do I think that these two facts amount to evidence from which a jury could legitimately draw the conclusion that the plaintiff company had constructive notice that the defendant was a married woman actually living with her husband, and was primâ facie contracting as his agent and pledging his credit. During the progress of the argument I entertained some doubt whether a new trial ought not to be directed, but on re-consideration I am of opinion that Mrs. Holden must, on the evidence, be held to have contracted otherwise than as agent. I have, therefore, come to the conclusion that there is no evidence on which a jury could properly find that this lady acted as agent for or on behalf of her husband, and I am of opinion that the appeal should be allowed and judgment entered for the appellant.

LORD LOREBURN, L.C.—I find in the precedent of the *Eastern Steamship Co.* v. *Smith* (7) the record is as follows:

> "It being moved to reverse the judgment, the same was objected to; both were equal, two for affirming and two against. According to ancient rule of law semper præsumitur pro negante, the question for reversal was determined in the negative, and therefore, the judgment was affirmed and the appeal dismissed."

Costs are never given in such a case. I propose, therefore, that that rule should be adopted in this case, unless your Lordships think otherwise.

Appeal dismissed without costs.

Solicitors: *Gery & Brooks; Lewis & Lewis.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

Re HUNT'S SETTLED ESTATES. BULTEEL *v.* LAWDESHAYNE

[Chancery Division (Farwell, J.), January 19, August 9, 10, 1905]

[Reported [1905] 2 Ch. 418; 74 L.J.Ch. 759; 93 L.T. 333]

Settled Land—Tenant for life—Powers—Investment of capital money—Direction to trustees to invest in leaseholds—Undesirable investment—Jurisdiction of court to restrain—Settled Land Act, 1882 (45 & 46 *Vict.*, *c.* 38), *s.* 21, *s.* 22 (2), *s.* 53.

In the exercise of his power to direct the investment of capital money, the tenant for life is in the same position as a trustee investing trust funds, and he will be restrained by the court from directing an investment which is not suitable for trust funds, even though he is acting bona fide and the investment is of the class authorised by the Settled Land Act.

Having contracted to purchase eight leasehold houses for £2,650, the tenant for life, acting under his statutory powers, directed his trustees to apply capital money in paying the purchase price and costs. The houses had an unexpired term of over sixty years and an aggregate ground rent of £50. The tenant for life produced a surveyor's report which supported the price, but the independent surveyor's report procured by the trustees stated that the houses were badly planned, badly built, and badly drained, would be increasingly expensive to maintain, and were not worth more than £1,400, so that the trustees were advised "not to buy at any price". The trustees

refused to proceed with the purchase. The court found that the report procured by the trustees was to be believed.

Held: the tenant for life was in the position of a trustee and was not justified in selecting an unsuitable investment and, even, if he had acted bona fide, the property not being a proper one for purchase by trustees, it was the duty of the court to interfere. Accordingly the trustees were not bound to carry out the direction of the tenant for life.

Notes. The Settled Land Act, 1882, has, with the exception of s. 30, been repealed. Sections 21, 22 (2) and 53 of the 1882 Act have been replaced by ss. 73, 75 (2) and 107 respectively of the Settled Land Act, 1925 (23 HALSBURY'S STATUTES (2nd Edn.) 161, 173 229).

Applied: *Re Gladwin's Trust*, [1919] 1 Ch. 232; *Re Cowley Settled Estates*, [1926] All E.R.Rep. 665. Referred to: *Shaw* v. *Cates*, [1909] 1 Ch. 389; *Re Lord Boston's Will Trusts, Inglis* v. *Lord Boston*, [1956] 1 All E.R. 593.

As to the fiduciary position of a tenant for life in exercising his statutory powers, see 34 HALSBURY'S LAWS (3rd Edn.) 528, 529; and for cases see 40 DIGEST (Repl.) 818, 819.

Cases referred to:

(1) *Re Whiteley, Whiteley* v. *Learoyd* (1886), 33 Ch.D. 347; 55 L.J.Ch. 864; 55 L.T. 564; 2 T.L.R. 864; affirmed sub nom. *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727; 57 L.J.Ch. 390; 58 L.T. 93; 36 W.R. 721; 3 T.L.R. 813, H.L.; 43 Digest 856, *3038*.

(2) *Hampden* v. *Earl of Buckinghamshire*, [1893] 2 Ch. 531; 62 L.J.Ch. 643; 68 L.T. 695; 41 W.R. 516; 37 Sol. Jo. 455; 2 R. 419, C.A.; 40 Digest (Repl.) 809, *2870*.

(3) *Re Lord Coleridge's Settlement*, [1895] 2 Ch. 704; 73 L.T. 206; 44 W.R. 59; 11 T.L.R. 596; 39 Sol. Jo. 725; 13 R. 767; 40 Digest (Repl.) 818, *2954*.

(4) *Re Hotham, Hotham* v. *Doughty*, [1902] 2 Ch. 575; 71 L.J.Ch. 789; 87 L.T. 112; 50 W.R. 692; 46 Sol. Jo. 685, C.A.; 40 Digest (Repl.) 818, *2955*.

Summons and **Action** heard together.

By her will, dated Sept. 28, 1868, Catherine Hunt devised her freehold estate in Devonshire to trustees upon trust for her nephew Charles Philip Francis Hunt for his life or until he should alienate or otherwise charge the same, in which case his life estate should be forfeited, and from and after his decease or such forfeiture upon trust for all his children equally as and when they should respectively attain the age of twenty-one years. On Mar. 2, 1880, Hunt was adjudicated a bankrupt. In 1884 Hunt renounced his former name and took that of Philip Lawdeshayne. On Apr. 30, 1898, all the property of Philip Lawdeshayne was assigned to the defendant Leppard by Lawdeshayne's trustee in bankruptcy, and by the judgment in an action of *Re Hunt, Pollard* v. *Geake* it was declared that the life estate of Lawdeshayne in the Devonshire estate was vested in Leppard by virtue of this assignment by the trustee in bankruptcy. In September, 1903, Lawdeshayne, in exercise of the powers given to him by the Settled Land Acts, sold the property in Devonshire for £5,000. After paying off a rentcharge on the estate a balance of £3,579 9s. 1d. remained, and this was invested in New Consols in the names of the trustees, who were trustees for the purposes of the Settled Land Acts. Early in 1904 Leppard's solicitor Knight wrote to the trustees' solicitors suggesting that part of this sum should be invested in the purchase of eight leasehold houses in Gowan Road, Willesden Green, for £2,650. These houses were held for a term of ninety-nine years from Mar. 25, 1898, at an aggregate ground rent of £50. The trustees' solicitors stated in reply that they knew Gowan Road, and did not consider the houses a suitable investment for trust funds. In spite of this, however, Lawdeshayne and Leppard contracted to purchase these houses for £2,650 and directed the trustees to apply so much as might be necessary of the sum of £3,579 9s. 1d. in paying the

purchase money and solicitors' costs. Inclosed with this direction was a valuation by a surveyor, Mr. Hewish, who had been asked to report whether the tenant for life would be justified in giving £2,800 for the property in question. In his report he stated that in his opinion the tenant for life should not offer more than £2,600 but that, if that sum would not be accepted, he might safely advance upon it by £50. The trustees, however, refused to carry out the purchase without further evidence as to value, and instructed Messrs. Farebrother and Ellis to report whether the price was a fair and reasonable one for trustees to pay for the property. Mr. Galsworthy, a member of the firm, reported that the property, which consisted of eight houses of the artisan class, had been sold by auction in 1900 for £2,375 and that five of the houses in occupation at the time of the report were held on monthly tenancies. The report then proceeded:

> "Moreover, the property is badly planned, badly built, badly drained, and one which would be increasingly expensive to maintain in repair and keep occupied.... With regard to value, we are of opinion that the utmost that should be given for the property at the present time for trust purposes is £1,400 but we strongly advise trustees not to buy at any price...."

The trustees thereupon declined to proceed with the purchase.

An action for specific performance was brought by the vendor against Lawdeshayne and Leppard, who thereupon served on the trustees a third-party notice requiring an indemnity from them. The trustees, however, obtained an order setting aside the service, and then took out this summons under s. 44 of the Settled Land Act, 1882, asking for directions whether they ought to comply with the directions given by Lawdeshayne and Leppard. This summons came on for hearing on Jan. 19, 1905, and, after being partially heard, was allowed to stand over in order that the trustees might ascertain whether the remaindermen, who were resident in Canada, desired to bring an action raising the question whether the tenant for life had in directing the purchase acted mala fide. Subsequently an action was commenced by the remaindermen with this object, and on Aug. 9, 1905, the action and summons came on for hearing together. Considerable evidence was given in the action to show that the tenant for life had acted in collusion with Leppard and another person.

On the summons.
Upjohn, *K.C.*, and *Rolt* for the trustees.
R. J. Parker for the tenant for life.

In the action.
Upjohn, *K.C.*, and *Jolly* for the remaindermen.
Butcher, *K.C.*, *R. J. Parker*, and *Peterson* for Leppard.
R. J. Parker for the tenant for life.
Rolt for the trustees.

FARWELL, J.—The question in the summons raises a short point of law which I will dispose of first. The tenant for life under the will of Catherine Hunt sold some of the settled property, and the proceeds are to be re-invested. He is minded to invest in leaseholds, and that, no doubt, is within the power given him by the Settled Land Act 1882. The leaseholds selected by him are, in the trustees' opinion, of an undesirable character, and they have therefore applied to the court for directions. It is contended, however, by the tenant for life that, if the tenant for life chooses property which is leasehold with the right number of years unexpired and there is no mala fides, the court cannot interfere with him in any case. I dissent altogether from that proposition. The tenant for life is a trustee under s. 53, and his liability follows from his position as trustee; he is neither in a better or worse position than an ordinary trustee who has a discretionary power to invest in leaseholds. It is said that, granted bona fides, it is sufficient for the tenant for life to say: "These are leaseholds

A with more than sixty years to run which I have chosen in the exercise of my discretion," and that the court cannot then interfere. I do not take this view. In *Re Whiteley*, *Whiteley* v. *Learoyd* (1) COTTON, L.J., says in discussing a proposed investment by a trustee (33 Ch.D. at p. 349):

> "We must consider whether this is, or is not, within the power to invest on real security. I am of opinion it is real security, and if the Vice-Chancellor based his decision against the trustees on the view that this was not real security, that is to say, not a security within the power granted to the trustees, I am obliged to differ from him."

Then he proceeds to describe the nature of the property, and says the land is not the less a real security because it has a brickfield upon it. Then he goes C on (ibid. at p. 350):

> "It is still real security, but, although it is real security, it does not follow that the trustees are free from liability in respect of loss incurred by lending on that security. It must be considered whether it was proper for the trustees, having regard, not only to the rules laid down by the court, but to the special circumstances of the case, to invest the sum which they did on that security."

The security selected in this case is, in my opinion, properly described by Mr. Galsworthy in his report, for I accept his testimony entirely and I place no reliance on the two surveyors called on behalf of the tenant for life, as to the value of the property. I find, then, as a fact that Mr. Galsworthy's description E of the property is correct. [HIS LORDSHIP then referred to Mr. Galsworthy's report.]

It is wrong for trustees to invest in property of this kind, although it is leasehold property with more than sixty years unexpired, just as it was wrong for the trustees in *Re Whiteley*, *Whiteley* v. *Learoyd* (1) to invest upon the security of a brickfield, though a security of an authorised kind. A tenant for life is in the position of a trustee, and he is not justified in selecting a security F which is not suitable. In *Hampden* v. *Earl of Buckinghamshire* (2) LINDLEY, L.J., says ([1893] 2 Ch. at p. 544):

> "Assuming a tenant for life to be acting bona fide and with a view to preserve the estates for those intended by the settlor to enjoy them, still an honest trustee may fail to see that he is acting unjustly towards those whose interests he is bound to consider and to protect; and if he is so acting, G and the court can see it although he cannot, it is, in my opinion, the duty of the court to interfere."

I certainly shall consider it my duty to interfere in such a case as the present until, at any rate, I am corrected by a higher tribunal. I am told, however, that I am bound by authority, and two cases were relied on—*Re Lord Coleridge's* H *Settlement* (3) and *Re Hotham*, *Hotham* v. *Doughty* (4). The first case is quite different from the present. The tenant for life there desired to invest in certain debentures which were within the power given by the particular settlement. The trustees, however, raised the question of the desirability of the investment. Really, then, the question was whether there were to be two sets of trustees, and whether the discretion as to investments was to be exercised I by the tenant for life or the trustees, as it is stated by CHITTY, J., in his judgment ([1895] 2 Ch. at p. 706:

> "The investments which the tenant for life has directed are all within the scope of the settlement power; but they are not such as the trustees themselves would, if they have any discretion in the matter, themselves select."

Then he proceeds to consider the sections of the Act, and comes to the conclusion that the trustees have no power to interfere with the discretion of the tenant for life, and says (ibid. at p. 707):

"The only limitations imposed on him are those to be found in the Act itself—notably in s. 21 and s. 53. By s. 53, a tenant for life in exercising any power under the Act is bound to have regard to the interests of all parties entitled under the settlement, and, in relation to the exercise thereof by him, is deemed to be in the position and to have the duties and liabilities of a trustee for those parties. Supposing that this case had not fallen within the Act, and that the trustees had, in the exercise of their ordinary discretion, selected these securities in good faith, their discretion could not have been questioned; they would have been acting within the scope of the authority conferred on them by the settlement. Similarly, the tenant for life in the exercise of his statutory power cannot be controlled by the trustees or by the court, so long as he really and honestly exercises his discretion."

That, to my mind, expresses exactly what I have been trying to point out—viz., that the tenant for life is in precisely the same position as an ordinary trustee.

In *Re Hotham, Hotham* v. *Doughty* (4) COZENS-HARDY, J., went a step further. There he distinguished *Re Lord Coleridge's Settlement* (3), and held that in the case of a mortgage it was for the trustees to satisfy themselves as to the title and value of the proposed security. The order made by COZENS-HARDY, J., was to some extent varied in the Court of Appeal. The whole question there was one between the solicitors to the tenant for life and the trustees as to who were the proper persons to investigate the title and value of the proposed mortgage. The decision is useful, however, as showing that whoever had that discretion as to title and value was bound to exercise it in accordance with the ordinary rules governing trustees. I fail to see that there is anything in these two cases to prevent my adhering to the view I have already expressed. [HIS LORDSHIP then proceeded to consider the facts of the present case, and held that, even if the tenant for life had acted bona fide, the property selected by him was not a proper one for a purchase by trustees, and that the trustees were not bound to carry out his direction. He further held, on the evidence in the action, that the tenant for life had attempted to exercise his powers fraudulently, and in collusion with Leppard and another person. A declaration was made on the summons accordingly, and on the action no order was made except that the defendants should pay the costs.]

Solicitors: *Morgan, Upjohn & Leach*; *H. C. Knight.*

[*Reported by* H. C. GARSIA, ESQ., *Barrister-at-Law.*]

This case was affirmed in the Court of Appeal (SIR RICHARD HENN COLLINS, M.R., ROMER and COZENS-HARDY, L.JJ.), reported [1906] 2 Ch. 11.

GETTY *v.* GETTY

[Probate, Divorce and Admiralty Division (Bucknill, J.), July 29, 1907]

[Reported [1907] P. 334; 76 L.J.P. 158; 98 L.T. 60]

Divorce—Adultery—Evidence—Confession—Need of corroboration.

There is no absolute rule that the court will require corroborative evidence of a confession of adultery. The test to be applied is whether the whole of the circumstances of the case are such as to satisfy the court that the confession is true. If the court is satisfied that the confession is made in good faith and can be relied upon it is not necessary that there should be any independent evidence of the adultery.

Notes. Followed: *Weinberg* v. *Weinberg* (1910), 27 T.L.R. 9.

As to corroboration and confessions of adultery, see 12 Halsbury's Laws (3rd Edn.) 238; and for cases see 27 Digest (Repl.) 326 et seq.

Cases referred to in argument:

Williams v. *Williams and Padfield* (1865), L.R. 1 P. & D. 29; 35 L.J.P. & M. 8; 13 L.T. 610; 27 Digest (Repl.) 327, *2718*.

Robinson v. *Robinson and Lane* (1859), 1 Sw. & Tr. 362; 29 L.J.P.M. & A. 178; 31 L.T.O.S. 268; 33 L.T.O.S. 96; 5 Jur.N.S. 392; 164 E.R. 767; 27 Digest (Repl.) 326, *2705*.

Petition by the husband, William Getty, for a divorce from his wife, Caroline Bertha Getty, on the ground of her adultery with a person unknown.

The parties were married on July 22, 1885, at St. Martin's Church, Patternewton, Yorkshire, and afterwards resided in Egypt, where the husband carried on business as a cotton merchant. Early in 1886 the wife left Egypt for England, with her husband's consent, and he saw her off from Alexandria. She travelled back to England with her sister, and on the way wrote a letter to the husband from Malta; but after that no direct communication was received from her for about nineteen years. There was no doubt that she arrived in England, and the husband himself came over to this country from Egypt in June, 1886. All efforts to discover the whereabouts of his wife, however, were unsuccessful, and he was equally unable to find her in 1887 and 1888 when he was again in England. In 1888 he received a letter from his wife's sister, and in consequence of it he sent £20 to the sister to be forwarded to his wife in her sister's name. The money was returned by the wife's solicitors. In 1899 the husband commenced a suit for the restitution of conjugal rights, at which date he had neither seen his wife nor heard anything directly from her for thirteen years. The wife filed an answer to the suit, and set up a charge of cruelty against her husband. The case came on for hearing in 1900, and the wife gave evidence as to the cruelty which she alleged against her husband. The hearing was adjourned for the production of further evidence, part of which had to be procured from Egypt. But eventually, before the hearing was resumed, the parties entered in a deed of separation, and the suit for the restitution of conjugal rights was abandoned.

At the beginning of 1905 the husband received the following letter from his wife:

> "My Dear William—I am a Christian scientist. I became interested in science from the healing of E.'s husband, who was supposed to have an incurable disease. I believe that God is the Divine principle of life, truth, and love. I want to possess the consciousness of truth, and cannot do so while I am not truthful with you. I was unfaithful to you nineteen years ago, and I regret bitterly the wrong I have done you. This statement sounds bald, but it is too ugly to dress up in fine phrases.—Yours very sincerely, Caroline B. Getty."

After her confession the wife refused to accept any income from the trustees of the marriage settlement. Every effort had been made by the husband and his

legal advisers to obtain the name of the person with whom the wife had committed adultery according to her own confession, but without success.

In an interview with Mr. Lupton, the solicitor who was acting on behalf of the wife in 1906, he said that he was not prepared to give the name of the man, nor was he in a position to furnish any particulars as to the adultery, except that it took place in England shortly after the wife returned from Egypt, and that the attachment which the wife had formed was only of short duration. The wife was unaware whether the man was alive or dead, and she was most unwilling to drag his name into a divorce suit after so many years had elapsed since the adultery took place. All efforts to obtain further information had been repulsed, both the wife and her former solicitor declining to state anything further than they had done previously. The solicitor stated that he had taken counsel's advice and was acting upon it entirely.

Barnard, K.C., and *Willis* for the husband.
Victor Russell for the wife.

His Lordship intimated that he desired to see the former solicitor of the wife, Mr. Lupton, who then went into the witness-box. His objection to answering certain questions having been overruled, he stated that the wife had made certain communications to him, but she had never stated where the adultery had taken place. She had refused to give any further information as to the adultery to which she had confessed, on the ground of the interval that had elapsed since its occurrence, and owing to her desire to avoid the serious consequences which might arise in the case of the adulterer, as she was unaware whether he was alive or dead.

BUCKNILL, J.—The evidence on the part of Mr. Lupton, that the wife never told him where the adultery, to which she had confessed, had taken place, appears to me to be very strong corroboration of the confession. If Mr. Lupton had not been called, I should have found myself in this position: that I should have had nothing but the confession of the wife, written more than two years ago and never since repeated. I do not overlook the fact that she has refused to take the money which is due to her under the terms of her marriage settlement ever since she wrote out her confession. But, nevertheless, without the evidence of Mr. Lupton I should have felt very great difficulty in acting upon the confession of the wife. Now, however, having heard his evidence, I am of opinion that all doubt as to the genuineness and sincerity of the confession has been removed, and that in her communication with her solicitor the wife made it clear that her confession was indeed true, and that she was unwilling to give full particulars as to the whole of the circumstances because she did not wish, to use a colloquial expression, to give away the man with whom she had committed herself. I am quite satisfied, under the whole of the circumstances, that I have sufficient evidence upon which I can act, accepting the confession as being a true statement, even though there is no actual corroboration by witnesses before the court. I therefore pronounce a decree nisi.

Solicitors: *Norris, Allens & Chapman*, for *Toulmin, Lawrence & Shield*, Liverpool; *T. B. & W. Nelson*, for *Nelson, Eddison & Lupton*, Leeds.

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law*]

THE TACTICIAN

[Court of Appeal (Lord Alverstone, C.J., Fletcher Moulton, L.J., and Elder Brethren), March 12, 1907]

[Reported [1907] P. 244; 76 L.J.P. 80; 97 L.T. 621; 23 T.L.R. 369; 10 Asp.M.L.C. 534]

Port—Pilot—Compulsory pilot—Duty of master and crew to give full assistance. The principle that the pilot in charge of a ship is entitled to the fullest assistance of a competent crew and a competent look-out, and a well-found ship, entitles him to full information from the master with regard to any fact which it is important for him to know. The master is bound, without interfering with the pilot's navigation, forcibly to call his attention to such a matter as the lights of another vessel where it appears that the pilot is drawing from them inferences which no competent mariner ought to draw.

Notes. Distinguished: *The Hans Hoth*, [1953] 1 All E.R. 218. Referred to: *The Elysia*, [1912] P. 152; *The Ape*, [1916] P. 303; *Steamship Alexander Shukoff* v. *Steamship Gothland, Steamship Larenberg* v. *Steamship Gothland*, [1921] 1 A.C. 216; *Workington Harbour and Dock Board* v. *Towerfield* (*Owners*), [1950] 2 All E.R. 414.

As to rights and liabilities of pilots, see 35 Halsbury's Laws (3rd Edn.) 581 et seq., and the Pilotage Act, 1913, s. 30 (23 Halsbury's Statutes (2nd Edn.) 855); and for cases see 41 Digest 901–904.

Case referred to:

(1) *The Oakfield* (1886), 11 P.D. 34; 55 L.J.P. 11; 54 L.T. 578; 34 W.R. 687; 5 Asp.M.L.C. 575.

Also referred to in argument:

The Argo (1859), Sw. 462; 166 E.R. 1217; 41 Digest 772, *6277*.

The Duke of Manchester (1846), 2 Wm. Rob. 470; 4 Notes of Cases, 575; 10 Jur. 863; 166 E.R. 833; on appeal sub nom. *Shersby* v. *Hibbert*, *The Duke of Manchester* (1847), 6 Moo.P.C.C. 90, Notes of Cases, 470; 13 E.R. 618, P.C.; 41 Digest 876, *7537*.

Hammond v. *Rogers*, *The Christiana* (1850), 7 Moo.P.C.C. 160; 7 Notes of Cases, Supp. xli; 7 L.T. 648; 13 E.R. 841, P.C.; 41 Digest 698, *5308*.

The Peerless (1860), Lush. 30; 29 L.J.P.M. & A. 49; 2 L.T. 25; affirmed (1860), Lush. 103; 13 Moo.P.C.C. 484; 30 L.J.P.M. & A. 89; 3 L.T. 125; 15 E.R. 182, P.C.; 41 Digest 774, *6314*.

Appeal by the owners of the *Tactician* from a decision of Bargrave Deane, J., by which he held them alone to blame for a collision which occurred between their steamship and the steamship *Leander*.

The collision occurred about 10.30 p.m. on Nov. 24, 1905, at the entrance to the river Thames, to the southward and eastward of the Black Deep lightship. The wind was from the southward and westward, fresh to moderate; the weather was fine and clear, and the tide was about high water. The case made by the plaintiffs, the owners of the *Leander*, was that the *Leander*, a steamship of 1,793 tons net and 2,793 tons gross register, manned by a crew of twenty-six hands all told, was lying at anchor in the Thames estuary, near the Black Deep lightship, in the course of a voyage from London to the river Plate with a general cargo. The *Leander* was heading about S.W., her regulation forward and aft anchor lights were duly exhibited and were burning brightly, and a proper anchor watch was being kept on board of her. In these circumstances the two masthead lights and the red light of the *Tactician* were seen about three miles off, and bearing a little abaft the port beam. The *Tactician* approached, keeping on about the same bearing, and showing the same lights, but, when about from

200 to 300 yards distant, her green light opened, and, coming on at great speed and shutting in her red light, with her stem she struck the port side of the *Leander* near the break of the forecastle, doing her damage, so that her forehold filled, and she had to accept salvage services from several tugs before she could be brought into a place of safety.

The plaintiffs charged the defendants with not keeping a good look-out; with neglecting to keep out of the way of the *Leander*; and with neglecting to slacken their speed or stop or reverse their engines. The case made by the defendants and counter-claimants was that the collision and damage, so far as they were occasioned by any fault on board the *Tactician*, were occasioned solely by the fault or neglect of the pilot who was compulsorily in charge of her. The defendants alleged that the *Tactician*, a screw steamship of 4,765 tons net register, was proceeding up the Edinburgh Channel, at the mouth of the river Thames, on a voyage from Calcutta to London. Her course was N.W. by W. westerly magnetic, her speed was about eleven knots, and she had on board a general cargo; she was manned by a crew of eighty-two hands all told, and was in charge of a duly licensed pilot. A good look-out was being kept on board of her, and her regulation lights were being duly exhibited and were burning brightly. In these circumstances those on board the *Tactician* saw a little on the starboard bow the white lights of the *Leander* about two and a half miles off. The pilot judged the lights to be those of a vessel proceeding down the channel, and soon after the glimmer of another light, which proved to be a dull white light, was seen by those on the *Tactician*. Shortly after the lights of the *Leander* were seen, the helm of the *Tactician* was starboarded to pass between her and the North Shingles Buoy, and, when she was discovered to be stationary, the helm of the *Tactician* was put hard-a-starboard and her engines were put full speed astern, but the stem and starboard bow of the *Tactician* struck the port bow of the *Leander*, causing damage to both vessels. Just before the collision the helm of the *Tactician* was put hard-a-port. The defendants further alleged that all the orders given by the pilot were promptly carried out by those on the *Tactician*, and that those on the *Leander* contributed to the said collision by omitting to make any sound or other signal of warning when the *Tactician* was seen to be approaching so as to involve a risk of collision, and counter-claimed for the damage the *Tactician* had sustained.

Bargrave Dean, J., held that the collision was caused by the default of the pilot, but it also might have been avoided if the master of the *Tactician* had done his duty in giving his advice and opinion to the pilot. By failing to do that he did not do his duty, and did not assist the pilot as the pilot ought to have been assisted, and, therefore, the learned judge found that the master was to blame as well as the pilot, and gave judgment for the defendants. On Feb. 17, 1906, the defendants gave notice of appeal asking that the judgment might be varied, and that it might be adjudged that the collision was occasioned solely by the fault or default of the pilot.

Sir R. Finlay, K.C., Aspinall, K.C., and *F. E. Smith* for the defendants.
Rufus Isaacs, K.C., Laing, K.C., and *Dawson Miller* for the plaintiffs.

LORD ALVERSTONE, C.J.—Notwithstanding the most able argument of counsel for the defendants, I do not see my way to interfere with the judgment of Bargrave Deane, J. I think the cardinal principle to be borne in mind in these cases, that do raise difficult questions of law and very often difficult questions of fact, is that the pilot is in sole charge of the ship, and that all directions as to speed, course, stopping and reversing, and everything of that kind, are for the pilot; and I entirely agree, if I may say so, with great respect, with the opinions of the very learned judges, from Dr. Lushington downwards, to which attention has been called, as to the danger of a divided command, and the danger of interference with the conduct of the pilot; and that if anything

of that kind amounts to an interference or a divided command serious risk is run of the ship losing the benefit of the compulsory pilotage.

I do not wish to put it any stronger than it is put in the passages that have been cited by counsel for the defendants, and so I do not think he has in any way over-stated the importance of that principle. But side by side with that principle is the other principle that the pilot is entitled to the fullest assistance of a competent crew, of a competent look-out, and a well-found ship. I agree with counsel for the defendants that the cases in which the master has to interfere at all with the pilot are very rare and very few, but I think the passages he has cited from the cases show there is a distinction, or may be a distinction, between interference and bringing to the pilot's notice anything which the pilot ought to know. The pilot has a good many things to attend to, particularly in a place like the Thames, and certainly it is not putting the case too high to say that he is entitled to full information with regard to any surrounding fact which it is important that he should know. I do not quite take the view that the lights —the further light—of this vessel were reported. If there really was a green light visible, that green light was not reported, and very great difficulty would have arisen if there had been any green light in view. Of course, it is perfectly obvious that there never was a green light. In those circumstances I think the first thing we have to consider is: Was the captain informed by the pilot that he had seen a green light and was confident that the vessel was going down channel?

Looking at the judgment of Bargrave Deane, J., I am not at all satisfied that he believed that part of the story. He comments pointedly upon the absence from the statement before the Receiver of Wreck of any reference to a green light at all, or any reference to the pilot having seen a light which he thought was a green light. Speaking for myself, I must say I should have had much more doubt about the case if I had believed the story that the pilot had said he saw a green light, and there was such a state of things as was consistent, for any appreciable time, with the pilot having seen a green light. I should take the view, however, on this evidence, that the captain's story that the pilot told him he had seen a green light, and was confident it was a green light, was not true. I cannot conceive such a thing. I cannot but think that that part of the case was unproved before the captain gave his evidence in court.

Quite apart from that, one must for a moment look at what are the admitted facts of the case. The course which counsel for the defendants has marked upon the chart, and which is the course I had in my mind marked off, is substantially straight for the Black Deep lightship, afterwards starboarding a little. The idea of the pilot was to go fairly close to the Shingles Buoy before shaping a course up into the river Thames. She was a vessel going eleven knots. The tide, apparently, had not very much effect upon her. It does not make much difference because the admitted facts are that for a period of nine to ten minutes at least two white lights were seen forming a rough triangle on either side of the Black Deep light. Whatever variation there was in those lights, it is said never to have been enough to take the Black Deep light outside either of those two lights. She keeps on her course, it may have been for over a mile, and all the time she had the Black Deep light inside those two white lights. We are advised, and we have both come to the conclusion by our unassisted knowledge of the matter, that a very small portion of those nine minutes would be sufficient to satisfy any competent man that the idea that those two lights were on a moving vessel, bound in any direction, must be a mistake.

Under those circumstances the only thing that is put against that fact being called to the attention of the pilot is that there was some conversation as to the light which the pilot thought was a green light and the captain thought was not. Even if it took place it falls far short of the pilot saying, "I am confident it is a green light." Would it have been a breach of the principle laid down

in the various authorities to have said to the pilot, without strong language or with it: "You must be mistaken. Look, those lights have kept ahead of us for three or four minutes"? I think that is what SIR JAMES HANNEN recognised when he pointed out in *The Oakfield* (1) that notice—I will not use a word so high as "remonstrance," because it might be thought that remonstrance involved interference—that notice and suggestion are not that interference of which the danger has been pointed out by DR. LUSHINGTON. Though I do not know that I should have framed my judgment quite in the same way, in substance I entirely agree with the judgment of the learned judge. I do not know that I should have spoken of "responsibility towards the pilot," but in my opinion the pilot did not have all the assistance he was entitled to have from the competent man beside him; and any competent master would have appreciated that it was not a moving vessel, and ought to have called the attention of the pilot to the fact. If he had, he would not be in any way interfering with the pilot's command. This appeal, therefore, must be dismissed.

FLETCHER MOULTON, L.J.—I am of the same opinion, and for the same reasons. I do not think this case raises in any way the question of the duty of the master to interfere with the authority of the pilot, but I think that just as the pilot is entitled to the assistance of the master and crew of the ship in obtaining information as to the surrounding circumstances, so in the present case he was entitled to the assistance of the master in calling his attention to the fact that the inferences he was drawing from the surrounding circumstances were such as a competent mariner ought not to draw. It was impossible for the captain to see the Black Deep light between the two white lights of the steamer stationary for so long without realising, if he was a competent mariner, that the ship must itself be stationary; and inasmuch as the action of the pilot showed he was not drawing that conclusion, I think it was the duty of the master at all events to call his attention to it and put prominently before his mind the very questionable character of the course that he was pursuing.

Solicitors: *Pritchards & Sons*, for *Simpson, North, Harley & Co.*; *Thomas Cooper & Co.*

[*Reported by* L. F. C. DARBY, ESQ., *Barrister-at-Law.*]

SHEFFIELD CORPORATION *v.* BARCLAY AND OTHERS

[House of Lords (The Earl of Halsbury, L.C., Lord Davey and Lord Robertson), December 1, 2, 8, 1904, July 3, 1905]

[Reported [1905] A.C. 392; 74 L.J.K.B. 747; 93 L.T. 83; 69 J.P. 385; 54 W.R. 49; 21 T.L.R. 642; 49 Sol. Jo. 617; 3 L.G.R. 992; 10 Com. Cas. 287; 12 Mans. 248]

Company—Shares—Corporation—Stock—Transfer—Forged transfer—Issue of new certificate—Liability to third party—Indemnity to company by person putting forward forgery—Warranty that transfer genuine.

Where a person invested with a statutory or common law duty of a ministerial character is called on to exercise that duty on the request, direction, or demand of another, and without any default on his part acts in a manner which is apparently legal, but is in fact illegal and a breach of duty, and he thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. It makes no difference that the person making the request is not aware of the invalidity in his title to make the request.

In registering a transfer of shares and issuing a new certificate a corporation or company is acting in a ministerial capacity, and so, where the transferee of a forged transfer of stock, acting without knowledge of the fraud, and without negligence, presented the forged transfer to a corporation with a request to them to register it, and the corporation, also acting without negligence, accepted and registered the transfer, and in due course sent on the certificate to the transferee, and thereby incurred liability to the true owner of the stock whose name had been forged,

Held: the corporation were entitled to an indemnity from the transferee for the loss caused by acting on the forged transfer on his request, although he acted in good faith and without negligence.

Per Lord Davey: I dissent from the proposition that a person who brings a transfer to the registering authority and requests him to register it makes no representation that it is a genuine document. I am disposed to think that he not only affirms that it is genuine, but warrants that it is so.

Notes. Applied: *A.-G.* v. *Odell*, [1906] 2 Ch. 47. Considered: *Moel Tryvan Ship Co.* v. *Kruger & Co.*, [1907] 1 K.B. 809. Followed: *Bank of England* v. *Cutler*, [1908] 2 K.B. 208. Considered: *Bamfield* v. *Goole and Sheffield Transport Co.*, [1908–10] All E.R.Rep. 799; *Groves* v. *Webb* (1916), 85 L.J.K.B. 1533; *Great Northern Rail. Co.* v. *L.E.P. Transport and Depository, Ltd.*, [1922] All E.R. Rep. 18; *Dawson Line, Ltd.* v. *Aktiengesellschaft Adler Für Chemische Industrie of Berlin*, [1931] All E.R.Rep. 546; *Welch* v. *Bank of England*, [1955] 1 All E.R. 811. Referred to: *Rubin and Ladenburg* v. *Great Fingall Consolidated*, ante p. 460; *Re Auchmuty* (1908), 99 L.T. 462; *Kirby* v. *Chessum* (1913), 30 T.L.R. 15; *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1918–19] All E.R.Rep. 151; *Brandon* v. *Michelham* (1919), 35 T.L.R. 617; *Secretary of State for India in Council* v. *Bank of India, Ltd.*, [1938] 2 All E.R. 797; *Gowers* v. *Lloyds and National Provincial Foreign Bank, Ltd.*, [1938] 1 All E.R. 766.

As to forged transfers of shares, see 6 Halsbury's Laws (3rd Edn.) 261, and for cases see 9 Digest (Repl.) 404, 405. As to rights of indemnity, see 18 Halsbury's Laws (3rd Edn.) 529, 530; and for cases see 26 Digest (Repl.) 231 et seq.

Cases referred to:

(1) *Dugdale* v. *Lovering* (1875), L.R. 10 C.P. 196; 44 L.J.C.P. 197; 32 L.T. 155; 23 W.R. 391; 26 Digest (Repl.) 232, *1787*.

(2) *Collins* v. *Evans* (1844), 5 Q.B. 820; Dav. & Mer. 669; 13 L.J.Q.B. 180; 2 L.T.O.S. 425; 8 Jur. 345; 114 E.R. 1459, Ex. Ch.; 41 Digest 102, *526*.

(3) *Humphrys* v. *Pratt* (1831), 5 Bli.N.S. 154; 2 Dow. & Cl. 288; 5 E.R. 269, H.L.; 21 Digest 547, *1227*.

(4) *Betts* v. *Gibbins* (1834), 2 Ad. & El. 57; 4 Nev. & M.K.B. 64; 4 L.J.K.B. 1, 111 E.R. 22; 26 Digest (Repl.) 233, *1797*.

(5) *Toplis* v. *Grane* (1839), 5 Bing.N.C. 636; 2 Arn. 110; 7 Scott, 620; 9 L.J.C.P. 180; 132 E.R. 1245; 26 Digest (Repl.) 232, *1786*.

(6) *Simm* v. *Anglo-American Telegraph Co.*, *Anglo-American Telegraph Co.* v. *Spurling* (1879), 5 Q.B.D. 188; 49 L.J.Q.B. 392; 42 L.T. 37; 44 J.P. 280; 28 W.R. 290, C.A.; 9 Digest (Repl.) 297, *1874*.

(7) *Oliver* v. *Bank of England*, [1902] 1 Ch. 610; 71 L.J.Ch. 388; 86 L.T. 248; 50 W.R. 340; 18 T.L.R. 341; 7 Com. Cas. 89, C.A.; affirmed sub nom. *Starkey* v. *Bank of England*, [1903] A.C. 114; 72 L.J.Ch. 402; 88 L.T. 244; 51 W.R. 513; 19 T.L.R. 312; 8 Com. Cas. 142, H.L.; 26 Digest (Repl.) 238, *1822*.

(8) *Collen* v. *Wright* (1857), 8 E. & B. 647; 27 L.J.Q.B. 215; 30 L.T.O.S. 209; 4 Jur.N.S. 357; 6 W.R. 123; 120 E.R. 241, Ex. Ch.; 1 Digest (Repl.) 758, *2957*.

Also referred to in argument:

Fletcher v. *Harcot* (1622), Hut. 55; 123 E.R. 1097; sub nom. *Battersey's Case*, Win. 48; 26 Digest (Repl.) 233, *1796*.

Richardson v. *Williamson and Lawson* (1871), L.R. 6 Q.B. 276; 40 L.J.Q.B. 145; 35 J.P. 728; 1 Digest (Repl.) 764, *2995*.

Childers v. *Wooler* (1860), 2 E. & E. 287; 29 L.J.Q.B. 129; 2 L.T. 49; 6 Jur.N.S. 444; 8 W.R. 321, 121 E.R. 109; 35 Digest 58, *533*.

Firbank's Executors v. *Humphreys* (1886), 18 Q.B.D. 54; 56 L.J.Q.B. 57; 56 L.T. 36; 35 W.R. 92; 3 T.L.R. 49, C.A.; 9 Digest (Repl.) 531, *3497*.

Low v. *Bouverie*, [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533; 40 W.R. 50; 7 T.L.R. 582, C.A.; 35 Digest 33, *254*.

Balkis Consolidated Co. v. *Tomkinson*, [1893] A.C. 396; 63 L.J.Q.B. 134; 69 L.T. 598; 42 W.R. 204; 9 T.L.R. 597; 37 Sol. Jo. 729; 1 R. 178, H.L.; 9 Digest (Repl.) 297, *1873*.

Cherry v. *Colonial Bank of Australasia* (1869), L.R. 3 P.C. 24; 6 Moo.P.C.C.N.S. 235; 38 L.J.P.C. 49; 16 E.R. 714; sub nom. *Colonial Bank of Australasia* v. *Cherry and McDougall*, 17 W.R. 1029; 1 Digest (Repl.) 764, *2994*.

Birmingham and District Land Co. v. *London and North Western Rail. Co.* (1886), 34 Ch.D. 261; 56 L.J.Ch. 956; 55 L.T. 699; 35 W.R. 173; 3 T.L.R. 179, C.A.; 26 Digest (Repl.) 231, *1783*.

Dixon v. Kennaway & Co., [1900] 1 Ch. 833; 69 L.J.Ch. 501; 82 L.T. 527; 16 T.L.R. 329; 7 Mans. 446; 9 Digest (Repl.) 298, *1875*.

Re Ottos Kopje Diamond Mines, Ltd., [1893] 1 Ch. 618; 62 L.J.Ch. 166; 68 L.T. 138; 41 W.R. 258; 37 Sol. Jo. 115; 2 R. 257, C.A.; 9 Digest (Repl.) 396, *2544*.

Re Bahia and San Francisco Rail. Co. (1868), L.R. 3 Q.B. 584; 9 B. & S. 844; 37 L.J.Q.B. 176; 18 L.T. 467; 16 W.R. 862; 9 Digest (Repl.) 297, *1871*.

Hart v. *Frontino and Bolivia South American Gold Mining Co., Ltd.* (1870), L.R. 5 Exch. 111; 39 L.J.Ex. 93; 22 L.T. 30; 9 Digest (Repl.) 297, *1872*.

Appeal by the plaintiffs from a decision of the Court of Appeal (Vaughan Williams, Romer, and Stirling, L.JJ.), reported [1903] 2 K.B. 580, reversing a decision of Lord Alverstone, C.J., in favour of the plaintiffs, in a case tried before him without a jury, and reported [1903] 1 K.B. 1.

On Mar. 29, 1893, £8,200 Sheffield Corporation 3½ per cent. Redeemable Stock was transferred to the names of A. A. Timbrell and A. O. Honnywill as trustees of a certain estate. They were duly registered as the holders of the stock, and a certificate was issued in their names. On April 11, 1893, a transfer of the stock to E. E. Barclay, the defendant, purporting to be executed by Timbrell and Honnywill, was handed to the defendants, Barclay & Co., bankers, and accepted

by them as security for advances to certain stockbrokers, who were their customers. On April 15, 1893, Barclay & Co. sent the transfer to the corporation, requesting that it should be registered, and that the new certificate should be sent to them in due course. The letter containing this request did not inclose the certificate issued to Timbrell and Honnywill. The corporation, however, had this certificate in their possession, having received it on account of the vendors of the stock from their brokers. The usual notices were sent to Timbrell and Honnywill of the proposed transfer, but from neither did the corporation receive any reply. In due course the corporation registered E. E. Barclay as the holder of the stock, and issued the certificate to Barclay & Co. Before registering the name of Mr. Barclay the corporation compared the signatures upon the transfers with the genuine signatures of Timbrell and Honnywill which they had in their possession. On Apr. 28, 1893, Mr. Barclay executed a transfer for value of £8,000 of the stock to Messrs. Young and Macdonald, and on May 12, 1893, a further transfer for value of the remaining £200 of the stock to Mary F. Cockayne, and in due course the transferees were registered as the holders of the stock transferred to them. In December, 1897, Timbrell died, and it was subsequently alleged by Honnywill that what purported to be his signature to the deed of transfer of April 11, 1893, was a forgery. In April, 1900, an action was brought by Honnywill against the corporation claiming a rectification of the register and usual relief upon the ground that the deed of transfer was a forgery so far as it purported to be signed by him. The respondents in the present appeal agreed to be bound by the decision in that action on the issue only whether or not the signature of Honnywill to the deed of transfer was or was not a forgery. At the trial the jury found that the transfer was a forgery, and Honnywill recovered judgment against the corporation for the capital sum with a sum equal to the dividends which would have been payable on the stock, with interest. The corporation's motion for judgment, or, in the alternative, for a new trial, was dismissed by the Court of Appeal in July, 1901, and the corporation thereupon purchased £8,200 of stock for £8,645 10s., and registered the same in the name of A. O. Honnywill, and paid him a further sum in respect of dividends and interest amounting to £2,524 which, with the costs, made up £11,487 17s. 5d. In October, 1901, the corporation commenced the present action, claiming damages for breach of agreement, and by their statement of claim they asked that the defendants should indemnify them in respect of their liability to A. O. Honnywill of £11,487 17s. 5d. By their defence the defendants pleaded that the statement of claim disclosed no cause of action, that they were bona fide holders for value of the transfers, and had neither knowledge nor means of knowledge of the forgery. Lord Alverstone, C.J., held that the defendants were liable, and entered judgment for the full amount of the claim which after certain adjustments was as amended, £10,471. He found that there was no negligence on the part of the defendants or of any of the officials of the corporation. The Court of Appeal reversed that decision on the ground that there was no implied contract by the defendants to indemnify the company against loss.

Danckwerts, *K.C.*, *Eldon Bankes*, *K.C.*, and *Waddy* for the appellants.
Haldane, *K.C.*, and *Radcliffe*, *K.C.*, for the respondents.

Their Lordships took time for consideration.

July 3, 1905. The following opinions were read.

THE EARL OF HALSBURY, L.C.—In this case two persons, Timbrell and Honnywill, were joint owners of corporation stock, created under a local Act of Parliament. Timbrell, in fraud of Honnywill, forged a transfer of the stock, and borrowed money on the security of the stock which the transfer was supposed to have transferred. A bank which lent the money sent the transfer to the proper officer of the corporation, and demanded, as they were entitled to do if the transfer was a genuine one, that they should be registered as holders of the stock. The

corporation acted upon their demand; they transferred the stock into the names of the bank, and the bank in ordinary course transferred it to holders for value. The corporation also in ordinary course issued certificates, and the holders of these certificates were able to establish their title against the corporation, who were estopped from denying that those whom they had registered were the stockholders entitled. Honnywill, after the death of Timbrell, discovered the forgery that had been committed, and compelled the corporation to restore the stock, and the question in the cause is whether the corporation has any remedy against the bank who caused them to act upon a forged transfer, and so render themselves liable to the considerable loss which they have sustained.

Apart from any decision upon the question (it being taken for granted that all the parties were honest), I should have thought that the bank were clearly liable. They have a private bargain with a customer. Upon his assurance they take a document from him as a security for a loan, which they assume to be genuine. I do not suggest that there was any negligence—perhaps business could not go on if people were suspecting forgery in every transaction—but their position was obviously very different from that of the corporation. The corporation is simply ministerial in registering a valid transfer and issuing fresh certificates. They cannot refuse to register, and though for their own sake they will not and ought not to register or to issue certificates to a person who is not really the holder of the stock, yet they have no machinery, and they cannot inquire into the transaction out of which the transfer arises. The bank, on the other hand, is at liberty to lend their money or not. They can make any amount of inquiries if they like. If they find that an intending borrower has a co-trustee, they may ask him or the co-trustee himself whether the co-trustee is a party to the loan, and a simple question to this co-trustee would have prevented the fraud. They take the risk of the transaction and lend the money. The security given happens to be in a form that requires registration to make it available, and the bank "demand," as, if genuine transfers are brought, they are entitled to do, that the stock shall be registered in their name or that of their nominees, and they are also entitled to have fresh certificates issued to themselves or nominees. This was done, and the corporation by acting on this "demand" have incurred a considerable loss.

As I have said, I think that if it were res integra I should think that the bank were liable; but I do think that it is not res integra, but that it is covered by authority. In *Dugdale* v. *Lovering* (1), Mr. Cave, arguing for the plaintiff, put the proposition thus (L.R. 10 C.P. at p. 197):

> "It is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done."

This, though only the argument of counsel, was adopted and acted upon by the court, and I believe that it accurately expresses the law. Qualifications have been constantly introduced into the discussion which I think have led to some confusion; they are not really qualifications of the principle here enunciated at all, but the expression of principles which would render the application of the principle in question erroneous. One is that there is no right of contribution between tortfeasors, and the other is to distinguish the right insisted upon from the ordinary remedy in damages against a person who has caused injury by intentional falsehood. Neither of these questions has any relation to what is here in debate. The principle insisted upon by Mr. Cave in his argument quoted above has been undoubtedly sanctioned as part of the law by several old decisions, and I think that this principle as enunciated is well established. With respect to the case of the sheriff quoted in the Court of Appeal (*Collins* v. *Evans* (2)) I think that it has been overlooked that the sheriff was executing a genuine writ, and the information he received was given to him to aid him in the execution

of the office, which by law he was bound to execute, and the information (for it was no more) was given to him in good faith, but can anyone suppose that, if anyone brought a forged writ, and called upon the sheriff to execute it, such person would not be liable to indemnify the sheriff? I cannot think that there would be any doubt on that subject but the genuineness or otherwise of the document to which the corporation were called upon to give effect made the whole difference, and I think that both upon principle and authority the corporation are entitled to recover, and I move your Lordships accordingly.

LORD DAVEY.—The appellants are suing the respondents upon an implied contract to indemnify them against the liability which has been incurred by them in these circumstances. On April 11, 1893, the respondents, Barclay & Co., Ltd., forwarded to the appellants a transfer of Sheffield Corporation stock purporting to be executed by two persons named Timbrell and Honnywill, who were the registered holders of the stock, in favour of the respondent Barclay, with a request to the appellants to register the name of Barclay and forward new certificates in due course. The appellants acted upon this request, and granted a new certificate to the respondent Barclay, who afterwards transferred the stock for value to third parties. The names of Barclay's transferees were registered in due course, and it is admitted that they obtained a good title against the appellants. All parties believed that the signatures to the transfer from Timbrell and Honnywill were genuine, but in fact Honnywill's signature had been forged by Timbrell. It was not, however, until 1899, after Timbrell's death, that Honnywill discovered the fraud, and he thereupon brought an action against the present appellants for rectification of the register and other relief, and recovered judgment against the appellants, under which they have incurred a large liability. On these facts the Lord Chief Justice, who tried the action, has held that the appellants are entitled to be indemnified by the respondents against the liability which they have incurred, but his judgment has been reversed by the Court of Appeal.

Before referring to the numerous authorities which have been cited, I will first state the grounds upon which I have come to the conclusion that the Lord Chief Justice was right and that his judgment should be restored. Not much turns upon the particular provisions in the corporation's private Act of 1883 as to the transfer of their debenture stock or the keeping of the register or the issue of certificates of title. They for the most part follow the lines of the similar provisions in the Companies Clauses Act. I think that the appellants have a statutory duty to register all valid transfers, and on the demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But, of course, it is a breach of their duty and a wrong to the existing holders of stock for the appellants to remove their names and register the stock in the name of the supposed transferee if the latter has in fact no title to require the appellants to do so. And it makes no difference that the appellants were not aware of the invalidity of the transfer or could not with reasonable diligence have discovered it. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request.

I think that this is the broad principle to be deduced from such cases as *Humphrys* v. *Pratt* (3), *Betts* v. *Gibbins* (4), *Toplis* v. *Grane* (5), and the other cases which have been cited. In *Humphrys* v. *Pratt* (3) the reasons for the

judgment in this House are unfortunately not stated in the report, but in commenting on that case in *Collins* v. *Evans* (2) TINDAL, C.J., says (5 Q.B. at p. 829):

> "The declaration states that the judgment creditor pointed out the goods, and required the sheriff to take them. He made the sheriff his mandatory or agent for the purpose of taking the goods, and if the sheriff, acting innocently in obedience to that command, commits a trespass there is no doubt but he, as any other individual in that position, whether sheriff or not, may recover over against his master or principal the damages he has been obliged to pay in consequence of obeying such directions."

In *Toplis* v. *Grane* (5) the same judge, after referring to the evidence in the case, says (5 Bing.N.C. at p. 650):

> "We think this evidence brings the case before us within the principle laid down by the Court of Queen's Bench in *Betts* v. *Gibbins* (4), that where an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to third parties, yet, if such act is not apparently illegal in itself, but is done honestly and bona fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof."

In *Collins* v. *Evans* (2), on the other hand, the sheriff was entrusted with the execution of a writ of ca. sa. against one John Wright, the defendant pointed out to him a person of the same name as the person liable, and the sheriff acted on the representation and incurred liability. It was held that the defendant was not liable to indemnify the sheriff, because he had merely made an innocent representation to the sheriff, but had not required the sheriff to act upon such representation and had left him to his own discretion whether he would act upon it or not. It has been said that the principle of these decisions only applies to cases between principal and agent and employer and employee, and the language of TINDAL, C.J., in his comment on *Humphrys* v. *Pratt* (3), gives some colour to that suggestion. I am not, however, of that opinion, and the contrary was decided in *Dugdale* v. *Lovering* (1). It may be that the language of TINDAL, C.J., was not so felicitous as it usually was, but his meaning is plain that the liability to indemnify the sheriff arose from his having acted in supposed execution of his duty at the request and by the direction of the creditor.

In some cases it is a question of fact whether the circumstances are such as to raise the implication of a contract for indemnity, but in cases like the one now before your Lordships, when a person is requested to exercise a statutory duty for the benefit of the person making the request, I think that the contract ought to be implied. It matters not to the corporation whether A. or B. is the holder of stock, but to the purchaser who has paid his purchase money or the banker who has lent money on the security of the stock it is of vital interest. The Court of Appeal distinguished the sheriff's cases on the ground that the request was to execute his duty in a particular manner. In the cases in question that was so. But I think that the argument hæret in cortice, and is neither logical nor maintainable. It is difficult to imagine a case where a person should innocently request the sheriff to execute a writ which, though apparently regular, is in fact fictitious or invalid. If such a case be possible, it would come within the exact words of TINDAL, C.J., and I entertain no doubt that the person presenting the writ would be held liable to indemnify the sheriff. It does not seem to matter at what stage of the transaction the request to do an act which turns out to be outside the officer's duty is made. In the present case the appellants ran no real risk until they issued the new certificate on the demand of the respondents. The judgment of the learned judges in the Court of Appeal seems to be based mainly on three grounds—(i) the decision of LINDLEY, J., in *Anglo-American Telegraph Co.* v. *Spurling* (6); (ii) that there was no consideration for the alleged contract of indemnity; (iii) that the contract—if any—to be implied from the

A circumstances was a warranty of their title by the transferees and not a contract of indemnity.

The cases of *Simm* v. *Anglo-American Telegraph Co.* (6) and *Anglo-American Telegraph Co.* v. *Spurling* (6) were an action and cross-action which arose out of a forged transfer of some of the company's stock and were heard together. The first action was by the persons claiming under the forged transfer against the B company for damages for wrongful removal of their names from the register on discovery of the fraud, and the cross-action was by the company against the persons who had brought in the forged transfer for registration for an indemnity. LINDLEY, J., decided the first action in favour of the plaintiffs. He also decided the cross-action against the company. With regard to the transferor, he said (5 Q.B.D. at p. 194):

C "Supposing that he knows nothing wrong about it, are the company entitled to say to him, 'We assume from the fact that you bring this transfer to us that it is a genuine document'? I apprehend that they are not entitled to say so to him. They are only entitled to say to him, 'We assume that you come honestly to us and that you do not know that anything is amiss with regard to the transaction.' "

D

The learned judge then stated his views as to the duties of the company as follows (ibid. at p. 195):

"It appears to me that a duty is thrown on the company to look to their own register, which involves, of course, the looking after transfers of stock E or shares standing in the names of persons on the register, and that duty the company owe to those who come with transfers, and I do not see any corresponding or conflicting duty on the part of the person who brings the transfer, except, of course, that of bringing what he believes to be an honest document. I think that the true view is this, that, there being no negligence on the score of want of care on either side, but there being a duty on the part of the company to keep the register correct and themselves to look after the transfers F between innocent parties, the loss must fall on the company."

There was an appeal in both cases, and the decision in the first action was reversed, but counsel for the telegraph company did not proceed with the appeal in the cross-action, because if they succeeded in the first appeal the telegraph company had not suffered any damage. I am of opinion that *Anglo-American* G *Telegraph Co.* v. *Spurling* (6) was also wrongly decided by LINDLEY, J., and I respectfully dissent from both the propositions laid down by him and adopted by the Court of Appeal in the present case. I dissent from the proposition that a person who brings a transfer to the registering authority and requests him to register it makes no representation that it is a genuine document, and I am disposed to think (though it is not necessary to decide it in the present case) H that he not only affirms that it is genuine, but warrants that it is so. I think that this is the result of the decision in *Oliver* v. *Bank of England* (7), affirmed in this House sub nom. *Starkey* v. *Bank of England* (7). It may be argued with some force that for this purpose no solid distinction can be made between the power of attorney through which the transfer of consols is effected and the deed of transfer in the present case. Each of these instruments, it may be said, is put forward I as evidence of the authority with which the person making the application professes to be clothed to request the removal of the stockholder's name and the substitution of another name in his place. But however this may be, it is enough for the decision of this appeal to say that the deed of transfer was put forward as a genuine document, and the appellants were invited to act upon it as such.

I am also of the opinion that the authority keeping a stock register has no duty of keeping the register correct which they owe to those who come with transfers. Their only duty (if that be the proper expression) is one which they owe to the stockholders who are on the register. This point was decided by all the learned

judges who took part in the decision of *Simm* v. *Anglo-American Telegraph Co.* (6). I will content myself with quoting the language of COTTON, L.J. (5 Q.B.D. at p. 214):

> "The duty of the company is not to accept a forged transfer, and no duty to make inquiries exists towards the person bringing the transfer. It is merely an obligation upon the company to take care that they do not get into difficulties in consequence of their accepting a forged transfer, and it may be said to be an obligation towards the stockholder not to take the stock out of his name unless he has executed a transfer, but it is only a duty in this sense—that unless the company act upon a genuine transfer they may be liable to the real stockholder."

True it is that the appellants, following what is now the usual practice, gave notice of the transfer which had been brought in to the persons named as transferors, but they had no duty to do so, and it was done merely for their own protection. Experience in these cases shows, however, that it is a very poor protection.

STIRLING, L.J., held in this case that the mere performance of a duty imposed by law upon anyone holding a definite legal position does not constitute a consideration sufficient to support a promise to him by the person to whom the duty is owed. But, with great respect to that very careful judge, he overlooked that this very point was involved in the decision in *Oliver* v. *Bank of England* (7). VAUGHAN WILLIAMS, L.J., quoted and commented upon the passage from the judgment of WILLES, J., in *Collen* v. *Wright* (8) where he says (8 E. & B. at p. 658):

> "The fact of entering into the transaction with the professed agent as such is good consideration for the promise."

And it did not occur either to the learned counsel who argued the case with great pertinacity or to any of the learned judges in the Court of Appeal or the noble Lords in this House to question that the acting by the Bank of England on the demand of the supposed attorney was not a good consideration for the promise by him to warrant the genuineness of the power which they held to be established.

Lastly, it was said by ROMER, L.J., that this is not an action on a warranty, and that a warranty and a contract of indemnity are distinct, one important difference being the period from which the Statute of Limitations would run. That, of course, is so, and the appellants admit that if they were suing on the warranty their action would be out of time. But I can see no legal reason why, in circumstances like those of the present case, it should not be held, if necessary, that the true contract to be implied from those circumstances is not only a warranty of the title but also an agreement to keep the person in the position of the appellants indemnified against any loss resulting to them from the transaction. And I think that justice requires that we should so hold. I agree with the Lord Chief Justice that as between these two innocent parties the loss should be borne by the respondents, who caused the appellants to act upon an instrument which turned out to be invalid. I am, therefore, of opinion that the appeal should be allowed and the judgment of the Lord Chief Justice restored, with costs here and below.

LORD ROBERTSON concurred.

Appeal allowed.

Solicitors: *R. F. & C. L. Smith*, for *Henry Sayer*, Town Clerk of Sheffield; *Maples, Teesdale & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

DE LA BERE *v.* C. A. PEARSON, LTD.

[Court of Appeal (Sir Gorell Barnes, P., Vaughan Williams, L.J., and Bigham, J.), November 21, 22, 1907]

[Reported [1908] 1 K.B. 280; 77 L.J.K.B. 380; 98 L.T. 71; 24 T.L.R. 120]

Contract—Consideration—Newspaper—Offer to give financial advice—Right to publish questions and answers—Breach—Damages—Introduction of stockbroker—Misappropriation of reader's money—Liability of newspaper proprietor.

The defendants were the proprietors of a newspaper in which was published a statement that readers desiring financial advice should address their queries to the city editor. If the defendants so desired, the readers' questions and the answers thereto were to be published in the newspaper. On Mar. 6, 1905, the plaintiff, a reader of the newspaper, wrote to the city editor saying: "Kindly advise me how I can best invest £800 in two or three fairly safe securities," and, in a postscript, "Please also name good stockbroker." The city editor handed this letter to an "outside broker," who wrote to the plaintiff and advised certain investments. Before the plaintiff received any contract notes from the broker, he sent him a sum of £1,300 to invest, and subsequently a further sum of £100. The broker sent contract notes to the plaintiff, but he did not purchase any securities for him and misappropriated the £1,400. The broker was an undischarged bankrupt. The city editor did not know this, but it was found as a fact that he could have discovered it by making inquiries. In an action by the plaintiff to recover the £1,400 as damages for breach of contract to use due care to give financial advice,

Held: (i) the publication of the questions and answers in the newspaper might tend to increase its sale, and, therefore, when the plaintiff accepted the offer by the newspaper there came into being a contract for a good consideration; (ii) while the contract did not amount to a warranty of the character or conduct of the stockbroker with whom the plaintiff was put in touch, it did amount to a contract to take reasonable care to name a good stockbroker, and, on the evidence, there was a breach of that contract; (iii) the damage was not rendered too remote by reason of the crime committed by the broker when he misappropriated the money and, therefore the plaintiff was entitled to recover £1,400 damages.

Notes. Referred to: *H.M.S. London*, [1914] P. 72; *Weld-Blundell* v. *Stephens*, [1920] All E.R. Rep. 32.

As to consideration for a contract, see 8 Halsbury's Laws (3rd Edn.) 113–121 and for cases see 12 Digest (Repl.) 196 et seq.; as to damages for breach, see 11 Halsbury's Laws (3rd Edn.) 241–251, 274–277, and for cases see 17 Digest (Repl.) 91, 103, 106, 117, 128, 145. As to liability of newspapers, see 30 Halsbury's Laws (3rd Edn.) 551, 564, and for cases see 37 Digest 540, *551*.

Cases referred to in argument:

Carlill v. *Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256; 62 L.J.Q.B. 257; 67 L.T. 837; 57 J.P. 325; 41 W.R. 210; 9 T.L.R. 124; 4 R. 176, C.A.; 12 Digest (Repl.) 59, *323*.

Hall v. *Lees*, ante p. 126; [1904] 2 K.B. 602; 73 L.J.K.B. 819; 91 L.T. 20; 53 W.R. 17; 20 T.L.R. 678; 48 Sol. Jo. 638, C.A.; 36 Digest (Repl.) 167, *904*.

Evans v. *Liverpool Corpn.*, [1906] 1 K.B. 160; 74 L.J.K.B. 742; 60 J.P. 263; 21 T.L.R. 558; 3 L.G.R. 868; 36 Digest (Repl.) 168, *905*.

Baxendale v. *Bennett* (1878), 3 Q.B.D. 525; 47 L.J.Q.B. 624; 40 L.T. 23; 43 J.P. 204; 26 W.R. 899, C.A.; 36 Digest (Repl.) 36, *175*.

Appeal by the defendants from a decision of LORD ALVERSTONE, C.J., in an action tried by him without a jury.

McCall, K.C., and *R. W. Turner* for the defendants.
Spencer Bower, K.C., and *Boydell Houghton* for the plaintiffs.

VAUGHAN WILLIAMS, L.J.—On the whole, I think that the decision of the Lord Chief Justice must be supported in its entirety, although I have felt considerable doubt in the course of the argument. In the first place, I think that there was a contract between the plaintiff and the defendants. The defendants advertised offering to give advice with reference to investments. The plaintiff, accepting that offer, asked for advice and also asked for the name of "a good stockbroker." The questions and answers were, if the defendants chose, to be inserted in their paper as published. Such publication might obviously have a tendency to increase the sale of their paper. I think that this offer, when accepted, resulted in a contract for a good consideration. I also think that the word "stockbroker," as employed between the plaintiff and the defendants, meant a stockbroker who was a member of the Stock Exchange. I think that the contract did not amount to a warranty of the character or conduct of the broker named, but that it did amount to a contract to take reasonable care in the nomination of a broker, and I think that there was a clear breach of that contract. I think also that the damages were not nominal, and that the measure of damages would include all damage incurred by the plaintiff in the ordinary course of business with a stockbroker on the Stock Exchange. I do not think that the damages are limited by the £800. I think that the nomination requested was of a broker fitted for the performance of the duties of a broker in transactions by way of investments of a moderate type. On that point, however, I have had the most doubt.

The only remaining point is whether the intervention of the crime which caused the loss made the damage too remote. That, in my opinion, depends on whether the words "good stockbroker" imported not only skill as a stockbroker, but also trustworthiness and honesty; and, assuming that they did, did the defendants take reasonable care in the selection of the stockbroker? I will answer the latter question first. In my opinion, they did not; they consciously recommended an "outside" broker, and they had, in my view, accepted an invitation to recommend a "good stockbroker," a member of the Stock Exchange. I think that the recommendation of a good stockbroker included the recommendation of a trustworthy, honest man fit to be entrusted with investments of a small or moderate character. I think also that "good stockbroker" imports trustworthiness and honesty as well as skill as a broker. I do not mean that the defendants guaranteed the trustworthiness and honesty of the broker, but only that they would take reasonable care in the selection of a broker whom they reasonably believed to be trustworthy and honest. I am far from saying that an outside broker cannot be recommended as an honest and trustworthy broker, nor that primâ facie an outside broker is to be presumed to be a person not fit to be trusted. But I do say that, if a person recommends an outside broker, the scope of his inquiries ought to be of a wider area than if he recommends a member of the Stock Exchange, and for the reason that, when a person recommends a member of the Stock Exchange, he is not only recommending a man who is a member of a great association with good traditions, but also a man who is subject to the somewhat stringent disciplinary rules of the Stock Exchange. For that reason I think that inquiries should be wider in the case of an outside broker.

That being so, we have to see what the defendants knew and what they might have known if they had entered upon inquiries in the spirit which I have indicated. They knew the man recommended was an outside broker; they might have known that he was an undischarged bankrupt. They did not know that, but they would have found it out if they had made reasonable inquiries. I will

say this, that the defendants' agent, to whom they entrusted these duties, had only known this broker for about six months in the way of business, and there is no evidence that he carried his inquiries any further in order to ascertain the antecedents of the broker. Occasionally, of course, a man who has been thoroughly honest and of good repute for a number of years may be suddenly tempted to do dishonest acts; but in the case of a broker who is not a member of the Stock Exchange a reasonably careful man ought to have prosecuted his inquiries further than was done in this case, and in this case he would probably have found out matters which would have made him hesitate to recommend this broker. At any rate, I think that, if the plaintiff had been informed that this broker was an outside broker and an undischarged bankrupt, he would most probably not have entrusted his business to him. In these circumstances I think that the decisions with reference to the intervention of a crime do not apply. This appeal, therefore, fails, and must be dismissed.

SIR GORELL BARNES, P.—I agree. I desire to state how this case presents itself to me. On the facts proved there was a contract, for good consideration, to take reasonable care to name a good stockbroker. The consideration was that the plaintiff, as a reader of *M. A. P.*, was asked to put forward his inquiries, with regard to financial matters, to the city editor, and the defendants agreed, if he did so, to answer the questions which he might put. Those being the facts, I think that there was a contract, and there is only one other point before I come to consider whether there was a breach. Counsel for the defendants raised the point that the city editor had no authority to name a good stockbroker, and suggested that his duties were confined to giving financial advice with regard to securities. I think it clear, however, when the evidence is read, that it was the regular course of business for the city editor to inquire, as he did at first from regular stockbrokers on the Stock Exchange, for the purpose of enabling him to answer the inquiries which were put to him, and, as consideration for giving answers to these inquiries, the brokers got introductions which led to business. That was clearly proved to have been going on for a considerable time, and I think that it was within the scope of the city editor's authority to answer the inquiry with regard to the name of a good stockbroker. That being so, there was, in my opinion, a contract. The next question is whether there was a breach. VAUGHAN WILLIAMS, L.J., has dealt fully with that question, and I think it is quite clear upon the evidence, and having regard to the terms of the inquiry and the words used, that the nomination of this broker did not fulfil the terms of the inquiry—that is, the recommendation of a good stockbroker. Then comes the most difficult point in the case, the question of damages. It is, I think, important to remember that many points which have been made before us were not even suggested before the Lord Chief Justice. The substantial point made before him was that there was a crime which in the circumstances prevented the plaintiff recovering more than nominal damages. I do not think that that is so. VAUGHAN WILLIAMS, L.J., has dealt with that point, and I think that the actual damages can be recovered although there may have been conduct on the part of the broker which came within the criminal law.

Other points were raised. The first, as I understand it, is that the plaintiff sent his money too soon to this broker, and, therefore, that his own fault has been productive of the loss. I cannot agree with that view, because I can see nothing in what the plaintiff did which shows that he acted unreasonably in any way in trusting the person who was recommended by the defendants. I cannot see anything unreasonable in the plaintiff acting as he did in sending his money in advance with instructions how it was to be invested. As to part of the money, it was sent after the contract notes had actually been passed. Before the Lord Chief Justice the point taken as to this was, not that there had been carelessness before the contract notes were sent, but that there had been carelessness afterwards. The answer to that was that the money had

already been lost when the alleged carelessness occurred; but no point seems to have been made on behalf of the defendants that there was carelessness prior to that time. In my opinion, there is not sufficient to show that the plaintiff acted in such a way as to disentitle him to say that he properly trusted to the broker. The next point is that, at any rate, there cannot be a right to recover damages to the full amount of the £1,400 which the plaintiff lost. As to that, I do not regard the letter of Mar. 6 as an absolutely strictly limited inquiry with regard to £800. The plaintiff wrote: "Please also name a good stockbroker." That seems to me to mean with a view to the moderate kind of investment which was being inquired about, and that was the way in which I think it was treated by those who received the letter. It seems to me that the true inference is that the letter was handed over to the broker for the purpose of his dealing with such investments as the plaintiff was then dealing with, limited, no doubt, to some extent, but not absolutely restricted to £800. That being so, although I feel some doubt, about it, I take the same view as that expressed by VAUGHAN WILLIAMS, L.J., upon this part of the case. I agree, therefore, that the judgment of the Lord Chief Justice ought to be affirmed.

BIGHAM, J.—I have had very great doubt upon one question in this case, and that is as to the amount of the damages recoverable by the plaintiff. I agree that there was a contract in this case, and for the reasons which have been given by VAUGHAN WILLIAMS, L.J., and SIR GORELL BARNES, P. I think, however, that it is necessary to see exactly what the contract was so as to form an opinion as to what the breach of it was. I think that the contract must be found in the letter of Mar. 6 and the answer to it. The letter of Mar. 6 asked this question or made this requirement: "Advise me how I can best invest £800 in two or three fairly safe securities to pay not less than 5 per cent." It is true that in a postscript it went on to say: "Please also name a good stockbroker." I confess that I do not read that letter in the way contended for on behalf of the plaintiff, nor in the way in which I understand that the President would read it. I read it as a request for advice as to the investment of a sum of £800 and for the name of a good stockbroker to carry out the advice given, and that it is limited to an inquiry for the name of a man who may be responsible for transactions to the extent of £800. That question was answered on Mar. 20 in this way. The letter was handed by the city editor of the paper to an outside broker, who wrote in answer to the letter: "The editor of *M. A. P.* regrets that his reply to yours of the 6th has been crowded out of his paper and so requests us to write to you." Therefore, the request for advice was complied with, and the contract was complete. That letter of Mar. 20 completed the contract and also constituted the breach, for it was the recommendation of a broker who, in my opinion, did not come within the description of a "good stockbroker." This broker was not a stockbroker within the meaning of the request, nor could he be described as a good stockbroker, and, therefore, there was a breach of the contract.

What, then, is the consequence? Can it be said that the loss of the £1,400 was the consequence of that breach? Two or three facts have to be borne in mind in this connection. On Mar. 27 the plaintiff sent £1,300 to the broker, no contracts having at that time been sent to him. The broker had not at that time any right whatever to demand any such sum; he had not come under any kind of liability at the request of the plaintiff. That £1,300 was, as the Lord Chief Justice has found, instantly lost—that is to say, it was all lost before the broker was in a position to ask the plaintiff to pay a single penny. I think that it is at least doubtful whether entrusting the broker with money before any contracts had been made was an act which ought to be regarded as consequent upon the advice given. If it was not, then it seems difficult to say that the defendants are responsible for the loss. When I come to consider the next question—that is, whether the damages ought not to be limited to the

£800—I think that it is still more difficult. It appears to me that this was a request and an answer with reference to transactions which were apparently to be limited to dealings with a sum of £800. That being so, it does seem to me very difficult to say that the damages could in any circumstances exceed that sum. The doubts which occur to me are confined entirely to the question as to the measure of damages, but I am not prepared to differ from the judgments on that question which have been pronounced by the lord justice and the learned President. I agree, therefore, that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Harrison & Davies*; *Walter Webb & Co.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

Re BULAWAYO MARKET AND OFFICES CO., LTD.

[CHANCERY DIVISION (Warrington, J.), July 23, 1907]

[Reported [1907] 2 Ch. 458; 76 L.J.Ch. 673; 97 L.T. 752; 23 T.L.R. 714; 51 Sol. Jo. 703; 14 Mans. 312]

Company—Director—Sole director—Appointment of another company.

There is nothing in the Companies Acts to prohibit a company which is required to have only one director [i.e., a private company] from appointing another company as its sole director.

Company—Winding-up—"Just and equitable"—Amendment of article relating to directors.

A person who takes shares in a company does so subject to the possibility of the regulations of the company being altered by special resolution, and, if such a resolution is passed, he cannot obtain an order for the winding-up of the company on the ground that, in view of the alteration, that course would be "just and equitable" within s. 222 (f) of [now] the Companies Act, 1948.

Notes. By s. 176 of the Companies Act, 1948: "Every company registered on or after Nov. 1, 1929 (other than a private company) shall have at least two directors, and every company registered before that date (other than a private company), and every private company, shall have a director."

Referred to: *Morris* v. *Kanssen*, [1946] A.C. 459.

As to directors and winding-up on the ground that it is just and equitable, see 6 HALSBURY'S LAWS (3rd Edn.) 274 et seq., 532, 534, 535. For cases see 9 DIGEST (Repl.) 451 et seq., and 10 DIGEST (Repl.) 856, 857. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Case referred to in argument:

Re Amalgamated Syndicate, [1897] 2 Ch. 600; 66 L.J.Ch. 783; 77 L.T. 431; 46 W.R. 75; 42 Sol. Jo. 13, 4 Mans. 308; 10 Digest (Repl.) 856, *5642*.

Petition by a shareholder for the compulsory winding-up of the Bulawayo Market and Offices Co., Ltd., registered on July 23, 1897, with a capital of £135,000, divided into 135,000 shares of £1 each.

By art. 128 of the articles of association it was provided:

"The directors may from time to time and at any time appoint any persons to be managers of the company, either for a fixed time or without any limitations as to the period for which such managers are to hold office,

and generally on such terms and conditions as the directors may think expedient, and, subject to the terms of any contract with such managers, may from time to time and at any time remove or dismiss such managers from office and appoint others in their place, and the directors may from time to time fix the remuneration to be paid to such managers, and such remuneration may be by way of salary, or commission, or participation in profits, or by all or any of such modes, and the directors may from time to time intrust to and confer upon such managers for the time being such of the powers, authorities, and discretions exercisable under these presents by the directors (including, if they think fit, power to use the seal) as they think fit, and may confer such powers for such time and to be exercised for such objects and purposes and upon such terms and conditions and with such restrictions as they think expedient, and may confer such powers either collaterally with or to the exclusion of, or in substitution for, all or any of the powers of the directors in that behalf, and may from time to time revoke, withdraw, alter, or vary all or any of such powers, and the directors may empower such managers to sub-delegate all or any of the authorities, powers, and discretions for the time being delegated to them, and, if thought fit, any such appointment may be made in favour of any company or the directors or managers for the time being of any company or the members for the time being of any firm or otherwise in favour of any fluctuating body of persons whether nominated directly or indirectly by the directors."

At meetings of the company held on Jan. 28 and Feb. 25, 1907, special resolutions were duly passed and confirmed with regard (i) to the reduction of capital, and (ii) to the appointment of directors. The latter as far as material was as follows:

"That art. 128 of the articles of association of the company be struck out and the following substituted therefor: Management. 128. Until otherwise determined by the company in general meeting, there shall be no directors of the company, but the control of the company and the management of its business in Bulawayo and London shall be vested in a manager or managers, and such manager or managers may exercise all such powers of the company and do, on behalf of the company, all such acts as may be exercised and done by the company and as are not by statute or by these articles required to be exercised or done by the company in general meeting. Whenever, under these articles, the directors are required or authorised or are given a discretion to do or not to do any act, then, as the case may be, the managers shall or shall not do or shall be empowered to do such act. 128A. The first managers of the company shall be the Rhodesia Exploration and Development Co., Ltd., who shall (until directors have been appointed) hold office so long as they shall be able and willing to act. A subsequent manager or managers shall be appointed by the company in general meeting."

The petition was presented by a shareholder holding five fully paid-up shares of £1 each, which had been recently reduced to 5s. per share, asking for a compulsory winding-up of the company. He alleged that it was just and equitable that this should be done in view of the special resolution, as set out, having been passed by the company, this being contrary to the established law relating to the management of limited companies in several respects.

Hughes, K.C., and *H. Greenwood* for the petition.

Jenkins, K.C., and *J. W. M. Holmes*, for the company, and *W. D. Draper*, for the opposing creditors, were not called on to argue.

WARRINGTON, J., having stated the facts, continued:—The ground on which this petition is presented is that the resolution is ultra vires the company, and that to appoint a limited company as its sole manager or director—the exact phrase does not matter—is a thing which a company cannot do, and, further, that it is just and equitable that this company should be wound-up, because

A the minority of the shareholders have been deprived by a majority of what is said to be their privilege of having individuals and not a company to look to as liable to them as directors. There is really nothing whatever to support the first contention. There is nothing in the provisions contained in the Companies Act, 1862, to show that it was essential that there should be directors of a company at all [but see now s. 176 of the Companies Act, 1948, set out in note B ante p. 759], much less that it should not be managed by a single director who might be a limited company. There is nothing to show that there must be directors at all, or that they must be individuals. There is nothing material in the Act of 1862, save that s. 67 seems to contemplate that there might be cases in which there were no directors at all. In the subsequent Acts, it is no doubt assumed that, in accordance with the usual practice as it has been C developed since limited companies were known, directors would be individuals; but even in those Acts, though it may be difficult to fit in their provisions if the usual practice in this respect is departed from, there is nothing indicating an enactment to the contrary. There is nothing whatever, therefore, in the statutes under which this company was formed to render it ultra vires the company to have another company as sole manager.

D The second argument which has been adduced is that it is just and equitable that the existing company, which originally started with directors, should be wound-up if the majority required by s. 51 of the Act of 1862 seek to alter the regulations affording protection to the minority in having individual directors. But a person who takes shares in a limited liability company does so subject to the possibility of such a special resolution as is prescribed by the Act of 1862 E being passed to alter the regulations of the company; and the argument to which I am referring here, whatever its weight might be in other cases, has particularly little application to the case of the present company, having regard to art. 128 of the original articles, which enabled the directors, even without a resolution of the company, to put the whole management of the company in the hands of some manager "to the exclusion of, or in substitution for, all or any of the F powers of the directors in that behalf." The directors were enabled by the very constitution of the company to divest themselves of all powers and responsibilities in the management of the company, and to put it into the hands of some other person as manager. Neither of these grounds affords a reason for winding-up the company, and I dismiss the petition with costs.

G Solicitors: *Hyman Isaacs & Lewis*; *Ingle, Holmes, Sons & Pott*; *Pritchard & Sons.*

[*Reported by* H. M. CHARTERS MACPHERSON, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL AND ANOTHER *v.* DORCHESTER CORPORATION

[Court of Appeal (Sir Richard Henn Collins, M.R., Romer and Cozens-Hardy, L.JJ.), April 24, 25, 26, 1906]

[Reported 94 L.T. 682; 70 J.P. 281; 22 T.L.R. 480; 50 Sol Jo. 438; 4 L.G.R. 675]

Sewage—Disposal works—Nuisance—Liability of local authority.

Water—Pollution—Effluent from sewage works—Public nuisance—Right of Attorney-General to intervene.

A local order confirmed by statute provided: "It shall be the duty of the [defendant] corporation within six months . . . to proceed to carry out and execute works for the disposal of the sewage of the borough approved by the Local Government Board, and, in the event of the corporation not [so] proceeding, . . . the requirements of this article may be enforced in manner provided by s. 299 of the Public Health Act, 1875. . . .", which section empowered the Local Government Board to enforce performance of duty by defaulting local authorities by writ of mandamus. By s. 27 (1) of the Public Health Act, 1875, a local authority was empowered to construct works for the disposal of sewage, "provided that no nuisance be created in the exercise of any of the powers given by this section". The corporation constructed sewage works approved by the Local Government Board, but it was alleged that in so doing they had committed a nuisance owing to the smell they had caused. In an action for injunctions by the Attorney-General and a private person,

Held: on the true construction of the local order the approval of the Local Government Board was made necessary so that the works should be of a proper construction, but the works were still executed under s. 27 of the Act of 1875 and the approval of the Board did not exempt the corporation from the obligation not to create a nuisance imposed by the proviso to s. 27; accordingly, the plaintiffs were entitled to the injunctions claimed.

Held, further: the discharge of sewage into a natural stream in contravention of s. 17 of the Public Health Act, 1875 [see now Public Health Act, 1936, s. 30] was capable of constituting a public nuisance regarding which the Attorney-General, as representing the public, had a right to intervene, although no damage had been proved.

Notes. Of the Public Health Act, 1875, s. 17 has been replaced by s. 30 of the Public Health Act, 1936, and s. 229 was repealed by the Act of 1936, except so far as its provisions may be material for the purposes of any unrepealed enactment in the Public Health Act, 1875, or any Act directed to be construed therewith: see Sched. 3, Part 1, of Act of 1936. Provision for the disposal of sewage and the construction of sewage works are now to be found in ss. 14 to 29 of the Act of 1936, s. 31 of which replaces the proviso to s. 27 of the Act of 1875 which is repealed by the Act of 1936, Sched. 3, Part 1.

As to the enforcement of the duties of defaulting authorities and the provision of sewers and sewage works, see 31 Halsbury's Laws (3rd Edn.) 25–27, 195 et seq. For cases see 38 Digest (Repl.) 161–163, 41 Digest 19 et seq., 30 et seq. For Public Health Acts, 1875 and 1936 see 19 Halsbury's Statutes (2nd Edn.) 56, 302.

Cases referred to:

(1) *A.-G.* v. *Cockermouth Local Board* (1874), L.R. 18 Eq. 172; 30 L.T. 590; 38 J.P. 660; 22 W.R. 619; sub nom. *Workington Local Board* v. *Cockermouth Local Board, A.-G.* v. *Cockermouth Local Board*, 44 L.J.Ch. 118; 33 Digest 22, *98*.

(2) *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193; 50 L.J.Q.B. 353; 44 L.T. 653; 45 J.P. 664; 29 W.R. 617, H.L.; 38 Digest (Repl.) 36, *185*.

Also referred to in argument:

R. v. *Staines Union*, *R.* v. *Staines Local Board* (1893), 62 L.J.Q.B. 540; 69 L.T. 714; 58 J.P. 182; 9 T.L.R. 587; 37 Sol. Jo. 683; 10 R. 292, D.C.; 38 Digest (Repl.) 163, *41*.

R. v. *Lincoln Corpn.* (1876), 62 L.J.Q.B. 542, n.; 10 R. 294, n., D.C.; 41 Digest 23, *179*.

East Fremantle Corpn. v. *Annois*, [1902] A.C. 213; 71 L.J.P.C. 39; 85 L.T. 732; 67 J.P. 103; 18 T.L.R. 199, P.C.; 38 Digest (Repl.) 19, *84*.

London, Brighton and South Coast Rail. Co. v. *Truman* (1885), 11 App. Cas. 45, 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 34 W.R. 657, H.L.; 36 Digest (Repl.) 324, *690*.

Southwark and Vauxhall Water Co. v. *Wandsworth Board of Works*, [1898] 2 Ch. 603; 67 L.J.Ch. 657; 79 L.T. 132; 62 J.P. 756; 47 W.R. 107; 14 T.L.R. 576, C.A.; 26 Digest (Repl.) 554, *2240*.

Boulton v. *Crowther* (1824), 2 B. & C. 703; 2 L.J.O.S.K.B. 139; 107 E.R. 544; sub nom. *Bolton* v. *Crowther*, 4 Dow. & Ry. K.B. 195; 38 Digest (Repl.) 19, *83*.

Canadian Pacific Rail. Co. v. *Parke*, [1899] A.C. 535; 68 L.J.P.C. 89; 81 L.T. 127; 48 W.R. 118; 15 T.L.R. 427, P.C.; 38 Digest (Repl.) 11, *40*.

A.-G. v. *London and North Western Rail. Co.*, [1900] 1 Q.B. 78; 69 L.J.Q.B. 26; 81 L.T. 649; 63 J.P. 772; 16 T.L.R. 30, C.A.; 38 Digest (Repl.) 351, *361*.

A.-G. v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (1882), 21 Ch.D. 752; 51 L.J.Ch. 746; 46 L.T. 687; 30 W.R. 916; 36 Digest (Repl.) 255, *60*.

R. v. *Walker* (1875), L.R. 10 Q.B. 355; 44 L.J.M.C. 169; 33 L.T. 167; 40 J.P. 230; 13 Cox, C.C. 94; 14 Digest (Repl.) 230, *1923*.

Appeal by the defendants against the decision of KEKEWICH, J., in an action by the Attorney-General, at the relation of R. R. Talbot, and R. R. Talbot, against the corporation of Dorchester.

The Attorney-General claimed an injunction to restrain the corporation (i) from maintaining, working, and carrying on certain works for the treatment and disposal of the sewage of the borough of Dorchester, a town of 9,500 inhabitants, so as to cause a public nuisance by smell affecting the inhabitants of the borough; and (ii) from conveying or permitting to be conveyed untreated, or improperly treated, sewage from the works into a natural stream, the river Frome. The plaintiff R. R. Talbot, who was the owner and occupier of a house and grounds of about seven acres, called Syward Lodge, which he purchased in 1888, also claimed an injunction to restrain the corporation from maintaining and carrying on their works so as to cause a nuisance to him, and damages for injury suffered.

In 1883 the corporation obtained a provisional order (the Dorchester Order, 1883, duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 4) Act, 1883), enabling them as urban sanitary authority for the borough to purchase compulsorily under the Lands Clauses Acts certain lands for the purpose of receiving, storing, disinfecting, and distributing or otherwise disposing of the sewage of the borough. In 1884 the corporation acquired three acres of land for the purpose, but did not then proceed to execute any works pending inquiries as to the best method of disposing of the sewage of the borough. In 1899 the corporation purchased by agreement other seven acres adjoining the three acres already acquired. On Dec. 30, 1899, the Local Government Board authorised the corporation to borrow £17,000 for sewage works, and on Aug. 7, 1900, approved plans and sections for a drainage scheme and sewage works on what is known as the "international system." On Nov. 9, 1900, the Dorchester Order, 1900 (duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 9) Act, 1900), came into operation whereby the boundaries of the borough were extended, and by art. 21 thereof it was enacted as follows:

"It shall be the duty of the corporation, within six months after the commencement of this order, to proceed to carry out and execute works for the disposal of the sewage of the borough approved by the Local Government Board, and, in the event of the corporation not proceeding with such works within such period as aforesaid, or not proceeding with the same with due diligence, the requirements of this article may be enforced in manner provided by s. 299 of the Public Health Act, 1875, as if this article were an order of the Local Government Board, limiting that time for the performance by the corporation of their duty in that behalf, and the corporation had not performed the duty hereby imposed within the time limited in the order."

By s. 299 of the Public Health Act, 1875 [see note ante p. 762] :

"Where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers or in the maintenance of existing sewers, or in providing their district with a supply of water, . . . or that a local authority has made default in enforcing any provisions of this Act which it is their duty to enforce, the Local Government Board, if satisfied, after due inquiry, that the authority has been guilty of the alleged default, shall make an order limiting the time for the performance of their duty in the matter of such complaint. If such duty is not performed by the time limited in the order, such order may be enforced by writ of mandamus, or the Local Government Board may appoint some person to perform such duty, and shall by order direct that the expenses of performing the same . . . shall be paid by the authority in default. . . ."

In 1901 work was commenced, but was stopped to await further inquiries into drainage systems, which led to a resolution to adopt the bacterial or septic system of treatment of sewage instead of the "international," and, it appearing that more land and additional works would be required, on July 22, 1902, the corporation obtained an order (the Dorchester Order, 1902, duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 2) Act, 1902), empowering them to take compulsorily additional lands for the disposal of sewage. On Sept. 15, 1902, the Local Government Board sanctioned plans and sections for sewage works upon the bacterial system, and on Oct. 14, 1902, authorised the corporation to borrow an additional £7,500 for sewage work. In 1903 the corporation, under their order of 1902, acquired an additional area of nine acres adjoining the land already purchased. The corporation then proceeded to carry out their works, in the course of doing which they made several alterations, partly owing to remonstrances from persons who alleged that a nuisance was being created. It appeared that these further alterations were approved by the Local Government Board, but in some cases after the alterations had been made. The works were finally completed on Mar. 17, 1904, when the sewage of the borough was treated therein and then discharged by an outlet into the river Frome, a small non-navigable stream. Before the construction of these works the borough of Dorchester was drained by sewers which led the sewage, without any treatment or purification, into the river Frome about 100 yards above the new outlet. Under the Public Health Acts the corporation were obliged to take into their new system all sewage formerly sent into the old system, included in which was a certain amount of brewery waste. The total area of the lands purchased by the corporation for their sewage works amounted to about nineteen acres, of which the three acres purchased in 1884 lay within the boundary of the borough and the remainder without it. The lands lay to the east of the borough, being distant about one mile from the centre of it. Syward Lodge, the plaintiff Talbot's property, was situate about 150 yards west-south-west of the nearest part of the lands.

By their statement of claim the plaintiffs alleged that the corporation were the urban sanitary authority for Dorchester and the owners of works and lands for the treatment of the sewage of the borough, which works and lands were

A situate partly within and partly without the boundary of the borough; that they had duly applied for and obtained in 1902 the sanction of the Local Government Board for the construction of the works, and also for the acquisition of such of the land upon which the works were placed as was without the boundary of the borough, and had constructed the works and were treating the sewage of the borough upon the works and land; that they had constructed and were B maintaining the works and treating the sewage conveyed there and disposing of the effluent from the sewage after it had been so treated at the works so negligently and improperly that they had caused to issue from the works and lands offensive, poisonous, and unwholesome vapours so as to be a public nuisance to the inhabitants of Dorchester, and also a private nuisance to the plaintiff Talbot. In this respect the plaintiffs alleged that the works had been constructed C by virtue only of the powers given by s. 27 of the Public Health Act, 1875 [see note ante p. 762], which provided as follows:

> "For the purpose of receiving, storing, disinfecting, distributing, or otherwise disposing of sewage, any local authority may (i) construct any works within their district, or (subject to the provisions of this Act as to sewage works without the district of the local authority) without their district; and D (ii) contract for the use of, purchase, or take on lease any land, buildings, engines, materials, or apparatus either within or without their district; and (iii) contract to supply for any period not exceeding twenty-five years any person with sewage, and as to the execution and costs of works, either within or without their district, for the purposes of such supply. Provided that no nuisance be created in the exercise of any of the powers given by this section."

E

The plaintiffs contended, therefore, that the corporation were liable for the nuisance created, as such nuisance was plainly prohibited by the section. The plaintiffs further alleged that the corporation conveyed, and were conveying, sewage and filthy water from the outfall of their works into the natural stream or watercourse—the river Frome—in contravention of s. 17 of the Public Health F Act, 1875 [see note ante p. 762], which provided as follows:

> "Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal, pond, or lake, until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity G and quality of the water in such stream or watercourse, or in such canal, pond, or lake."

By their defence the corporation denied that they had constructed or were maintaining their works or disposing of the effluent therefrom negligently or improperly, or that they were causing either a public or a private nuisance, and H said that, if there were any nuisance, it was necessarily incidental to the construction and maintenance of such works, particularly during the early working, and was only temporary. They alleged that the sewage works complained of were the works for the disposal of the sewage of the borough, approved by the Local Government Board, which were prescribed by art. 21 of the Dorchester Order, 1900, and had been executed and were maintained by them under the I express directions of that order as confirmed by statute, and under the best engineering advice, and with all proper skill and caution. They further denied that they had committed a breach of s. 17 of the Public Health Act, 1875, in respect of the effluent from their sewage. They alleged that they were compelled under the Public Health Acts to take all the sewage previously sent into the old system, and that their present effluent was certainly an abatement of the nuisance caused by the old effluent. The action came on for trial before KEKEWICH, J., who decided (93 L.T. 290) that the corporation had created both a public and a private nuisance by their works, and that, as their local order was merely a

direction to them to exercise their powers under s. 27 of the Public Health Act, 1875, an injunction must be granted, and also, that the disposal of the effluent was a breach of s. 17 of the Public Health Act, 1875, for which an action was maintainable by the Attorney-General; but the breach having been remedied, no injunction was granted. From that decision the corporation appealed.

Danckwerts, *K. C.*, and *Stewart-Smith*, *K.C.* (with them *Sargant*), for the corporation.

Macmorran, *K.C.*, and *Longstaffe* (with them *P. Ogden Lawrence*, *K.C.*) for the plaintiffs.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal from a decision of KEKEWICH, J., in which he found in favour of the Attorney-General that a nuisance had been committed by the defendants, the local authority of Dorchester. The action was brought by the Attorney-General at the relation of Mr. Talbot, and the question was whether certain works for the disposal of sewage executed by the corporation of Dorchester were or were not a nuisance. That question had to be regarded from two different aspects. First, as to the works themselves as a whole; secondly, as to the fact that the effluent water from the corporation's system of disposal of sewage found its way into the river Frome. The learned judge in the court below has found with respect to what I may call the first part—that is to say, the works themselves apart from the nuisance caused by the flow into the river Frome—that they were a nuisance. With respect to the discharge of the effluent into the river Frome, he has found that at the date of the action there was a nuisance—that is to say, a violation of s. 17 of the Public Health Act, 1875—but that practically, by measures taken since the commencement of the action, that mischief had been abated to such a degree that he was not prepared to direct any inquiry as to damages upon that head. He satisfied himself with pronouncing a declaration to the effect that s. 17 had been violated, and must not be violated by the defendants.

I will deal with the first point, which is the principal point, and that is whether a nuisance is established by the disposal of the sewage carried out by the corporation, and, assuming that such nuisance does exist, whether the corporation are protected by Act of Parliament, as they contend, from any consequences by reason of such nuisance. The question whether a nuisance does exist or not is practically, I think, conceded. In fact, counsel for the corporation contended that it was a matter of practical impossibility to carry out these operations without creating a nuisance; and the learned judge has found as a fact that there was a nuisance, and a serious nuisance, existing at the date of the writ. Nothing has been urged before us to give any reason whatever for differing from his conclusion of fact upon that part of the case. Therefore, the case resolves itself into the question whether, admitting that a nuisance has been created by the corporation, they are by law protected from any consequences in the way of damages by reason of the fact that in creating the nuisance they were purporting to act under an Act of Parliament—in other words, whether by statute the corporation are empowered to create a nuisance, and, therefore, are relieved from any liability in consequence of having created it.

The point is really a very short one. The corporation do not appear to have been very diligent in the matter of finding, or seeking to find, some means of disposing of the sewage of the locality, for as far back as 1883, I think, they began to move in the matter. For many years the question had been in the inquiry stage as to the best means of disposing of the sewage. A very simple means had been adopted up to that time, because the sewage was all sent into the river Frome. Ultimately, even the corporation began to think that that was not altogether an entirely satisfactory mode of dealing with their sewage. But in the result nothing effective had been done by them up to the year 1900, at all events. They had, however, come to the point that they had arrived at the conclusion that some land outside the area of their borough would be required

for the satisfactory disposal of their sewage, and they had also arrived at the conclusion that they would require to raise money for the purpose. Having to raise money involved the interference of the Local Government Board, and the incidental examination of the scheme by which the corporation proposed to carry out their disposal of the sewage, and approval, or refusal to approve, on the part of the Local Government Board. An inquiry was held and approval given, and on Dec. 7, 1899, the Local Government Board made an order reciting that an inquiry was held by an inspector, and that they had received a report, and that, in pursuance of the powers given to them by statute, they allowed the construction by the corporation of the works mentioned in the notice set forth in the schedule to the order and in the plans referred to in such notice subject to certain modifications. Then comes the modification that the work shall be in accordance with the plan which has been sealed with the official seal of the Local Government Board.

After that order was made the corporation began to think that the particular plan that had been approved, and the method that had been inquired into, were not on the whole the most satisfactory, and they succeeded in getting the matter inquired into again with the view of substituting for the scheme, which was, I think, called the "international method" of dealing with sewage, a more modern method which has been called, I believe, the "bacteriological method." Therefore, they got a further inquiry, and the result of that inquiry was an approval of the plan, modified to a certain extent by substituting the bacteriological method for the other. The result was that an order was made by the Local Government Board on Sept. 15, 1902, which stated that, in pursuance of the powers given to them by the statutes in that behalf they allowed the construction by the corporation of the works mentioned and described in the notice in the form set forth in the schedule to the order and in the plans referred to. Then followed a description of the plan as it was then proposed by the corporation with a view to carrying out the sewage disposal according to the new method. In the course of these proceedings, while the attitude of the corporation was, as I have already remarked, one of inquiry—that is to say, an abstention from carrying anything out, but a disposition to inquire, and, if need be, to pursue the inquiries until something occurred to arrest their curiosity in the matter of the inquiry—it so happened that they became desirous of extending the boundaries of their district. In consequence they had to make, and did make, an application to have that carried out. The result was that the Local Government Board availed themselves of that opportunity, and they introduced into the order allowing the extension of the boundaries a provision that was afterwards embodied in the Provisional Orders Confirmation Act, 1900, and constitutes art. 21 of that Act. That article declared it to be the duty of the corporation to

> "proceed to carry out and execute works for the disposal of the sewage of the borough approved by the Local Government Board, and, in the event of the corporation not proceeding with such works within such period as aforesaid [six months] or not proceeding with the same with due diligence, the requirements of this article may be enforced in manner provided by s. 299 of the Public Health Act, 1875, as if this article were an order of the Local Government Board, limiting that time for the performance by the corporation of their duty in that behalf, and the corporation had not performed the duty hereby imposed within the time limited in the order."

That raises the question which is submitted for our decision in this case, but, in order to appreciate the significance of that provision, it is necessary to see how the law stood under the Public Health Act, 1875, alone. By a series of sections beginning with s. 15 in that Act the powers of the local authority in respect of sewage are dealt with, and s. 15 requires every local authority to keep in repair all sewers belonging to them, and to cause to be made such sewers as may be necessary for effectually draining their district for the purposes

of this Act. There follows s. 16, giving certain powers in the construction of sewers. Then comes s. 17, which is the section I have already referred to with regard to a local authority sending excrementitious matter into natural streams or watercourses, &c. Then there is s. 18 dealing again with the alteration and discontinuance of sewers. Section 19 deals with the cleansing of sewers, and we get on to s. 27, which is a very material one in this case, and deals with the disposal of sewage. The sections up to that have been dealing with the creating, cleansing, &c., of sewers. Now comes the question of disposal of sewage:

> "For the purpose of receiving, storing, disinfecting, distributing, or otherwise disposing of sewage, any local authority may—(1) construct any works within their district or (subject to the provisions of this Act as to sewage works without the district of the local authority) without their district, and (2) contract" etc.,

for the use of or purchase of land, and contract to supply sewage to any person, and as to the execution and cost of works.
Now comes a very material proviso:

> "Provided that no nuisance be created in the exercise of any of the powers given by this section."

Section 299 is another very important section in this connection. It is in these terms:

> "Where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers, or in the maintenance of existing sewers, or in providing their district with a supply of water, in cases where danger arises to the health of the inhabitants from the insufficiency or unwholesomeness of the existing supply of water, and a proper supply can be got at a reasonable cost, or that a local authority has made default in enforcing any provisions of this Act, which it is their duty to enforce, the Local Government Board, if satisfied, after due inquiry, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint. If such duty is not performed by the time limited in the order, it may be enforced by writ of mandamus, or the Local Government Board may appoint some person to perform the duty, and shall by order direct that the expenses of performing the same, together with a reasonable remuneration to the person appointed for superintending such performance, and amounting to a sum specified in the order, together with the costs of the proceedings, shall be paid by the authority in default, and any order made for the payment of such expenses and costs may be removed into the Court of Queen's Bench, and be enforced in the same manner as if the same were an order of such court."

That section has been treated as not dealing with or giving any remedy for or means of enforcing the provisions of s. 27 dealing with the disposal of sewage. It has been treated as merely giving a power to enforce in the way described the obligations imposed by the earlier sections from s. 15 onwards. Without considering whether that view is well founded or not, I treat that as being the accepted view of the effect of s. 299. Therefore, though the Local Government Board had means at its disposal for enforcing the performance of the duties imposed by s. 15 and onwards, and that machinery might be put in motion for the purpose of enforcing those obligations, yet there was no such machinery in the case of a failure by the local authority to find adequate means for the sewage disposal. The effect of this order made and expressed in art. 21 of the Provisional Orders Confirmation Act, 1900, was to enable, it seems to me, the provisions of s. 299, which related to failure to perform properly the duties imposed by the earlier sections from s. 15 onwards—the machinery for enforcing those duties imposed by those sections—to be applied in enforcing

A the duty to supply proper means of sewage disposal in this particular case. That, I think, is clear when one examines critically s. 299 and art. 21. What art. 21 does is this. First of all, it imposes an obligation upon the corporation within six months after the commencement of the order to carry out and execute works approved by the Local Government Board. Then, in the event of the corporation not proceeding with such works, or not proceeding with the same B with due diligence, this provision is enacted:

> "The requirements of this article may be enforced in manner provided by s. 299 of the Public Health Act, 1875, as if this article were an order of the Local Government Board, limiting the time for the performance by the corporation of their duty in that behalf, and the corporation had not performed the duty hereby imposed within the time limited in the order." C

So it simply treats the provisions of art. 21, when followed by non-performance, as being equivalent to the limiting of a time, which is the condition of s. 299 and the default following thereupon. The section runs thus:

> "The Local Government Board, if satisfied, after due inquiry, that the authority has been guilty of the alleged default, shall make an order limiting D a time for the performance of their duty in the matter of such complaint."

Those were the conditions which let in the right to apply for a mandamus under s. 299, and by the effect of this statute the benefit of those provisions is made applicable to something which was deemed to be outside them—namely, the failure to provide for the disposal of sewage. They lay down here that by E the effect of art. 21 the requirements of the article may be enforced as if the article were an order of the Local Government Board limiting the time for the performance by the corporation of their duty in that behalf, and the corporation had not performed their duty.

It seems to me that all that that does is to apply the machinery applicable to another set of sections to the default in the disposal of sewage. It does F not in any way impinge upon or modify the obligations for the disposal of sewage created by s. 27 which I have already read; and those provisions in express terms provide that no nuisance be created in the exercise of any of the powers given by this section. Therefore, the obligation not to create a nuisance, in my judgment, remains. It is contended by the corporation who are the appellants in this case—and this is the whole of their argument—that the effect of art. 21 G is to relieve the corporation of the obligation not to create a nuisance. The way that, according to their contention, it deals with that obligation is by incidentally repealing or inferentially repealing, by order under statutory sanction, the performance of works in accordance with the manner approved by the Local Government Board. They contend that the true effect of this section is a mandate from the legislature to do the works in a particular way approved by H the Local Government Board, and that incidentally and impliedly by that mandate they can claim for the mandatees an immunity from any liability if it should turn out that the works so approved by the Local Government Board are a nuisance. My first answer to that point is, that you cannot ignore the condition of the law at the time when this particular enactment was passed. Although there was in existence a positive enactment of the legislature debarring the persons I under the mandate from committing a nuisance, it behoves them, when they assert that they are justified in committing the same, to show very clearly that that particular inhibition was withdrawn, and that, if the statutory provision can be read so as to be contemporaneous with the existing enactment inhibiting the creation of a nuisance, we ought so to read it. When you come to criticise what has been done, it seems to me that this provision does not in any way limit or qualify the obligation of the local authority not to commit a nuisance. It is, in fact, only a convenient way of enabling the obligations of s. 27 to be enforced. I pointed out that, if there was a means of enforcing the obligation

by reason of the machinery of s. 299 applied to that particular class of default, the legislature, in order to supply the means for compelling the local authority to carry out an admitted duty, could have facilitated the method of enforcing it without in the smallest degree altering the obligation existing. Where is the release from that obligation that the corporation rely upon so much? They simply get it out of the words "approved by the Local Government Board." Article 21 provides that:

> "It shall be the duty of the corporation within six months after the commencement of this order to proceed to carry out and execute works for the disposal of the sewage of the borough approved by the Local Government Board."

It seems to me that that does not amount to anything more than this, that it is a condition precedent to their right to execute the works at all that they shall be approved by the Local Government Board. That is a necessary condition, but it does not confer any immunity. It does not substitute the Local Government Board for the local authority as the persons who take the responsibility of creating or refraining from creating a nuisance. It simply makes a condition precedent the approval of the Local Government Board. The works may be carried out, I should suppose, in a number of different ways, and it is quite possible that the Local Government Board might see no objection to a great many different ways of doing it. But where in that legislation do you get the immunity from an already imposed obligation that the corporation are not to commit a nuisance? It seems to me that it simply adds a condition in this particular case that, before they can proceed to put in operation this machinery for enforcing the duty, it must be shown that the works have been approved by the Local Government Board. Anything more than that, it seems to me, would get rid of a clear enactment that a nuisance is not to be created. In my judgment, therefore, this article merely provides machinery for enforcing the obligation which remains unqualified, and which is to be found in s. 27. On these grounds I think that this appeal fails.

With regard to the obligation under s. 17 of the Act of 1875, the learned judge in the court below has contented himself with making a declaration. The only point taken upon that is that this was not a matter of public interest and that, therefore, the Attorney-General had no power to invoke the jurisdiction of the court as upon a public mischief. It seems to me when you look at the words of the section and apply it to this particular case—namely, the disposal of excrementitious matter by a local authority or a corporation such as this by sending it into a flowing stream—you come directly within the wording of the section. And it would appear obvious that that is a matter which concerns not merely a private individual, but the public. I think that *A.-G.* v. *Cockermouth Local Board* (1), which was cited, is a clear authority to this effect. Here is a river receiving the effluent from a system of sewage disposal, and if that effluent does amount to a nuisance—the learned judge has found that it is a nuisance—then it seems to me that that is a matter in which the public are concerned, and that the Attorney-General, as representing the public, has a perfect right to intervene. On these grounds I think that the appeal fails on this point also, and the result is that the appeal must be dismissed.

ROMER, L.J.—I have come to the same conclusion. On the true construction of art. 21 of the Order of 1900, I think that that article was not intended to protect the corporation from liability in respect of its sewage disposal works in cases where those works, by their insufficiency or otherwise, should cause a nuisance.

To my mind, under the circumstances of this case, the object and effect of art. 21 were—having regard to the previous delay of the corporation in respect of its sewage disposal works—to compel it to proceed with those works within a reasonable and given time. I think that the approval of the Local Government Board of the works rendered necessary by art. 21 was for the purpose of ensuring that those works should be substantial and proper, and not for the purpose of

giving immunity to the corporation from the obligation cast upon it by s. 27 of the Public Health Act, 1875, if the corporation had not been guilty of delay, and had proceeded under the powers conferred upon it by the last-mentioned section. Under art. 21 of the Order of 1900 the corporation had cast upon it the obligation to carry out and execute proper works, subject only to the limitation that such works as they chose to adopt should be approved of by the Local Government Board. There were, I should assume, many works which might have been adopted by the corporation without creating a nuisance, and which might have been approved of by the Local Government Board. And if the corporation has chosen to adopt works which are such as to cause a nuisance, it cannot, in my opinion, escape liability because those works have been approved of by the Local Government Board. I cannot gather from art. 21 that the provision as to the approval of the Local Government Board was intended to cast upon that Board the obligation of seeing that the works should not be such as to create a nuisance, or to give that Board, or the corporation, with the approval of the Board, a statutory right to sanction or execute works which might create a nuisance without making the corporation liable for that nuisance. As LORD BLACKBURN said in *Metropolitan Asylum District* v. *Hill* (2) (6 App. Cas. at p. 208):

> "It is clear that the burthen lies on those who seek to establish that the legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears."

To my mind, the corporation in this case does not discharge that burthen by saying that art. 21 of the Order of 1900 was to have the effect contended for before us.

That disposes of the main part of the appeal. With regard to the second point as to the jurisdiction of the court to grant such relief as the court here has done at the instance of the Attorney-General in a case where no damage has been proved, I need only say that I agree with the decision of the learned judge in the court below, and with the remarks upon it that have been made by my Lord. Therefore, in my opinion, the appeal wholly fails.

COZENS-HARDY, L.J.—I am of the same opinion. I fully agree with what has been said by my Lord and ROMER, L.J., and, therefore, I only propose to add a few words.

It seems to me that the real effect of art. 21 of the Order of 1900 is simply this. It says to the corporation that they shall within six months proceed to exercise the powers which they possess under s. 27 of the Public Health Act, 1875, and they shall get the approval of the Local Government Board of the plans. But I cannot find anything which exempts the corporation from the conditions imposed by s. 27—conditions which they would have been liable to if they had done that which was certainly their moral duty, if not their legal duty, without reference to art. 21. The strength of the argument of counsel for the corporation rested upon the direction that the corporation were to execute works approved by the Local Government Board, and it was said that when once the Board had given their approval all private rights were taken away, and there is a complete immunity from either injunction or damages. But I think that when you look at the scheme of the Public Health Act, 1875, it is apparent that that is not the meaning or the effect of an Order made by the Board. Sections 27 to 34 of that Act deal with the disposal of sewage. The latter part of those sections provides for what is to happen when works contemplated have to be made partly outside or wholly outside the boundaries of the local authority, and the provision is made that there must then be a local inquiry if any objection is made. Section 34 provides as follows:

> "The Local Government Board may, on application of the local authority, appoint an inspector to make inquiry on the spot into the propriety of the

intended work, and into the objections thereto, and to report to the Local Government Board on the matters with respect to which such inquiry was directed, and on receiving the report of such inspector, the Local Government Board may make an order disallowing, or allowing with such modifications (if any) as they may deem necessary, the intended work."

What is the effect of that? Proceeding strictly under the Public Health Act, 1875, you find that the Local Government Board are empowered to inquire into the propriety of the work. Accordingly, they do inquire into the propriety of the work. They consider that the work is proper, and they allow it. But nevertheless it is work done under s. 27, and it is done subject to the limitation that no nuisance shall be created in the exercise of any of the powers given by the section.

So I think that it is impossible to say that it was any part of the scheme of the Act to enact that an approval of the plans or an approval of the works by the Local Government Board was anything more than helpful to the local authority in the sense that it might give a certain protection against the probability of damages. But it was not an enactment which gave them immunity from damages. Applying the words of that section to art. 21 of the Order of 1900, it seems to me to assist the conclusion at which we have arrived. On the whole, I can find nothing to exempt the corporation from the liability which is imposed upon them by the proviso to s. 27 that no nuisance shall be created. For these reasons I think that the view taken by the learned judge in the court below is perfectly right; and on the second part of the case I do not think that it is necessary for me to add anything.

Appeal dismissed.

Solicitors: *Chester, Broome & Griffithes*, for *A. G. Symonds*, Town Clerk, Dorchester; *H. S. Clutton & Johnson*, for *Lock Reed & Lock*, Dorchester.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

WEINER *v.* SMITH AND OTHERS. WEINER *v.* GILL AND OTHERS

[Court of Appeal (Lord Alverstone, C.J., Sir Gorell Barnes, P., and Farwell, L.J.), July 12, 13, 1906]

[Reported [1906] 2 K.B. 574; 75 L.J.K.B. 916; 95 L.T. 438; 22 T.L.R. 699; 50 Sol. Jo. 632; 11 Com. Cas. 240]

Sale of Goods—Sale on approval—Sale or return—Time for passing of property in goods—"Until settled for or charged"—Goods obtained by third person by fraud—Receipt of goods "in good faith"—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 18, *r.* 4, *s.* 25 (2).

The plaintiff handed goods to H. upon the terms of a document which stated: "On approbation. On sale for cash only or return. . . . Goods had on approbation or on sale or return remain the property of [the plaintiff] until such goods are settled for or charged." H. delivered the goods to L., who falsely represented that he had a customer for the goods, but intended to misappropriate them at the time when he received them. L. immediately pledged the goods with the defendants, who advanced money on them in good faith.

Held: the provision in the document that the goods remained the property of the plaintiff "until settled for or charged" meant that the property was not to pass until H. either paid for the goods in cash or the plaintiff agreed to give him credit; there appeared from that provision a "different intention" within s. 18 of the Sale of Goods Act, 1893, and, therefore, H. could not exercise either of the options provided in r. 4 (a) or (b) of s. 18 and that section did not apply; accordingly, the property in the goods never passed to H. who was unable to transfer a title to the goods to L., and the plaintiff was entitled to recover them from the defendants.

Per Lord Alverstone, C.J.: L. having obtained the goods by fraud, it could not be said that he had received them "in good faith" within s. 25 (2) of the Act of 1893, and, therefore, the defendants could not get a good title through him.

Kirkham v. *Attenborough* (1), [1897] 1 Q.B. 201, distinguished.

Notes. Followed: *Percy Edwards, Ltd.* v. *Vaughan* (1910), 26 T.L.R. 545. Considered: *Truman* v. *Attenborough* (1910), 103 L.T. 218. Distinguished: *Weiner* v. *Harris*, [1908–10] All E.R.Rep. 405; *Whitehorn Bros.* v. *Davison*, [1911] 1 K.B. 463. Followed: *Kempler* v. *Bravingtons* (1925), 133 L.T. 680. Referred to: *Janesich* v. *Attenborough* (1910), 102 L.T. 605.

As to goods delivered on approval or on sale or return, see, 34 Halsbury's Laws (3rd Edn.) 71–73; and for cases see 39 Digest 507. For Sale of Goods Act, 1893, see 22 Halsbury's Statutes (2nd Edn.) 985.

Cases referred to:

(1) *Kirkham* v. *Attenborough*, *Kirkham* v. *Gill*, [1897] 1 Q.B. 201; 66 L.J.Q.B. 149; 75 L.T. 543; 45 W.R. 213; 13 T.L.R. 131; 41 Sol. Jo. 141, C.A.; 39 Digest 508, *1252*.

(2) *Bryce* v. *Ehrmann* (1904), 7 F. (Ct. of Sess.) 5; 42 Sc.L.R. 23.

(3) *Moss* v. *Sweet* (1851), 16 Q.B. 493; 20 L.J.Q.B. 167; 16 L.T.O.S. 341; 15 Jur. 536; 117 E.R. 968; 39 Digest 511, *1276*.

(4) *Rimmer* v. *Webster*, [1902] 2 Ch. 163, 71 L.J.Ch. 561; 86 L.T. 491; 50 W.R. 517; 18 T.L.R. 548; 1 Digest (Repl.) 431, *871*.

(5) *Farquharson Bros. & Co.* v. *King & Co.*, [1902] A.C. 325; 71 L.J.K.B. 667; 86 L.T. 810; 51 W.R. 94; 18 T.L.R. 665; 46 Sol. Jo. 584, H.L.; 1 Digest (Repl.) 432, *876*.

Appeal by the defendants from a decision of BRAY, J., at the trial of two consolidated actions without a jury.

The plaintiff, who brought these actions claiming the delivery up to him of articles of jewellery which had been pawned with the defendants by one Longman, was a manufacturing jeweller and diamond merchant. In August and September, 1904, he handed the articles of jewellery in question to one Huhn, upon the terms contained in a document which was as follows:

> "On approbation. On sale for cash only or return. From Samuel Weiner, diamond mounter and manufacturing jeweller. Goods had on approbation or on sale or return remain the property of Samuel Weiner until such goods are settled for or charged. The consignees are responsible for these goods until they are returned to my possession."

This document specified the prices at which Weiner was willing to sell the articles of jewellery. Within a short time of receiving the goods from Weiner, Huhn handed them to one Longman who had represented to Huhn that, in the case of each article of jewellery, he had a customer who wanted to buy the article, and each article was delivered to him by Huhn in order that he might offer it to the customer. Longman was to pay immediate cash or return the article in a day or two. Longman, in fact, had no customer for any of the articles, and immediately on receiving them from Huhn he pledged them with the two defendant firms, who advanced money on them in good faith. The learned judge at the trial found as a fact that Longman intended to misappropriate the goods at the time when he obtained them from Huhn. Huhn subsequently prosecuted Longman for larceny, but he was acquitted. The actions were tried before BRAY, J., without a jury as a Commercial Cause. The learned judge gave judgment in favour of the plaintiff: [1905] 2 K.B. 172; and the defendants appealed.

By the Sale of Goods Act, 1893:

> "Section 17 (1). Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. Section 18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. . . . Rule 4.—When goods are delivered to the buyer on approval, or 'on sale or return,' or other similar terms, the property therein passes to the buyer—(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction: (b) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact. . . . Section 25 (2). Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

Hamilton, K.C., and *C. L. Attenborough* for the defendants: The judgment of the learned judge was wrong, and judgment ought to be given in favour of the defendants. As soon as Huhn handed over the goods to Longman he could no longer return them to the plaintiff, and he thereby did an act adopting the trans-

A action which caused the property in the goods to pass to him in accordance with the provisions of s. 18, r. 4, of the Sale of Goods Act, 1893. This case, therefore, is entirely governed by the decision of the Court of Appeal in *Kirkham* v. *Attenborough* (1). Further, the goods could not be, and in fact were not, returned to the plaintiff within a reasonable time, and, therefore, the property in the goods passed to Huhn after the expiration of a reasonable time under r. 4 (b) of s. 18. B The form of the document in this case has not the effect of preventing the property in the goods passing in accordance with the provisions of s. 18: *Bryce* v. *Ehrmann* (2). Further, the pledging of the goods by Longman to the defendants was a transaction within s. 25 (2), of the Sale of Goods Act, 1893, being a pledge by a purchaser in possession of goods with the consent of the seller.

J. F. P. Rawlinson, K.C., and *H. Dobb* for the plaintiff: The decision of C BRAY, J., was correct and ought to be affirmed. The provisions of r. 4 of s. 18 of the Sale of Goods Act, 1893, do not apply at all, because "a different intention appears" from the contract itself. The goods could become the property of Huhn as purchaser "for cash only," and it is expressly provided that the property in the goods is not to pass until they have been paid for or the plaintiff has agreed to give credit. *Kirkham* v. *Attenborough* (1) which was the case of an ordinary D contract of sale or return where no "different intention" appeared, has, therefore, no application to the present case. Accordingly, the property in these goods never passed to Huhn, and the defendants have no title to them. Section 25 (2) of the Sale of Goods Act cannot apply, because Longman did not receive the goods from Huhn in good faith, but obtained them fraudulently.

E *Cur. adv. vult.*

July 13, 1906. The following judgments were read.

LORD ALVERSTONE, C.J.—In this case I am of opinion that the judgment of BRAY, J., was right and must be affirmed. The question arises under a curious contract contained in a document between the plaintiff and one Huhn, F to whom the goods in question were entrusted upon the terms of that document. I desire to express no opinion upon the point as to estoppel. That point has not been argued before us, and it is not desirable to express any opinion as to what the rights of the parties would have been if a case of estoppel could be made out. That question is not now open to us.

I will now deal with the point made on behalf of the defendants which is based G upon s. 25 of the Sale of Goods Act, 1893. I think that the short answer to that point is that the defendants could not get a good title through Longman, who obtained the goods by fraud and was a fraudulent person, and it is, therefore, impossible to say that Longman received the goods "in good faith." Whether Longman was or was not guilty of larceny is not necessary for us to decide.

Then comes the point upon which BRAY, J., decided in favour of the plaintiff— H that is, that the property in the goods never passed from Weiner to Huhn so as to give the latter a right to sell or dispose of the goods and give a good title to them to any other person. If this were an ordinary case of the delivery of goods "on sale or return," *Kirkham* v. *Attenborough* (1) would be a conclusive authority in favour of the defendants. In that case, which is binding upon us, it was held by the Court of Appeal that, where a person who has received goods "on sale or I return" pledges them, he has done something inconsistent with their return, and thereby adopts the transaction and becomes the purchaser so that the property in the goods passes to him. Therefore, as I have said, if this were an ordinary contract for the delivery of goods "on sale or return," *Kirkham* v. *Attenborough* (1) is a distinct authority in favour of the defendants. Under such a contract the person to whom the goods are delivered has the privilege of getting the goods on credit for a time, with the right to purchase them or to return them; but, if he does any act which is inconsistent with their return, he becomes a purchaser, or, if he retains the goods for an unreasonable time without giving notice of rejection,

the property passes to him. The learned judge decided that the contract in the present case did not bring the case within the decision of *Kirkham* v. *Attenborough* (1). I may say here that I think that the Scottish case of *Bryce* v. *Ehrmann* (2) does not help us much, although there are in that case some expressions of opinion as to this kind of contract. The case on behalf of the defendants has been put shortly in this way. Huhn had power to try to find a purchaser for these goods, but not to deliver them to any other person for any other purpose; therefore, when he gave the goods to Longman, he did an act which was equivalent to the act which was held in *Kirkham* v. *Attenborough* (1) to pass the property in the goods, and, therefore, he exercised such rights under the contract that the property in the goods passed to him.

The question, therefore, depends upon whether the learned judge took the right view of the contract contained in the document in this case. Section 18 of the Sale of Goods Act, 1893, provides:

> "Unless a different intention appears, the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. . . . Rule 4.—When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property passes to the buyer—(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction. . . ."

Does the intention to pass the property in goods at a different time sufficiently appear from the document in the present case? The document commences thus: "On approbation. On sale for cash only or return." If the document had stopped there, I think that some difficulty might have arisen. It might be said that the purchaser was given credit until approval, or the doing of some act adopting the transaction as in *Kirkham* v. *Attenborough* (1). It seems to me to be an essential part of this bargain that credit should be given to the purchaser up to the time when the purchaser approves or does some such act; and I cannot see why the seller could not say to the purchaser that if he approves, or if he adopts the transaction, in that case he must pay cash at once. This document, however, goes further, and says that:

> "Goods had on approbation or on sale or return remain the property of Samuel Weiner until such goods are settled for or charged."

I think that, if there is no legal objection to those terms, there is a specific statement that the property is not to pass until Huhn says that he approves of the goods, and either offers cash for them or asks Weiner to debit him with the price and Weiner consents to do so.

The result is, therefore, that by the terms of the contract the property does not pass until one of those events has happened—that is, until the goods have been paid for or credit given to the buyer. I think, therefore, that an intention is indicated that the property is not to pass until some other event than those specified in s. 18 has happened. The terms contained in the contract were not complied with, and the property in the goods did not pass. That being so, it is obvious that the decision in *Kirkham* v. *Attenborough* (1) does not apply. The remaining words of the document—"The consignees are responsible for these goods until they are returned to my possession"—do not, in my opinion, in any way affect the question. I base my judgment upon the ground that the learned judge took the true view that the property in the goods did not pass until one of the events specified in the contract happened. This appeal, therefore, fails, and must be dismissed.

SIR GORELL BARNES, P.—I agree that this appeal must be dismissed. We are not concerned in this case with the question of estoppel. That question was not raised in the argument for the defendants, no doubt for the reasons which appear in the judgment of BRAY, J. Nor is it necessary for us to consider the Scottish case of *Bryce* v. *Ehrmann* (2), which has been cited, because that case

was decided upon a contract in a different form, and under rules of law which are different from those which prevail in this country.

The sole question, therefore, in this case is whether the property in these goods passed from Weiner to Huhn. As a general rule, a person in possession of goods cannot give a better title to them than he himself possesses. To that rule there are exceptions—e.g., under the Factors Act, and s. 25 of the Sale of Goods Act, 1893. It has been suggested that this case comes within s. 25 of the Sale of Goods Act, but I think that that contention cannot be successfully maintained. In considering the question which we have to determine—namely, whether the property in these goods passed to Huhn—regard must be had to the provisions of ss. 17 and 18 of the Sale of Goods Act, 1893. Section 17 provides that:

> "(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

Section 18 provides:

> "Unless a contrary intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. . . . Rule 4.—When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein passes to the buyer:—(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction."

If this were a case of the delivery of goods upon the terms of an ordinary contract of sale or return, it would clearly come within the decision in *Kirkham* v. *Attenborough* (1), because the property would have passed according to (a) or (b) of r. 4. As was said by WIGHTMAN, J., in *Moss* v. *Sweet* (3) (16 Q.B. at p. 495):

> "The meaning of this contract was that the goods were to be taken as sold, unless returned within a reasonable time."

The option would be with the purchaser, and, if he exercised the option, he would simply become a debtor to the seller for the price.

In the present case the contract is of a different kind. It is headed: "On approbation. On sale for cash only or return"; and provides that: "Goods had on approbation remain the property of Samuel Weiner until such goods are settled for or charged." In other words, "a different intention appears," and the rules of s. 18 do not apply. It appears to me to be clear that the intention of the parties was that no property in the goods was to vest in Huhn until he paid for the goods or until the seller chose to give him credit and charge him with the price. Therefore, by no means could the purchaser exercise such an option as is provided for in (a) or (b) of r. 4 of s. 18 and thereby cause the property in the goods to pass to himself, because he could only obtain the property in the goods by doing that which was specified in the contract—that is, by paying cash or getting the seller to consent to debit his account with the price. In my opinion, therefore, the property in the goods did not pass to Huhn. For these reasons I agree that the appeal must be dismissed.

FARWELL, L.J.—I agree. I will treat this case simply as a common law case as to the passing of the property in the goods as between the parties to this contract. I desire to reserve my opinion as to what would be the result if the rights of any third person, a purchaser for value without notice, claiming under the doctrine of estoppel had arisen. Section 18 of the Sale of Goods Act, 1893, provides that "unless a different intention appears," one of the rules (r. 4) for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer is "when goods are delivered to the buyer on approval or 'on sale or return' . . . the property therein passes to the buyer" on the

happening of certain events. I cannot see how that provision can have effect given to it in a case like the present where the goods have been delivered, not "on approval or 'on sale or return,'" but upon the terms "on sale for cash only or return," and that the goods are to remain the property of the person delivering them until such goods are settled for or charged. I see no reason why two parties, as between themselves, and with regard to any third person who cannot rely upon the doctrine of estoppel, should not agree that the contract should have that effect. If the doctrine of estoppel were applicable, I should have had very great difficulty in seeing the answer to the very able argument of counsel for the defendants on the ground that this would be a mere trap by which the original owner of the goods might defraud innocent purchasers by sending a man out with goods for the purpose of selling and delivering them to a purchaser, who could not get any title at all. I think that, when it comes to be considered, the doctrine of estoppel may be found to cure that mischief. If I did not think that were so, I should be more inclined to construe this contract in the same way as the Scottish court appears to have done in *Bryce* v *Ehrmann* (2). I do not desire now to do more than refer to the judgment which I gave in *Rimmer* v. *Webster* (4) where I stated the considerations which I considered applicable to an estoppel of this kind; and I would also point out that in the case in the House of Lords, *Farquharson Bros. & Co.* v. *King & Co.* (5), the real question, according to Lord Lindley, which ought to have been left to the jury was, "Did the plaintiffs so act as to hold Capon out to the defendants as their agents to sell goods to the defendants?" That might very well be applied to a case where, although not in express terms, a person is clothed with the indicia of title for the purpose of selling goods, and one is driven to say that the property did not pass, but that the person was an agent. In that way I think that injustice might be avoided. I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Attenborough & Sons*; *J. A. White.*

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

A

VILLAR *v.* GILBEY

[House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Robertson and Lord Atkinson), March 5, 6, 7, 19, 1907]

B [Reported [1907] A.C. 139; 76 L.J.Ch. 339; 96 L.T. 511; 23 T.L.R. 392; 51 Sol. Jo. 341]

Will—Child "born in my lifetime"—Child en ventre sa mère at testator's death.

The rule of construction by which a child en ventre sa mère is considered to be "born" or "living" only applies when that construction is necessary for the benefit of the unborn child, to enable it to take a benefit which, if C born, it would be entitled to.

A testator by his will, after devising real estate to his brother for life, with remainder to the brother's two sons successively in tail with remainder, in default of such issue devised the hereditaments to the third, fourth, and every other son of his said brother successively, and the heirs of the body of such son and sons, and he further declared that any third or other son or sons of his D brother born in his (the testator's) lifetime should not take a larger estate than for life only. The testator died on Sept. 18, 1854, and a third son of the testator's brother was born on Oct. 9 following. The first and second sons died without issue.

Held: the effect of applying the above rule of construction to the present case would be to reduce the interest of the third son from an estate tail to a E life estate and so would not be for his benefit; therefore, the rule had no application, and the words in the will "born in my lifetime" must be construed in their natural and ordinary meaning.

Notes. Considered: *Re Salaman, De Pass* v. *Sonnenthal*, [1908] 1 Ch. 4. Applied: *Athey* v. *Pickerings* (1926), 96 L.J.K.B. 250. Followed: *Elliot* v. *Joicey*, [1935] All E.R. Rep. 578; *Re Heath, Stacey* v. *Bird*, [1945] Ch. 417. F Considered: *Re Stern's Will Trusts*, [1961] 3 All E.R. 1129. Referred to: *Williams* v. *Ocean Coal Co.*, [1907] 2 K.B. 422; *Scholfield* v. *Orrell Colliery Co.*, [1909] 1 K.B. 178.

As to special rules of construction of wills, see 34 Halsbury's Laws (3rd Edn.) 204 et seq., and cases there cited.

G Cases referred to:

(1) *Trower* v. *Butts* (1823), 1 Sim. & St. 181; 1 L.J.O.S.Ch. 115; 57 E.R. 72; 44 Digest 835, *6877*.

(2) *Blasson* v. *Blasson* (1864), 2 De G. J. & Sm. 665; 5 New Rep. 65; 34 L.J.Ch. 18; 11 L.T. 353; 10 Jur.N.S. 1113; 13 W.R. 113; 46 E.R. 534, L.C.; 44 Digest 773, *6307*.

H (3) *Pearce* v. *Carrington* (1873), 8 Ch. App. 969, 42 L.J.Ch. 900; 29 L.T. 706; 22 W.R. 41, L.JJ.; 44 Digest 836, *6892*.

(4) *Re Burrows, Cleghorn* v. *Burrows*, [1895] 2 Ch. 497; 65 L.J.Ch. 52; 73 L.T. 148; 43 W.R. 683; 11 T.L.R. 527; 39 Sol. Jo. 656; 13 R. 689; 44 Digest 835, *6884*.

I (5) *Re Wilmer's Trusts, Moore* v. *Wingfield*, [1903] 1 Ch. 874; 72 L.J.Ch. 378; 88 L.T. 379; 51 W.R. 395; 47 Sol. Jo. 336; affirmed, [1903] 2 Ch. 411; 72 L.J.Ch. 670; 89 L.T. 148; 51 W.R. 609; 47 Sol. Jo. 602, C.A.; 37 Digest 64, *69*.

(6) *Thellusson* v. *Woodford* (1799), 4 Ves. 227; 31 E.R. 117, L.C.; affirmed (1805), 1 Bos. & P.N.R. 357; 11 Ves. 112, H.L.; 44 Digest 540, *3571*.

(7) *Gibson* v. *Gibson* (1698), 2 Eq. Cas. Abr. 184; Freem. Ch. 223; 22 E.R. 159; 7 Digest (Repl.) 194, *287*.

(8) *Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372; 10 Bing. 140; 7 Bli.N.S. 202; 3 Moo. & S. 571; 6 E.R. 956, H.L.; 37 Digest 65, *74*.

(9) *Wallis* v. *Hodson* (1740), 2 Atk. 114; Barn. Ch. 272; 26 E.R. 472, L.C.; 24 Digest (Repl.) 945, *9556.*

(10) *Edwards* v. *Freeman* (1727), 2 P.Wms. 435; 1 Eq. Cas. Abr. 249; 24 E.R. 803, L.C.; 20 Digest (Repl.) 482, *1897.*

(11) *Rawlins* v. *Rawlins* (1796), 2 Cox, Eq. Cas. 425; 30 E.R. 196, L.C.; 44 Digest 835, *6874.*

(12) *Whitelock* v. *Heddon* (1798), 1 Bos. & P. 243; 126 E.R. 883; 44 Digest 835, *6875.*

(13) *Storrs* v. *Benbow* (1853), 3 De G.M. & G. 390; 22 L.J.Ch. 823; 1 W.R. 420; 43 E.R. 153; sub nom. *Storrs* v. *Benbow*, *Storrs* v. *Middleton*, 21 L.T.O.S. 189; 17 Jur. 821, L.C.; 44 Digest 835, *6879.*

Also referred to in argument:

Doe d. Lancashire v. *Lancashire* (1792), 5 Term Rep. 49, 101 E.R. 28; 44 Digest 835, *6871.*

Long v. *Blackall* (1797), 3 Ves. 486; 30 E.R. 1119, L.C.; 44 Digest 897, *7562.*

Blackburn v. *Stables* (1813), 2 Ves. & B. 367; 35 E.R. 358; 44 Digest 219, *437.*

Musgrave v. *Parry* (1715), 2 Vern. 710; 23 E.R. 1067, L.C.; 44 Digest 834, *6863.*

Northey v. *Strange* (1716), 1 P.Wms. 340; 24 E.R. 416; 44 Digest 834, *6864.*

Burdet v. *Hopegood* (1718), 1 P.Wms. 486; 24 E.R. 484, L.C.; 44 Digest 834, *6865.*

Miller v. *Turner* (1748), 1 Ves. Sen. 85; 27 E.R. 907, L.C.; 44 Digest 834, *6868.*

Clarke v. *Blake* (1788), 2 Bro.C.C. 319; affirmed sub nom. *Doe d. Clarke* v. *Clarke* (1795), 2 Hy. Bl. 399; 44 Digest 835, *6872.*

Long's Case (1694), Freem.K.B. 505; 89 E.R. 381; sub nom. *Reeve* v. *Long*, Carth. 309; Holt, K.B. 228; 3 Lev. 408; 4 Mod. Rep. 282; 1 Salk. 227; Skin. 430; sub nom. *Reve* v. *Long*, Comb. 252; 44 Digest 834, *6862.*

Appeal from a decision of the Court of Appeal (Sir Richard Henn Collins, M.R., Romer and Cozens-Hardy, L.JJ.), reported [1906] 1 Ch. 583, reversing a decision of Swinfen Eady, J., reported [1905] 2 Ch. 301.

The third son mentioned in the will was one William Beaumaurice Rush, who had become bankrupt. The official receiver in the bankruptcy had conveyed to the appellant in fee simple the estates devised to the bankrupt by the will by a deed enrolled as a disentailing assurance. The respondent had purchased the life interest of the bankrupt, and also the interest in remainder on his death. The action was brought by the appellant for a declaration that the bankrupt took an estate tail, and not merely an estate for life under the will. Swinfen Eady, J., gave judgment for the plaintiff, but his judgment was reversed by the Court of Appeal.

Younger, K.C., and *Draper*, for the appellant.
Warmington, K.C., *Micklem, K.C.*, and *Wace* for the respondent.

Their Lordships took time for consideration.
Mar. 19, 1907. The following opinions were read.

LORD LOREBURN, L.C.—In this case George William Rush made a will in the year 1854, by which he devised certain estates to his brother for life, remainder to his brother's eldest son for life with divers remainders in tail, remainder to his brother's second son for life with remainders in tail, and in default of such issue, then to the third, fourth, and every other son of his said brother successively and in remainder one after another according to priority of birth, and to the heirs of the body of such son or sons. And then follow these words:

"But I declare my intention to be that any third or other son or sons of my said brother born in my lifetime shall not take a larger interest in my said estates than for life only with remainder to his issue in tail male and then in tail female. . . ."

A The third son of the testator's brother is William Beaumaurice Rush, and as events have fallen out he has become entitled to these hereditaments under this will. The only question is whether he is entitled to an estate tail, or is entitled only to an estate for life as having been "born in my [the testator's] lifetime."

The testator died on Sept. 18, 1854, and William Beaumaurice Rush was born on Oct. 9, 1854. If the plain meaning of words is to prevail, it is obvious that B William Beaumaurice Rush was not born in the testator's lifetime, and SWINFEN EADY, J., so held. But the Court of Appeal were of opinion that there is a fixed rule of construction which compels a court to hold that he was born in the lifetime of the testator because at that time he was en ventre sa mère. Everything depends upon whether or not such a rule of construction has been established by the authorities. It is certain that a child en ventre sa mère is protected by the law, C and may even be party to an action. Again, in computing lives for the purpose of the rule against perpetuities, a child en ventre sa mère is taken as if it were actually living. And under the old law, which treated a will made before marriage as revoked by marriage and the subsequent birth of a child, it made no difference whether the child was actually born before the father's death or was still en ventre sa mère at that time. All this is quite true, but I do not think that it helps to D establish a rule that the words "born in my lifetime" include persons born some weeks or months later. I cannot see what bearing these rules of law have upon the meaning of words used by a testator who can make what dispositions and choose such language as he pleases. Another series of decisions was cited, under which the courts held that children en ventre sa mère at the father's death must be included in the description in a will of children "living" at the father's death. E From the beginning this construction was acknowledged by the courts to be in some sense a straining of language, but was justified on the ground that such children came within the motive and reason of the gift, and should, therefore, be included by a fiction or indulgence, on the ground that it was for their benefit. The civil law was invoked, which authorises the treatment of posthumous children as though they were living at their father's death when it is for their advantage. F And though there are subsequent cases which justify the construction which I am now discussing on the ground that children in utero are in fact "living," though unborn (which, if sound, makes all this class of cases wholly immaterial in the present case), the main stream of authorities puts it upon the earlier ground; and it is everywhere stated or assumed that no such construction will be applied unless it is for the benefit of the child. All these cases are valid enough when G we are dealing with the words "living at the father's death," but are not helpful, except by analogy, when we are dealing with the words "born during the father's lifetime." For it does not follow that where courts have attached an unnatural meaning to particular words, and thus made them words of art, a like unnatural meaning must be attached to different words, even though their ordinary or natural sense be very similar.

H Two cases remain to be noticed. The first is *Trower* v. *Butts* (1), where a posthumous child was held to be included under the words "born in 'the father's' lifetime." As I read that case LEACH, V.-C., so decided on the ground that this construction was for the child's benefit. The other case is *Blasson* v. *Blasson* (2), in which similar words occurred, and LORD WESTBURY, L.C., upheld *Trower* v. *Butts* (1) on the ground which I have just mentioned, and spoke of

I

> "this peculiar rule of construction which is limited to cases where such construction of the word 'born' is necessary for the benefit of the unborn child."

Out of these materials the Court of Appeal has deduced a rule stated by COZENS-HARDY, L.J., as follows:

> "As a general rule of construction the words child living at or born at a particular date include a posthumous child in the absence of any context indicating a contrary intention."

It will be observed that this principle is laid down quite broadly and regardless of the circumstance whether the construction is for the benefit of the child or not. The Court of Appeal thought that this distinction had been overruled by authority. When I examine the cases, *Pearce* v. *Carrington* (3), *Re Burrows, Cleghorn* v. *Burrows* (4), and *Re Wilmer's Trusts, Moore* v. *Wingfield* (5), cited in support of this view, I cannot find that they support it. It seems to me that the sentence which I have quoted from LORD WESTBURY, L.C., accurately states the rule, and its limitation; and, with the utmost respect for the Court of Appeal, I cannot accept the rule without the limitation, because there is not authority for such a view. I agree with counsel for the respondent that it may be difficult at times to say when a particular construction is for the benefit of a child. But I am not on that account to extend to all cases a construction which has throughout been applied only to a particular class. Authority may compel us to do violence to the English language, and to say that in some cases a child is born weeks or months before it is brought forth. But, in my opinion, we ought not to say so, knowing that it is not the fact, unless we are constrained by authority; and we are not so constrained except where it is for the child's benefit. Inasmuch as the effect of applying the rule of construction which I have been discussing to the present case would be to reduce the interest of William Beaumaurice Rush from an estate tail to a life estate, it would not be for his benefit, but obviously to his prejudice; and the rule, therefore, has no application. Accordingly, I am of opinion that this appeal prevails, and that the judgment of SWINFEN EADY, J., should be restored.

LORD MACNAGHTEN.—I have had the advantage of reading the opinion which has just been delivered by the Lord Chancellor, and also that which is about to be delivered by LORD ATKINSON, and I am of the same opinion, and have nothing to add.

LORD JAMES OF HEREFORD.—I concur.

LORD ROBERTSON.—I concur.

LORD ATKINSON.—The question for decision in this appeal is the proper construction to be put upon the words "born in my lifetime" in a clause in the will of George William Rush, dated June 22, 1854, whereby he purported to cut down to a life estate the estate tail which he had given in the preceding clause to the third, fourth, and every other son and sons of the body of his brother Alfred Rush successively, the third son of Alfred Rush, named William Beaumaurice Rush, having been born three weeks after the death of the testator. In the construction of wills the well-established rule to be observed is

> "that every word is to have the effect, every word is to be taken, according to its natural and common import, and if words of art are used they are to be construed according to the technical sense, unless upon the whole will it is plain that the testator did not so intend":

Thellusson v. *Woodford* (6), 4 Ves. at p. 329, per SIR RICHARD PEPPER ARDEN, M.R. It can scarcely be contended that the words "born in my lifetime" are words of art, or that the word "born" does not in its natural and common import mean "brought forth." Yet the Court of Appeal have apparently, by a system of induction not easy to follow, evolved from the consideration of a number of cases dissimilar in character, in each of which a child en ventre sa mère was deemed to have been living before its actual birth, a rule of construction applicable to wills and marriage articles, if not to deeds and other instruments, by virtue of which the words "born in my lifetime" are primâ facie to be read as equivalent to "born in my lifetime or within nine months after my decease," so as to cover the case of a child en ventre sa mère irrespective of the effect which such a construction may have on the interest of the child. With all respect to the

A Court of Appeal I cannot think that the conclusion at which they have arrived is warranted by the authorities on which it purports to be based.

Leading counsel for the appellant, in his most lucid and convincing argument, has referred your Lordships to numerous authorities ranging from *Gibson* v. *Gibson* (7), decided in 1698, to *Re Wilmer's Trusts* (5). He has classified those authorities under four heads: (i) those dealing with the revocation of wills; B (ii) those dealing with the construction of the words "life in being" in the rule against perpetuities; (iii) those in which the question turned on the construction to be put upon the words "leaving children living" at a particular time, or at the happening of a particular event, and other forms of words of like import; and, (iv) those cases in which "born" was used in forms of words somewhat similar to those found in the will under consideration in this case.

C In the first three classes of cases a child en ventre sa mère was deemed to be alive before the date of its birth, though it had not then any independent existence, and in some of them it was said that when it was born the date of its birth was by a fiction of the law carried back to the earlier time or event. The ground of the decision in the first class of cases was, apparently, that it was assumed that a will made by a man when free from the obligations which marriage and paternity D imposed must have been made upon the condition that it should not be operative, should not be treated as his will, when those obligations were created; that the obligation of paternity arose when the child which he had begotten was en ventre sa mère though still unborn; that the condition was then fulfilled, and that the will should, therefore, be taken, upon the happening of that event, to be revoked.

The origin and growth of the law against perpetuities, based upon public policy, E is fully described in *Cadell* v. *Palmer* (8) and *Thellusson* v. *Woodford* (6), and the cases in class (ii) establish that, in construing the rule, a child en ventre sa mère may be deemed to be "a life in being," and the period of gestation be added at both ends of the period of twenty-one years mentioned in the rule, as this trifling prolongation of the period during which property may be tied up did not in any way bring about the mischief against which the rule was directed. I think F that the contention of counsel for the appellant that the authorities grouped in the first and second classes do not touch the question to be decided in this case is a sound one. A passage in the judgment of LORD HARDWICKE, L.C., in *Wallis* v. *Hodson* (9) (2 Atk. at p. 116), in which he says that a child en ventre sa mère is

> "a person in rerum naturâ so that both by the rules of the common and civil G law she was to all intents and purposes a child as much as if born in the father's lifetime,"

was much relied upon for the respondent, but that was a case on the Statute of Distributions. The Lord Chancellor proceeded to state that the history of that statute shows that its main object was to make the jurisdiction of the ecclesiastical courts more extensive than was allowed by the common law; that SIR JOSEPH H JEKYLL, M.R., had decided in *Edwards* v. *Freeman* (10) that the Act was to be construed by the civil law, and that nothing was more clear than that the civil law considers a child in its mother's womb as absolutely born, to all intents and purposes, for the child's benefit. This case seems to me, therefore, to be an authority for the appellant rather than for the respondent.

The cases in the third class were decided upon the principle that where such I words as "living at my death," or words of like import, are used in a will or marriage articles, a child en ventre sa mère will be considered as living though it had not at the time an independent existence. *Rawlins* v. *Rawlins* (11) and *Whitelock* v. *Heddon* (12) came within this principle, for, though in the former case the words "children now born or hereafter to be born" immediately preceded the words "and who shall be living at the time of my decease," it was on these latter words that the question turned; while in the latter case what was really decided was that a gift to "such male issue as my son John Whitelock shall or may have at the time of my grandson John Heddon attaining the age of twenty-one

years" should on the construction of the will in that case be read as synonymous with a gift to "such son or sons of John Whitelock as should be living when John Heddon attained twenty-one years of age," and that, therefore, a child then en ventre sa mère, and subsequently born alive, took. This decision did not turn at all on the earlier words of the will, "begotten and born in lawful matrimony," and the case is no authority at all for the proposition that the words "born at a particular event" must be held to include a child then en ventre sa mère irrespective of the benefit to be conferred upon the child by that construction.

It would appear to me, therefore, that the only authorities cited which have any direct bearing on the present case are *Trower* v. *Butts* (1), *Blasson* v. *Blasson* (2), and *Pearce* v. *Carrington* (3). In the first of these Sir John Leach, V.-C., held that under a bequest to all the children of the testatrix's nephew R. born in the lifetime of the testatrix, a child of which the wife of R. was enceinte at the time of the testatrix's death should be included. It will be observed that it was directly for the benefit of the child to adopt that construction. The Vice-Chancellor apparently founded his decision on *Whitelock* v. *Heddon* (12), and it has been urged that he mistook the meaning and effect of the decision in that case, and was misled by it. In the last part of his judgment, however, he says (1 Sim. & St. at pp. 184, 185):

> "Upon the whole, I am of opinion that, inasmuch as it is adopted as a rule of construction that a child en ventre sa mère is within the intention of a gift to children living at the death of a testator, because plainly within the reason and motive of the gift, so a child en ventre sa mère is to be considered within the intention of a gift to children born in the lifetime of a testator, because it is equally within the reason and motive of the gift."

I think it perfectly plain that Sir John Leach, V.-C., considered that he was only entitled to adopt the construction which he did adopt because he thereby secured a benefit to the child en ventre sa mère. It is for this reason, as it appears to me, that Lord Westbury, L.C., in *Blasson* v. *Blasson* (2) approved of his decision. His words are (2 De G.J. & Sm. at p. 669):

> "But, in my opinion, the judgment of Sir John Leach, V.-C., was right, and well warranted by antecedent decisions in our law. The same rule prevails in other systems of jurisprudence."

He then proceeds to state (ibid. at p. 670) what that rule is, namely:

> "that the fiction or indulgence of the law which treats the unborn child as actually born applies only for the purpose of enabling the unborn child to take a benefit which if born it would be entitled to, and that it is limited to cases where de commodis ipsius partus quæritur."

It is clear, I think, that he considered that Sir John Leach, V.-C., acted upon this rule, and that it was the justification for his decision. I cannot concur in the contention that Lord Westbury's judgment in *Blasson* v. *Blasson* (2) is not a decision on the point involved in this case. In my opinion, it is a direct decision that, for the purpose of ascertaining the period of distribution of a fund, the words "born and living at the time of my decease" do not include a child in utero, but for the purpose of ascertaining who is to participate in the gift they do include such a child, since it is for its benefit to be included.

In *Pearce* v. *Carrington* (3) a gift was made in the earlier part of a will to the testator's daughter for life, and after her decease to her children who being sons should attain the age of twenty-one, or being daughters should attain that age or marry, and, if she had no such children, then over. By a codicil it was directed that if the daughter should be living at the expiration of five years from the death of the testator's wife, and should not then have any child or children, the gift over should take effect at once, as if the daughter were dead. The benefit conferred upon the child who was en ventre sa mère at the expiration of the period of five

years was to prevent the divesting of the interest to which he had become entitled under the earlier clause of the will. The decision was based upon the rule laid down by LORD WESTBURY, L.C., in *Blasson* v. *Blasson* (2) which was cited in argument, and it was held that the above benefit so accruing to the child was sufficient to bring the case within the rule laid down in that authority. Yet in the Court of Appeal this case of *Pearce* v. *Carrington* (3) is relied upon as an authority that the doctrine of benefit no longer applies. In my opinion, it decides precisely the contrary.

Your Lordships were referred to a number of text-books and books of precedents to show that there was at the date of the will a uniform practice of conveyancers with regard to the form of the words to be employed to reduce the estates tail devised to persons to be born in the testator's lifetime to life estates. I think that they failed to show the existence of any such uniform practice or opinion. On the contrary, counsel for the appellant, in his most effective reply, established that in the opinion of one eminent conveyancer at all events, whose work was a high authority at the date of the will, no such technical meaning as that contended for in this case was given to words such as those in question. On the authority of these three last-mentioned cases, which is not, I think, weakened by the decision in *Storrs* v. *Benbow* (13), I am of opinion that the legal fiction mentioned by LORD WESTBURY, L.C., should not be applied to the detriment of William Beaumaurice Rush; that the words of the will must be construed in their natural sense; that the judgment of SWINFEN EADY, J., was right, and should be restored, and the appeal allowed.

Appeal allowed.

Solicitors: *E. E. Baron Reed*, for *C. P. Clarke*, Taunton; *Baileys, Shaw & Gillett.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re SAMUEL ALLEN & SONS, LTD.

[CHANCERY DIVISION (Parker, J.), January 15, 22, 1907]

[Reported [1907] 1 Ch. 575; 76 L.J.Ch. 362; 96 L.T. 660; 14 Mans. 144]

Hire-Purchase—Mortgage of goods—Equitable mortgage—Rights of owner against mortgagee—Postponement of mortgagee's claim to that of owner.

Machinery fixed to a company's leasehold premises was supplied by the owners to the company under a hire-purchase agreement in the usual terms one of which was that, in case of default of the monthly payments or of breach of the conditions of the agreement, the owners might enter and remove the machinery. A year later, the company gave a bank an equitable mortgage of the premises by deposit of deeds, together with a written charge under the company's common seal, which contained an agreement to give a legal mortgage on demand. The bank then had no notice of the hire-purchase agreement. The company having failed to pay the due monthly payments, and having otherwise committed a breach of the conditions in the hire-purchase agreement, the owners claimed the machinery. The bank also claimed it, the principal secured by the mortgage and arrears of interest being due from the company.

Held: the hire-purchase agreement created an equitable interest by which a subsequent equitable mortgagee was bound, and, therefore, the claim of the bank was postponed to that of the owners under the hire-purchase agreement.

Notes. Approved: *Re Morrison, Jones and Taylor, Cookes* v. *Morrison, Jones and Taylor*, [1914] 1 Ch. 50; *Hamer* v. *London, City and Midland Bank* (1918), 87 L.J.K.B. 973.

As to the rights of mortgagees as against owners under hire-purchase agreements, see 19 HALSBURY'S LAWS (3rd Edn.) 558, 559; and for cases see 35 DIGEST 449–453.

Cases referred to:

(1) *Gough* v. *Wood & Co.*, [1894] 1 Q.B. 713; 63 L.J.Q.B. 564; 70 L.T. 297; 42 W.R. 469; 10 T.L.R. 318; 9 R. 509, C.A.; 35 Digest 309, *562*.

(2) *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; 66 L.J.Ch. 114; 75 L.T. 610; 45 W.R. 356; 13 T.L.R. 139; 41 Sol. Jo. 154, C.A.; 35 Digest 309, *563*.

(3) *Reynolds* v. *Ashby & Son*, [1903] 1 K.B. 87; 72 L.J.K.B. 51; 87 L.T. 640; 51 W.R. 405; 19 T.L.R. 70, C.A.; affirmed, ante p. 401; [1904] A.C. 466; 73 L.J.K.B. 946; 91 L.T. 607; 53 W.R. 129; 20 T.L.R. 766, H.L.; 35 Digest 309, *565*.

(4) *Meux* v. *Jacobs* (1875), L.R. 7 H.L. 481; 44 L.J.Ch. 481; 32 L.T. 171; 39 J.P. 324; 23 W.R. 526, H.L.; 35 Digest 308, *501*.

(5) *Longbottom* v. *Berry* (1869), L.R. 5 Q.B. 123; 10 B. & S. 852; 39 L.J.Q.B. 37; 22 L.T. 385; 35 Digest 307, *553*.

Summons in the winding-up of Samuel Allen & Sons, Ltd.

The hirers, Samuel Allen & Sons, Ltd., were incorporated in June, 1904, and acquired a leasehold warehouse and business premises in Copperfield Road, Mile End, London. By a hire-purchase agreement dated July 14, 1904, between W. Lee and J. R. Lee (who carried on business as Lee and Hunt, and were therein called "the owners"), of the one part, and Samuel Allen & Sons, Ltd., of the other part, it was agreed (i) that the owners should let to the hirers certain machinery which was specified in the schedule and was already affixed to the company's premises, on the conditions thereinafter stated; (ii) that the hirers should pay a certain sum on the signing of the agreement in consideration of the option of purchase thereby granted, and should pay a monthly rent for the hire of the machinery so long as they saw fit to continue the hire; (iii) that the hirers should keep the machinery in their own custody and possession at Nos. 24 and 26, Copperfield Road, and should not allow it to be removed without the consent of the owners, and should not interfere with the owners' name plates or marks upon the machinery; . . . (vi) that the hirers should keep the machinery free and exempt from legal process; . . . (viii) that the hirers might at any time during the period of hire become the purchasers of the machinery on payment of a named sum, in which event credit would be given for all previous payments, including the sum mentioned in (ii) above; (ix) that "when the hirers shall by such payments as aforesaid have paid to the owners [the named sum] then the said machinery shall become the absolute property of the hirers, but until such payment in full the hirers shall merely remain bailees"; (x) that in case of default in the monthly payments, or of breach of the conditions, or the liquidation of the company, the owners were to be entitled to enter and remove the machinery; (xi) if the owners took possession under cl. (x), and the hirers did not exercise an option given to them of purchasing the machinery within a limited time and at a certain amount, the hirers were not to be entitled to any credit allowance or return for or on account of any payments previously made by them. By an instrument addressed to the London and Provincial Bank, Ltd., dated July 24, 1905, the hirers duly declared under their common seal that they had deposited with the bank a land certificate and the lease of the Copperfield Road premises to secure a current account with the bank, and agreed to pay the amount in the account, and charged their business premises with the appurtenances thereto with the amount, and agreed to execute a legal mortgage if called upon to do so. The existence of the hiring agreement was not known to the bank. The hirers made default in paying instalments under the hiring agreement. On May 15, 1906, the hirers' landlords distrained for rent on the machinery in question and

other articles. The sheriff also seized them under a writ of fieri facias. They were advertised to be sold by auction, but the sale did not take place. On Oct. 31, 1906, the owners of the machinery claimed under cl. (x) of the hiring agreement to enter and remove the machinery. On Nov. 13, 1906, it was ordered by the court that the hirers should be compulsorily wound-up. On that day the hirers were in arrear of the monthly payments to the owners of the machinery; they had committed a breach of cl. (vi) of the hiring agreement; and £515 11s. 8d. was due to the bank under its security. An arrangement was arrived at under which the official receiver sold the machinery. He held the proceeds of sale pending a decision as to who was entitled to them. Meanwhile the owners of the machinery took out a summons in the winding-up, the official receiver, the landlords, and the bank being respondents thereto, asking for an order that the official receiver should forthwith deliver to them the plant and machinery upon the premises in the occupation of the company which was included in the hiring agreement.

Cave, K.C., and *Rolt* for the owners.—The owners' title is better than that of the bank. Both titles are equitable, but the owners are prior in point of time, and are, therefore, to be preferred. *Gough* v. *Wood & Co.* (1) is in our favour. There the mortgage was a legal mortgage by sub-demise, and the decision was based on the fact that tne mortgagee having allowed the mortgagor to remain in possession had assented to the agreement between the mortgagor and the person whose position corresponds with that of the applicants in this case. *Hobson* v. *Gorringe* (2) is distinguishable, inasmuch as there the mortgage was a legal one, and the mortgagee was a purchaser for value without notice. The person who let the machinery in that case had an equitable right: see the judgment of A. L. SMITH, L.J. In *Reynolds* v. *Ashby & Son* (3) the title of the mortgagee was affirmed for the same reason—viz., that he held the legal estate without notice for value. The fact of the mortgagee not having notice is immaterial where his rights are equitable only, and where the mortgage takes place after the hiring agreement, as here.

Ward Coldridge for the official receiver.

A. à Beckett Terrell for the bank.—There is no equitable right in an owner who lets out machinery as against a mortgagee to remove the machinery on default of payment of instalments. The mortgagee is not prejudiced by not having got a legal mortgage. Fixtures pass with the land unless they are excluded expressly or inferentially, and it is immaterial at what time they were so affixed, and that the mortgage was one of leaseholds: COOTE ON MORTGAGES (7th Edn.), p. 127. The holder of a bill of sale of fixtures is postponed to the equitable mortgagee of a lease: *Meux* v. *Jacobs* (4); *Longbottom* v. *Berry* (5); *Hobson* v. *Gorringe* (2) shows that, though as between the person who lets a fixture and the hirer-mortgagor there is a right in the former to remove the fixture in certain events, that right does not diminish the rights of a mortgagee of the land to have the fixture as part of his security, even if he has only an equitable claim against the land. [He referred to *Reynolds* v. *Ashby & Son* (3).]

PARKER, J.—In this case the only question I have to decide is whether the interest of Lee and Hunt, whom I will call the owners, under a hiring agreement, which was dated July 14, 1904, in certain chattels which were affixed to leasehold premises belonging to the company, was an interest of such a nature that a subsequent equitable mortgagee of the leasehold premises took his interest subject to the interest of the owners. Admitting for one moment that the interest under the hiring agreement is an equitable interest in the land, I think it is reasonably clear that the title of the owners was in precedence of the subsequent equitable mortgagees.

Various cases have been quoted to me on the general principle of these hiring agreements, to which I will refer shortly. The first was *Gough* v. *Wood & Co.* (1). That case, however, depended upon the mortgagee of the property giving an implied

authority to the mortgagor to enter into agreements involving the affixing of machinery to the property and the subsequent removal in default of the machinery being paid for as agreed, and I do not think that it has any direct bearing upon this point because in fact here all parties admit that the property was so affixed to the freehold as to become the property of the owner of the freehold interest, at any rate as between him and the mortgagee. The second case cited was *Hobson* v. *Gorringe* (2). In that case the circumstances were not quite the same as in the first case I have mentioned, because the mortgagee who might otherwise have been held to have given an implied licence with regard to the chattels had actually entered into possession of the property before the chattels so affixed were removed from the freehold, and that entry into possession was held to be an implied revocation of an implied licence which the mortgagee could have given, so that the property then remained the property of the mortgagee, and the hirer had no interest in it. It appears, however, in the judgment of A. L. SMITH, L.J., that he conceived that the decision might have been different if when the mortgagee took his mortgage he had had notice of the interest of the owner of the chattels under the hiring agreement. In that case there was a legal mortgage and, unless the mortgagee took with actual notice of the hiring agreement, it is clear that he could rely on the plea of purchase for value without notice. What A. L. SMITH, L.J., says is this ([1897] 1 Ch. at p. 192):

> "The right [to enter and remove the fixtures] was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from the King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe is such a purchaser."

Gorringe was the mortgagee who had the legal estate. For what it is worth, I think that passage is in favour of the contention of counsel for the owners and seems to show that A. L. SMITH, L.J., in the case he was dealing with thought that, if the legal mortgagee had had notice of the hiring agreements, the decision would have been otherwise than it was. The last case cited to me was *Reynolds* v. *Ashby & Son* (3). In the judgment of ROMER, L.J., in the Court of Appeal there is a passage similar to that which I have quoted from the judgment of A. L. SMITH, L.J., in the earlier case. What he says is ([1903] 1 K.B. at p. 101):

> "With regard to the absence of title in the mortgagor as between himself and the plaintiff, I may observe that the mortgagee was not affected with any notice of the rights of the plaintiff, or for any other reason prevented from claiming these fixtures which he found forming part of the premises when he entered into possession; and, though the mortgagor knew of the plaintiff's rights, he may well have thought when the goods were affixed that he would be able duly to pay for them, and so acquire a good title, and so there was no objection to making them part of the premises subject to the right of the plaintiff to remove them if default in payment for them occurred."

Again, ROMER, L.J., seems to think that had the mortgagee had notice it might have made some difference in the decision.

The point, therefore, though not covered by authority, is more or less affected by the dicta of the judges who have decided the earlier cases quoted to me. On the other hand, it is said that the hiring agreement is of such a nature that it creates a purely personal right, and not a right which could in any way be enforced in equity against the land, and, therefore, that the purchaser even of an equitable estate is not bound by that contract, and the doctrines of priorities as administered in equity have no application at all. I do not think I should be right if I were to hold that an agreement of this sort is of a purely personal nature. These agreements are very common and very useful, and, of course, it is open to a mortgagee when he takes his mortgage to make what inquiries he likes as

to whether there are any agreements or not affecting the fixtures upon the property. If he does not do so, in my opinion, he must as equitable mortgagee be held to take subject to those agreements, and I think that those agreements, in the form which has been read in this case, do create an equitable interest by which a subsequent purchaser who does not get the legal estate is bound, and that, applying the ordinary principles of priorities as between the interest of the owner under the hiring agreement and the interest created by the equitable mortgage, the interest created by the hiring agreement takes precedence. On that ground I think the claim of the bank on this summons is postponed to the claim of the persons who own the chattels under the hiring agreement.

Solicitors: *Rose-Innes, Son & Crick*; *Solicitor to the Board of Trade*; *A. A. Banes.*

[*Reported by* R. C. CARTER, ESQ., *Barrister-at-Law.*]

MADDEN *v.* RHODES AND OTHERS

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Ridley and Darling, JJ.), March 8, 1906]

[Reported [1906] 1 K.B. 534; 75 L.J.K.B. 329; 94 L.T. 741; 70 J.P. 230; 54 W.R. 373; 22 W.R. 356; 50 Sol. Jo. 326; 21 Cox, C.C. 180]

Trade Union—Offence—Wilfully withholding property of union—Summary proceeding for penalties—Need to prove fraud or criminality—Trade Union Act, 1871 (34 & 35 *Vict.*, *c.* 31), *ss.* 4, 9, 12.

An officer of a trade union who, having in his possession moneys, books, or other effects belonging to the trade union, "wilfully withholds" the same, is not, in the absence of any fraud or criminality on his part, liable to be proceeded against for penalties under s. 12 of the Trade Union Act, 1871, and a court of summary jurisdiction has no power under that section to entertain a complaint against him for such wilful withholding of the property of the trade union. Under s. 9 of the Act, however, civil proceedings may be taken against him for the recovery of the property.

Barrett v. *Markham* (1) (1872), L.R. 7 C.P. 405, applied.

Notes. As to trade union offences, see 32 HALSBURY'S LAWS (2nd Edn.) 502 et seq., and for cases see 43 DIGEST 109 et seq. For Trade Union Act, 1871, see 25 HALSBURY'S STATUTES (2nd Edn.) 1244.

Cases referred to:

(1) *Barrett* v. *Markham* (1872), L.R. 7 C.P. 405; 41 L.J.M.C. 118; 27 L.T. 313; 36 J.P. 535; 25 Digest 329, *306.*

(2) *R.* v. *Stoddart*, [1901] 1 K.B. 177; 70 L.J.Q.B. 189; 83 L.T. 538; 64 J.P. 774; 49 W.R. 173; 17 T.L.R. 55; 45 Sol. Jo. 61; 19 Cox, C.C. 587, C.C.R.; 25 Digest 463, *498.*

Case Stated by a metropolitan magistrate sitting at the Marlborough Street Police Court, on the hearing of a summons before him on July 10, 1905, between Edward Madden, a trustee of the Amalgamated Society of Tailors and Tailoresses, and Thomas Rhodes and four others, the trustees of the London (West End) branch of that society.

The summons was issued under s. 12 of the Trade Union Act, 1871, by the appellant on behalf of the Amalgamated Society of Tailors and Tailoresses, a

society registered as a trade union under the Act, against the respondents as trustees of the London (West End) branch of the union, complaining that they being officers of the union having in their possession certain moneys, securities, books, papers, and other effects of the Amalgamated Society of Tailors and Tailoresses wilfully withheld the same. A general committee of management of the society, termed an executive council, was elected by a conference of delegates of branches which met periodically to decide all questions of importance to the trade, enact new rules, amend existing ones, transact any business in the interests of the union, and elect a general committee of management, termed "an executive council." Under the rules of the union each branch was "to appoint its own officers and conduct its own business in accordance with rules." A dispute having arisen between the executive council and the West End branch in respect of the duties and appointment of an officer (not mentioned in the rules) referred to as the out-collector of the branch, a conference on Aug. 10, 1904, resolved:

> "That it be an instruction from the conference that in future the out-collector of the West End branch must make members and take contributions for all branches of the West London district, and such other branches as the executive council may direct, but no collector can be appointed without the consent of the executive council."

On April 28, 1905, the executive council, reciting the continued refusal of the West End branch to perform the duty imposed upon it by the above resolution, demanded "the resignation of the branch officers and committee and the appointment of loyal members of our amalgamation," and further authorised the appellant, with another general trustee, to proceed to the West End branch and

> "to compel the trustees of that branch to deliver up all moneys, books, vouchers, documents, and all property of whatever description, held by them in trust for the Amalgamated Society of Tailors and Tailoresses."

The West End branch replied with the following unanimous resolution:

> "This meeting of members of the West End branch of the A.S.T. having considered the present situation in all its bearings, are satisfied that the branch officials have done nothing to justify the action of the executive council, and hereby demand the withdrawal of all adverse resolutions against the branch, and the acknowledgment of Mr. Willis's position as collector; failing which we authorise the officers and committee to withdraw the branch from the A.S.T., and pledge ourselves to support such action in any and every possible manner."

It was admitted that there was no fraud or criminality, and, therefore, the magistrate formed the opinion that the questions raised were not within the jurisdiction of a magistrate at a police court under s. 12 of the Trade Union Act, 1871, and he dismissed the case.

By the Trade Union Act, 1871:

> "Section 4. Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements—namely: (1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed: . . . Section 9. The trustees of any trade union registered under this Act, or any other officer of such trade union who may be authorised so to do by the rules thereof, are hereby empowered to bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint, in any court of law or equity, touching or concerning the property, right, or claim to property of the trade union, and shall and may, in all cases concerning the real or personal property of such trade union, sue and be sued, plead and be impleaded, in any court of law or equity, in their proper names,

without other description than the title of their office; and no such action, suit, prosecution, or complaint shall be discontinued or shall abate by the death or removal from office of such persons or any of them, but the same shall and may be proceeded in by their successor or successors as if such death, resignation, or removal had not taken place. . . . Section 12. If any officer, member, or other person being or representing himself to be a member of a trade union registered under this Act, or the nominee, executor, administrator, or assignee of a member thereof, or any person whatsoever, by false representation or imposition obtain possession of any moneys, securities, books, papers, or other effects of such trade union, or, having the same in his possession, wilfully withhold or fraudulently misapply the same, or wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such trade union, or any part thereof, the court of summary jurisdiction for the place in which the registered office of the trade union is situate, upon a complaint made by any person on behalf of such trade union, or by the registrar, or in Scotland at the instance of the procurator fiscal of the court to which such complaint is competently made, or of the trade union, with his concurrence, may, by summary order, order such officer, member, or other person to deliver up all such moneys, securities, books, papers, or other effects to the trade union, or to repay the amount of money applied improperly, and to pay, if the court think fit, a further sum of money not exceeding £20, together with costs not exceeding 20s.; and, in default of such delivery of effects, or repayment of such amount of money, or payment of such penalty and costs aforesaid, the said court may order the said person so convicted to be imprisoned, with or without hard labour, for any time not exceeding three months: Provided that nothing herein contained shall prevent the said trade union, or in Scotland Her Majesty's Advocate, from proceeding by indictment against the said party: Provided also that no person shall be proceeded against by indictment if a conviction shall have been previously obtained for the same offence under the provisions of this Act."

Shearman, K.C. (*Edmond Browne* with him) for the appellant.—The summons was under s. 12 for "wilfully withholding." The magistrate took the view that the section dealt only with criminal offences, and that unless there was an allegation that the wilful withholding of these things was with criminal intent he had no jurisdiction. He based his decision upon *Barrett* v. *Markham* (1). The magistrate was wrong in holding that he was bound by that case, and that the section did not apply where there was no fraud or dishonesty. If the complainant has not this remedy, then he has no remedy at all, as the common law remedy is taken away by s. 4, under which an action cannot be maintained for breach of any agreement (among others) between members of a trade union as to the conditions on which any members shall "transact business", and s. 9, which enables the trustees of the union to bring or defend actions, does not give the right to bring an action in such a case as this. Section 9 does not refer to disputes between one member and another member of the trade union, but merely to disputes between members and persons who are not members. The policy of the Act is that when there is a dispute between members of trade unions, then if anybody wilfully withholds property, either criminally or civilly, the complainant must go before the magistrate under s. 12, the object being to provide a summary remedy. Taking the words of s. 12, the section says that if any person "by false representation or imposition obtain possession," etc. That part of the sentence clearly implies fraud, but the "false representation or imposition" does not govern the next part of the sentence, and does not govern the words "wilfully withhold." One set of facts giving jurisdiction is "by false representation or imposition" obtaining possession of any moneys, but the next part of the sentence is a fresh sentence, and the words "or, having the same

in his possession, wilfully withhold," etc., apply if the person has these things in his possession, whether he obtained them by false representation or not. Taking the words "wilfully withhold or fraudulently misapply the same," they show that the "wilfully withholding" is entirely different from fraudulent withholding. So that on the construction of the section itself it is clear that a person may "wilfully withhold" these things without being guilty of any misrepresentation, fraud, or criminal intent whatever, and the following words "or wilfully apply any part of the same," etc., certainly do not point to a criminal matter. The magistrate dismissed this case on the authority of *Barrett* v. *Markham* (1), which was decided on s. 24 of the Friendly Societies Act, 1855. In that case the treasurer of a friendly society was summoned under s. 24 for "withholding or misapplying" moneys of the society, and the court held that he could not be convicted unless it were shown that he had been guilty of some fraud or misrepresentation. There are two distinctions between that case and the present. The sections are not quite the same. The section in that case had the words "withhold or misapply the same"—the word "wilfully" which is in the present section not being in that section; but, although there are slight differences, it is conceded that the sections are substantially the same. Secondly, in that case the proceeding was against the treasurer, and there was in a preceding section—s. 22—a civil remedy given against him, followed by this quasi-criminal remedy in s. 24. In the present Act there is no such civil remedy given in express terms, but there is only a general suing clause given in s. 9, which does not apply as between members, and s. 4 applies to prevent the courts from entertaining any dispute of the present kind, so that there is in effect no other legal remedy, except the remedy taken in this case under s. 12. That case is, therefore, distinguishable upon the grounds that there are substantial differences between the two Acts, and that s. 4 of the Act now in question prohibits disputes between members being dealt with in a civil court. The decision itself is not a very sound decision, and what was done here comes literally within the words "wilfully withholding," and those words ought to be construed literally: *R.* v. *Stoddart* (2).

Herman Cohen, for the respondents, was not called on to argue.

LORD ALVERSTONE, C.J.—In my opinion, the magistrate came to a perfectly right decision. If *Barrett* v. *Markham* (1) is to be taken to be an authority on the construction of s. 12 of this statute, it is distinctly in point. That was a decision of WILLES, J., in which KEATING, J., concurred, that a proceeding under s. 24 of the Friendly Societies Act, 1855, which is analogous to the section in question in this case—namely, s. 12 of the Trade Union Act, 1871—can only be taken in respect of a quasi-criminal case—that is, in respect of something which is of a criminal character. Looking at the proviso at the end of the section, which, as counsel for the appellant has admitted, was the same as that at the end of s. 24 of the Friendly Societies Act, 1855, and, looking at the nature of the punishment and the coupling of the words immediately preceding referring to "false representation or imposition," and the words immediately following "fraudulently misapply," I should have thought that the words "wilfully withhold" imported something in the nature of conduct which would not admit of an answer in a civil court. If *Barrett* v. *Markham* (1) binds us, then we are clearly not entitled to deal with this case upon the basis that a mere civil dispute comes within the section. The principle of that decision seems to me to rest upon two grounds—first, that there was in s. 22 of the Friendly Society's Act, 1855, an alternative civil remedy; and, secondly, that the language of the section then in question, s. 24 of the Act of 1855, in its enactment pointed to proceedings in the nature of criminal proceedings, and in the nature of misconduct—as WILLES, J., says: "a withholding or misapplying under circumstances importing misconduct." That is the language of one of the greatest lawyers who ever sat on the bench. Therefore it would not be wise not to rely on that which

is his own test. If counsel for the appellant could have successfully distinguished these two Acts, we should have been able to say that that decision was not an authority binding upon us in this case. He admits that the language of the two sections is so much alike that the principle based upon that language in the two cases seems to be the same; but he suggests that there is no alternative civil remedy given by the Trade Union Act, 1871, or at all events, that there is no such alternative civil remedy given by the Act of 1871 as was given by s. 22 of the Friendly Societies Act, 1855. In my opinion, s. 9 of the Trade Union Act, 1871, certainly gives quite as full a civil remedy as s. 22 of the Act of 1855; and when it is said that that civil remedy given by s. 9 is taken away by s. 4, I cannot agree with that contention. As I pointed out in the course of the argument, we must read ss. 4 and 9 together. Section 4 has been considered in the Court of Appeal more than once recently, and I think it has been generally considered to be a section applicable as between members of a trade union, and not as between what I may call one trade union against another or one branch of a trade union against another. Therefore, it seems to me that the language of s. 4 certainly does not point to a dispute of this character. Further, there is the point which was indicated to us during the argument by counsel for the respondents, that s. 9 contemplates disputes between the trustees of a trade union with regard to property and persons who have got possession of property which the trade union claims. The claim in the present case is by a trustee of what counsel for the appellant has called the general society, against four persons who are trustees of what is called the branch society. In my judgment, a claim of this kind is directly within the remedy contemplated by s. 9. Applying these principles, I think that this case fails, and, in my judgment, the magistrate was right in thinking that the principle of the decision in *Barrett* v. *Markham* (1) applied. Therefore, this appeal must be dismissed.

RIDLEY, J.—I agree.

DARLING, J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Pattinson & Brewer*; *Andrews & Andrews.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

LEICESTER & CO. *v.* CHERRYMAN

[King's Bench Division (Ridley and Bray, JJ.), April 12, 1907]

[Reported [1907] 2 K.B. 101; 76 L.J.K.B. 678; 96 L.T. 784; 71 J.P. 301; 23 T.L.R. 444; 51 Sol. Jo. 429]

Pawn—Stolen goods pawned—Conviction of pawner—Restitution order made by court—Detinue action by true owner to recover goods—Competency—Pawnbrokers Act, 1872 (*35 & 36 Vict., c.* 93), *s.* 30 (2).

The plaintiffs, a firm of jewellers, employed a traveller to sell their goods, some of which he pawned. Upon his conviction of larceny before a court of summary jurisdiction an order was made by the justices, but not on the plaintiffs' application, under s. 30 (2) of the Pawnbrokers Act, 1872, for the restitution of the goods to the plaintiffs upon the payment by them to the pawnbroker of the amount advanced on the goods. The plaintiffs did not take advantage of this order, but brought an action of detinue against the pawnbroker for the return of the goods.

Held: the provision in s. 30 (2) of the Pawnbrokers Act, 1872, that on the conviction of a person who has pawned stolen goods the court may order the delivery of the goods to the owner on payment by him to the pawnbroker of the whole or part of the amount of the loan did not exclude the civil rights of the owner of the property, nor, in a case like the present, where the owner did not apply for an order under s. 30 (2), did it operate as an estoppel to bar an action for the enforcement of those rights, and, therefore, the plaintiff was entitled to maintain his action.

Notes. Section 100 of the Larceny Act, 1861, has been replaced by s. 45 of the Larceny Act, 1916; see 5 Halsbury's Statutes (2nd Edn.) 727 and 1011 respectively.

As to the rights of the true owner of pawned goods, see 29 Halsbury's Laws (3rd Edn.) 222–224; and for cases see 37 Digest 18–22.

Cases referred to:

(1) *Dover* v. *Child* (1876), 1 Ex.D. 172; 45 L.J.Q.B. 462; 34 L.T. 737; 40 J.P. 296; 24 W.R. 537; 21 Digest 228, *602*.

(2) *Midland Rail. Co.* v. *Martin & Co.*, [1893] 2 Q.B. 172; 62 L.J.Q.B. 517; 69 L.T. 353; 58 J.P. 39; 17 Cox, C.C. 687; 5 R. 489; sub nom. *Martin & Co.* v. *Midland Rail. Co.*, 9 T.L.R. 514, D.C.; 21 Digest 228, *603*.

(3) *Ex parte Davison* (1896), 60 J.P. 808; 13 T.L.R. 93, D.C.; 21 Digest 229, *608*.

(4) *Stephenson* v. *Garnett*, [1898] 1 Q.B. 677; 67 L.J.Q.B. 447; 78 L.T. 371; 46 W.R. 410, C.A.; 13 Digest (Repl.) 441, *661*.

Appeal by the defendant from the decision of the deputy-judge sitting at the county court of Southwark.

The facts and arguments as stated in the judgment of the learned deputy-judge were as follows. The plaintiffs sought to recover certain goods, their property, which were detained by the defendant. It was proved that a man named Russell, who had been employed by the plaintiffs as a traveller to sell their goods, had pawned some of them with the defendant, a pawnbroker, and had afterwards been convicted before a court of summary jurisdiction at Brentford, when the goods in question were produced, and were identified by the prosecutors, the present plaintiffs. It was also proved that after the conviction an application was made to the justices by one of the police engaged in the case for an order for the restitution of the goods to the owner, that this was opposed by a solicitor who appeared for the defendant and other pawnbrokers, and that the justices made an order under s. 30 of the Pawnbrokers Act, 1872, for the delivery up of the goods on payment by the owners to the pawnbroker of the amounts which had been

advanced. The plaintiffs did not ask for the order, though one of them was present at the time, nor did they object to an order being made. As a defence to the present action counsel contended in the first place that there was no evidence of a demand having been made on the defendant for the delivery of the goods; but it was admitted that he had received a letter on or about Aug. 22, 1906, in terms similar to one which was produced, which had been sent to another pawnbroker, and, though the letter did not contain a demand in express terms, it was, in the opinion of the deputy-judge, in substance a sufficient demand; it gave notice to the defendant that the plaintiffs were claiming the goods, and proposing to take proceedings to recover them if the defendant would not accept the terms offered to him.

The principal point on which the defendant relied in the county court was that, an order having been already made by a court of competent jurisdiction for the delivery of the goods, the plaintiffs were estopped or debarred from taking proceedings in another court—that, if the matter were not actually res judicata, the action ought to be dismissed as frivolous and vexatious and an abuse of the process of the court. The attention of the deputy-judge was called to several cases in which questions had arisen on a very similar position under s. 40 of the Metropolitan Police Courts Act, 1839, which gave power to police magistrates to make orders for the delivery up of goods. Among them were *Dover* v. *Child* (1), *Midland Rail. Co.* v. *Martin & Co.* (2), and *Ex parte Davison* (3). In those cases it was held that an application on which an order was refused was not a bar to further proceedings, and there were in the judgments a few expressions which to some extent supported the contention of the defendant's counsel, but (said the deputy-judge) it had not been decided that when a party had obtained an order he was estopped from taking other proceedings. It seemed to the deputy-judge that if he was not estopped when he failed to obtain an order, he was not estopped by the making of one. The case was, perhaps, stronger in favour of the defendant under the Pawnbrokers Act than under a Metropolitan Police Act, inasmuch as the latter enabled the defendant against whom an order had been made to bring an action to recover the property which he had been ordered to give up, while there was no such provision in the Pawnbrokers Act, and, therefore, the order was more like a judgment.

The deputy-judge continued: I think, however, that the probable explanation is that the pawnbroker does not claim to be the owner of the goods, and, though he loses the security for his loan, he is not in the same position as a man who has had to give up what actually belongs or may belong to him. Again, the case would be stronger in favour of the defendant if there had been a summons and the question for the court had been simply the ownership of the goods; there would then, I think, be more reason for holding the plaintiffs estopped on the ground that they had chosen their tribunal and that the matter was determined, but here there was simply a sort of interlocutory application. The plaintiffs were not strictly parties to the proceeding, which was a criminal prosecution; they were there only as witnesses, and I think it would be going too far to hold that by making an application for the delivery of their goods they abandoned their common law right to bring an action of detinue. I should, therefore, hold that the matter was not res judicata even if the application had been made by the plaintiffs, but on the evidence before me, although it may be assumed that if no condition of payment had been attached they would have availed themselves of the order. I feel bound to hold that the plaintiffs did not make the application, and that there is therefore no reason for holding that they are estopped from proceeding here.

On the other point that the action ought to be dismissed as an abuse of the process of the court, *Stephenson* v. *Garnett* (4) was cited. That was a case in the High Court, which undoubtedly has jurisdiction so to dispose of an action, but the jurisdiction of this court is statutory, and it has no inherent jurisdiction. I do

not think that I have the power to stay or dismiss the action, and, if I had, I do not think that the circumstances of this case are such as to call for the exercise of such a power. I come to the conclusion, therefore, that the suggested defences to the action are not sound, and I give judgment for the plaintiffs, but, as the case involves questions of considerable difficulty and I am not at all confident of the correctness of my conclusions, I think that if the defendant desires it there should be leave to appeal.

By s. 30 (2) of the Pawnbrokers Act, 1872:

> "If any person is convicted in any court of feloniously taking or fraudulently obtaining any goods and chattels and it appears to the court that the same have been pawned with a pawnbroker, the court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the court, according to the conduct of the owner and the other circumstances of the case, seems just and fitting."

Atkin, K.C., and *Attenborough* for the defendant.—The question here is whether an order made by the magistrate under s. 30 of the Pawnbrokers Act, 1872, for the restitution of stolen goods upon payment by the owner of the amount advanced upon them is an order which is enforceable in such a way as to prevent the bringing of an action in a civil court for the detinue of the goods the subject of the order. The section of the Act is clearly intended to give to pawnbrokers larger rights than they would have at common law. Under the Metropolitan Police Act, 1839, s. 40, the magistrate may order the delivery up to the owner of goods detained either absolutely or upon terms. Under s. 100 of the Larceny Act, 1861, the court before whom a thief is prosecuted to conviction can order the restitution of stolen property to the owner without any compensation. Section 30 of the Pawnbrokers Act was intended as an encouragement to pawnbrokers and as a penalty to prosecutors whose conduct does not commend itself to the magistrate. When the court has made an order under this section it is conclusive. It all depends whether the court has exercised its discretion upon the conduct of the parties. The application may be made by the pawnbroker himself. In the present case it was made by the police, and the plaintiffs did not dissent from the making of it, and, therefore, they must be held to have agreed to it and to be estopped from taking subsequent proceedings. It is clear that in certain circumstances the legislature contemplated that the owners of stolen goods should be deprived of their common law right, and, that being so, the plaintiffs were not entitled to sue the defendant in the county court.

G. Elliott, for the plaintiffs, was not called on to argue.

RIDLEY, J.—I take this general view of this matter. The Acts which deal with this question were not intended to alter civil rights as they existed. It was intended to give to the owner of property a summary remedy so that, when a prosecution had proceeded so far and so successfully as to result in a conviction, the magistrate was given the power of ordering the restitution of the property. That was intended for the benefit of the prosecutor, and the right was given to save him the expense and the obligation of taking civil proceedings to recover his property. In doing this it was obviously necessary to see that other people's rights were not affected. This provision as to payment to the pawnbroker of the whole or part of the amount of the loan was, accordingly, inserted in s. 30 of the Pawnbrokers Act, 1872. It is not found in s. 100 of the Larceny Act, 1861 (see note ante p. 794), probably because that Act was dealing with general questions of stolen property, but in practice, courts of assize, and, I believe, of quarter sessions also, have adopted the practice of saying that an order will not be made for the restitution of the property unless the prosecutor is willing to compensate the pawnbroker in cases in which he may deserve it. It was argued

on behalf of the defendant that the provision in the Pawnbrokers Act was meant to exclude the civil rights of the owner of the property. The sufficient answer to that, in my opinion, is that, if that had been intended, it would have been so stated. He also relies upon the doctrine of estoppel as a bar to the plaintiffs' action. I do not think there can be any estoppel, because I think the legislature meant to leave the two rights side by side. In a case such as the present, where the owner did not make the application and it was made by the police, I do not see how the doctrine of estoppel can arise at all. For these reasons I think that the decision of the deputy-judge was right, and the appeal must be dismissed.

BRAY, J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *E. E. Clark*; *Stanley Attenborough & Sons.*

[*Reported by* P. B. DURNFORD, ESQ., *Barrister-at-Law.*]

R. *v.* LINNEKER

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Lord Alverstone, C.J., Kennedy, Ridley, Darling and Walton, JJ.), April 30, 1906]

[Reported [1906] 2 K.B. 99; 75 L.J.K.B. 385; 94 L.T. 856; 70 J.P. 293; 54 W.R. 494; 22 T.L.R. 495; 50 Sol. Jo. 440; 21 Cox, C.C. 196]

Criminal Law—Attempt to commit crime—Distinction from intention—Attempt to shoot—Evidence—Need to prove more than intention and possession of firearm.

The prisoner, during an interview with the prosecutor, put his hand into his overcoat pocket and began to pull out a revolver. As he got the revolver clear of his pocket the prosecutor sprang on him and held his arm before he could raise it. The two men struggled for a few minutes, and during the struggle the prisoner said to the prosecutor: "You've got to die". Eventually the prosecutor wrested the revolver from the prisoner, who was given into the custody of the police.

Held: while it was necessary to distinguish between an intent and an attempt and to prove an attempt to shoot it was not sufficient to establish an intention to shoot and possession of a firearm for that purpose, the acts of the prisoner constituted an attempt to discharge the revolver at the prosecutor with intent to do him grievous bodily harm within s. 18 of the Offences Against the Person Act, 1861, the attempt beginning when the prisoner drew the pistol from his pocket, attempted to raise his arm to aim the weapon, and struggled to free himself from the grasp of the prosecutor in order that he might do so.

Notes. Considered: *R.* v. *White*, [1908–10] All E.R.Rep. 340. Referred to: *R.* v. *Robinson* (1915), 79 J.P. 303; *R.* v. *Punch* (1927), 20 Cr. App. Rep. 18; *R.* v. *Oakes*, [1959] 2 All E.R. 92.

As to attempts to commit crimes and wounding with intent to maim, see 10 HALSBURY'S LAWS (3rd Edn.) 306–310, 734, 735; and for cases see 14 DIGEST (Repl.) 112–119, 15 DIGEST (Repl.) 984, 985.

Cases referred to:

(1) *R.* v. *Brown* (1889), 24 Q.B.D. 357; 59 L.J.M.C. 47; 61 L.T. 594; 54 J.P. 408; 38 W.R. 95; 15 Cox, C.C. 199, C.C.R.; 14 Digest (Repl.) 118, *814.*

(2) *R.* v. *St. George* (1840), 9 C. & P. 483; 14 Digest (Repl.) 115, *797*.
(3) *R.* v. *Lewis* (1840), 9 C. & P. 523; 14 Digest (Repl.) 115, *798*.
(4) *R.* v. *Duckworth*, [1892] 2 Q.B. 83; 66 L.T. 302; 56 J.P. 473; 40 W.R. 448; 8 T.L.R. 324; 36 Sol. Jo. 272; 17 Cox, C.C. 495, C.C.R.; 14 Digest (Repl.) 115, *800*.

Case Stated by JELF, J.

James Reginald Linneker was tried at the Derby Winter Assizes on Mar. 3, 1906, on an indictment charging him under the Offences Against the Person Act, 1861, ss. 14, 18, in the first count with feloniously attempting to discharge a certain revolver loaded with gunpowder and leaden bullets at one John Plowright Houston with intent to murder him; in the second count the same with intent to commit murder; and in the third count the same with intent to do the said John Plowright Houston some grievous bodily harm. The indictment did not contain the words "by drawing a trigger," nor did it specify any other manner in which the attempt was made, but no objection was taken to the indictment on this or any other ground, the only objection being, as hereinafter mentioned, that the evidence did not bring the case within the statute. By s. 14 of the Act of 1861:

> "Whosoever . . . shall shoot at any person, or shall, by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person . . . with intent . . . to commit murder shall, whether any bodily injury be effected or not, be guilty of felony. . . ."

By s. 18:

> "Whosoever shall unlawfully and maliciously . . . shoot at any person, or, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person with intent . . . to do . . . grievous bodily harm to any person . . . shall be guilty of felony. . . ."

The prisoner was convicted under the third count (sentence being postponed to the next assizes and the prisoner being admitted to bail meanwhile).

Mr. Houston was the general manager of the Bolsover Colliery. The prisoner, a young man in the employment of the colliery owners, interviewed Mr. Houston at his office on Feb. 16 on the subject of his chance of promotion in the service. There was no sort of quarrel between them. Presently, in answer to a question, Mr. Houston said: "Why did you ask me that question?" The prisoner said, "I am going to tell you why," and he at once put his right hand into his overcoat pocket and commenced to pull something out. Mr. Houston saw something glitter like silver (which turned out to be a six-barrelled revolver), and it at once struck him that there was going to be some mischief. As the prisoner got the revolver (five barrels of which were loaded) clear of his pocket, Mr. Houston jumped up from his chair, sprang on the prisoner, and was able to lay hold of his arm before he could raise it. They struggled for a few minutes. Once, when Mr. Houston tried to open the door, the prisoner nearly got his arm loose, his right hand holding the revolver. While they were struggling prisoner said several times "You've got to die." Eventually Mr. Houston wrested the revolver from him, and, with the assistance of another witness, took him to the police-station. On the way the prisoner said: "I shall very likely have to do time for this, but, whether it is long or short, I shall do for you when I come out." Mr. Houston said: "Why? what have I done to you?" and the prisoner said: "I think you have kept me back." Upon these facts it was submitted by counsel for the defence that there was no evidence of an attempt under the statute either with intent to murder or with intent to do grievous bodily harm. JELF, J., overruled the objection, and told the jury that if they thought the prisoner took the revolver out of his pocket for the purpose of shooting Mr. Houston, and that if he had not been interrupted he would have or probably would have accomplished that purpose, they might find him guilty of the attempt to discharge

the revolver at Mr. Houston either with intent to murder (first and second counts) or with intent to do grievous bodily harm (third count). The jury convicted him on the third count. No objection was taken to the language of the summing up, the only point being that there was no case within the statute.

The learned judge drew the attention of the court to the remarks of several members of the Court for the Consideration of Crown Cases Reserved in *R.* v. *Brown* (1) regarding *R.* v. *St. George* (2) and *R.* v. *Lewis* (3), which cases Stephen, J., had followed in *R.* v. *Brown* (1) (the decision of the Court for the Consideration of Crown Cases Reserved in the latter case being on a different point), and also *R.* v. *Duckworth* (4).

Moresby White for the Crown.—The conviction was right. There was evidence not merely of an intent, but of an attempt to discharge the revolver. It was not necessary to prove that the prisoner attempted to draw the trigger; it was sufficient to prove that he attempted to do all that a person intending to discharge a pistol would do. The evidence was that when he was stopped by the prosecutor, the prisoner was doing all the acts which would lead up to the discharge of the pistol at the prosecutor; that is evidence sufficient to support a conviction for the attempt.

[He referred to *R.* v. *Brown* (1); *R.* v. *Duckworth* (4).]

The prisoner was not represented.

LORD ALVERSTONE, C.J.—I am of opinion that this conviction must be affirmed. The prisoner was indicted for feloniously attempting to discharge a pistol loaded with gunpowder and bullets at the prosecutor. The indictment did not contain an allegation that the prisoner had attempted to discharge the pistol by drawing the trigger. The gist of the offence is an attempt to discharge a firearm with intent to do bodily harm, and it is necessary to distinguish between an intent and an attempt. It is not sufficient to establish an intention to shoot and possession of a pistol for that purpose. Was there in this case an attempt to discharge the revolver? It was loaded, the man had drawn it from his pocket, and he had risen from his chair and struggled with the prosecutor. It would be wrong not to hold that there had been an attempt to commit the crime. The attempt began when the prisoner drew the pistol from his pocket and struggled to get his arm free. The cases entirely support this view. *R.* v. *St. George* (2) was directly overruled by *R.* v. *Duckworth* (4). *R.* v. *Lewis* (3) does not touch this case, for there the weapon was not in a condition to be discharged. In *R.* v. *Brown* (1) the judge thought that he could not leave the case to the jury. All the judges in *R.* v. *Lewis* (3), doubting the soundness of the decision in *R.* v. *St. George* (2), while quashing the conviction, expressed the opinion that the case was not within s. 14. We have also, in the opinion we have formed in the present case, the support of the opinion of Stephen, J., and Huddleston, B.

KENNEDY, J.—I am of the same opinion. The evidence was sufficient to justify the jury in finding their verdict. It is, however, always necessary to see that the jury understand the distinction between an intent and an attempt.

RIDLEY, J.—I also agree. The sections in the Offences against the Person Act which deal with attempts to do bodily harm by shooting are repeated from the legislation previous to 1837, and are a deliberate re-enactment of their provisions.

DARLING, J.—I am of the same opinion. Sections 14 and 18 deal with two matters which constitute crime—intent and attempt. Attempt is proved by evidence as to what a man does with his hands. In this case the prisoner did all that a man intending to discharge a pistol would do if he was not hindered by somebody else. He pulled it out of his pocket, attempted to raise his arm to aim his weapon, and struggled to free himself from the grasp of the prosecutor in order that he might do this. It has been assumed that there was no evidence

of an attempt because no intent was proved. But there was in my opinion abundant evidence of intent.

WALTON, J.—The question we have to decide is: Was there evidence of an attempt to discharge this pistol? Every act is not an attempt; an act may be mere preparation. But in this case there was in my opinion evidence of an attempt.

Conviction affirmed.

Solicitor: *Mansfield M. Humble*, Chesterfield.

[*Reported by* A. A. Bethune, Esq., *Barrister-at-Law.*]

TORRENS AND ANOTHER *v.* WALKER

[Chancery Division (Warrington, J.), April 30, May 1, 1906]

[Reported [1906] 2 Ch. 166; 75 L.J.Ch. 645; 95 L.T. 409; 54 W.R. 584]

Landlord and Tenant—Repair—Liability of landlord—Covenant to repair—Need for notice of want of repair—Obligation of landlord to replace worn out parts of structure—Walls of old building—Bricks and mortar perished due to passage of time and the elements—Necessity to rebuild walls to make them safe.

There can be no breach of a landlord's covenant to repair until he has had notice of want of repair. **Semble,** notice must come from the lessee himself. Further, under a covenant to repair the landlord is not obliged to replace part of the structure that has become worn out by the passage of time and the elements, but need merely patch up the structure so far as it is reasonable to do so.

Where, therefore, unknown to the landlord and the tenant, the walls of a building, which was some two hundred years old, were found, on the demolition of adjoining premises, to be in a dangerous state, and, owing to the fact that the bricks and mortar had perished from the effect of time and the elements, the walls could not be made safe except by re-building them,

Held: the landlord was not in breach of his covenant to keep the outside of the building in good and substantial repair, and an action by the tenant for damages for breach of the covenant failed.

Makin v. *Watkinson* (1) (1870), L.R. 6 Exch. 25, applied.

Gutteridge v. *Munyard* (2) (1834), 7 C. & P. 129, and *Proudfoot* v. *Hart* (3), (1890), 25 Q.B.D. 42, applied.

Notes. Distinguished: *Lurcott* v. *Wakely*, [1911–13] All E.R.Rep. 41. Considered: *Hewitt* v. *Rowlands* (1924), 93 L.J.K.B. 729. Referred to: *Murphy* v. *Hurly*, [1922] All E.R.Rep. 169; *Griffin* v. *Pillett* (1925), 70 Sol. Jo. 110; *Bishop* v. *Consolidated London Properties, Ltd.*, [1933] All E.R.Rep. 963; *McCarrick* v. *Liverpool Corpn.*, [1946] 2 All E.R. 646.

As to covenants by a landlord to repair, see 23 Halsbury's Laws (3rd Edn.) 586, para. 1268; and for cases see 31 Digest (Repl.) 344 et seq.

Cases referred to:

(1) *Makin* v. *Watkinson* (1870), L.R. 6 Exch. 25; 40 L.J.Ex. 33; 23 L.T. 592; 19 W.R. 286; 31 Digest (Repl.) 346, *4768*.

(2) *Gutteridge* v. *Munyard* (1834), 7 C. & P. 129; 1 Mood. & R. 334; 31 Digest (Repl.) 358, *4892*.

(3) *Proudfoot* v. *Hart* (1890), 25 Q.B.D. 42; 59 L.J.Q.B. 389; 63 L.T. 171; 55 J.P. 20; 38 W.R. 730; 6 T.L.R. 305, C.A.; 31 Digest (Repl.) 359, *4900*.

(4) *Huggall* v. *McKean* (1884), 1 Cab. & El. 391; 1 T.L.R. 53; 33 W.R. 588; affirmed sub nom. *Hugall* v. *M'Lean* (1885), 53 L.T. 94; 33 W.R. 588; 1 T.L.R. 445, C.A.; 31 Digest (Repl.) 346, *4770*.

(5) *Lister* v. *Lane and Nesham*, [1893] 2 Q.B. 212; 62 L.J.Q.B. 583; 69 L.T. 176; 57 J.P. 725; 41 W.R. 626; 9 T.L.R. 503; 37 Sol. Jo. 558; 4 R. 474, C.A.; 31 Digest (Repl.) 358, *4893*.

Also referred to in argument:

Jacob v. *Down*, [1900] 2 Ch. 156; 69 L.J.Ch. 493; 83 L.T. 191; 64 J.P. 552; 48 W.R. 441; 44 Sol. Jo. 378; 31 Digest (Repl.) 540, *6635*.

Payne v. *Haine* (1847), 16 M. & W. 541; 16 L.J.Ex. 130; 8 L.T.O.S. 414; 153 E.R. 1304; sub nom. *Paine* v. *Hayne*, 11 J.P. 462; 31 Digest (Repl.) 359, *4895*.

Wright v. *Lawson* (1903), 68 J.P. 34; 19 T.L.R. 510, C.A.; 31 Digest (Repl.) 360, *4921*.

Action for breach of covenant to repair a house.

By an indenture of lease dated May 31, 1890, made between F. J. Dickes, of the one part, and Louisa Keeping, of the other part, the first, second, and third floors with two rooms and partial use of the kitchen in the basement and the yard, etc., of a dwelling-house, No. 8, Glasshouse Street, and No. 1, Sherwood Street, Regent Street, in the county of Middlesex, were demised to Louisa Keeping for the term of eighteen years from Mar. 25, 1890, at the yearly rent of £150. The lessee covenanted to keep the inside of the premises in good and substantial repair, to deliver up to the lessor at the determination of the term; to permit the lessor, his heirs or assigns, and his or their servants or agents, twice in every year during the term, at convenient hours in the daytime, to enter on the demised premises and view the state of repair, and that the lessee, her executors, administrators, or assigns would not at any time during the term carry on, or permit to be carried on, any trade or business on the premises, or permit the same to be occupied or used in any other manner than as a private hotel. The lessor covenanted to keep the outside of the premises in good and substantial repair. In January, 1905, the term of the lease was extended to Sept. 26, 1909. About the same time the lease was assigned to the plaintiff, Mary Torrens. Shortly afterwards the plaintiff sold the business of a private hotel, carried on by her on the demised premises to the Sherwood Hotels Co., Ltd., in which she held shares, and agreed to assign the lease to the company. No assignment was executed; and the plaintiff carried on the business as manager for the company, and held the lease as their trustee. The leasehold reversion had become vested in the defendant, Annie Louisa Walker.

In 1905, when the adjoining houses, Nos. 3 and 4, Sherwood Street, were pulled down, it was discovered that the plaintiff's house was in a very bad state of repair, and on July 13, 1905, London County Council served on the demised premises a notice under the London Building Acts, addressed to the owner, that having had a certificate of the district surveyor that the structure of the premises was in a dangerous state, the council required the owner to take down the front and back walls, so far as they were broken, decayed, and out of form, and the party wall next No. 3 Sherwood Street, so far as it was broken, decayed, bulged, and out of form; to do any other work rendered necessary by the foregoing work, and that, the case being urgent, the council had instructed their works department to shore up and hoard in the structure immediately. The demised premises were at once shored up by the council. On receipt of this notice the plaintiff at once informed the defendant thereof through her solicitor, and gave the defendant notice that the building was out of repair. Until the communication of the council neither

the plaintiff nor the defendant was aware of the dangerous state of the building. In August, 1905, the plaintiff closed the hotel. In October, Mary Torrens and the company commenced this action as co-plaintiffs against the defendant, asking for an injunction to restrain the defendant from keeping the outside wall of the demised premises out of repair and for damages. In November a magistrate's order was made requiring the owner to take down the walls according to the notice; this order was served on the plaintiff and communicated to the defendant, who made no attempt to comply with it. The plaintiff left the hotel shortly afterwards, whereupon the London County Council pulled down the front wall of all the stories above the first floor of the house and part of the back wall, and propped up the floors with timber.

At the hearing of the action, in which the claim was limited to damages, the trial judge, WARRINGTON, J., found the following facts. The demised premises were about 200 years old, were absolutely worn out, and had come to the end of their time. This condition was not due to any neglect on the part of the lessor, but to the effect of time and the elements on the materials used. The survey showed that the front wall was beyond repair and nothing could be done to make it safe without rebuilding. The bricks had come to such a state that they could not be used again, and the mortar was perished to such an extent that the whole of the wall above the first floor—i.e., the whole front wall of the demised premises—consisted of nothing but a heap of dry bricks. The back wall, being of much smaller extent, was not in such a bad condition, and parts of it might have been preserved; but the whole of the back wall above the level of the second floor would have had to be rebuilt, and it was very probable that when the work was begun it would be found necessary to rebuild both walls lower down, even below the level of the first floor. On July 13, 1905, repairing the building in the ordinary sense was impossible. Nothing could be done but to rebuild it. It was not merely that rebuilding was the course which a prudent owner would have adopted as the best, but it was the only practicable course to make the building stand.

Jenkins, K.C., and *H. Greenwood* for the plaintiff.
Upjohn, K.C., and *Manning* for the defendant.

It was submitted on behalf of the plaintiff that the lessor's covenant to repair imposed a liability to put the premises into repair if and when necessary. The fact that the premises were out of repair when demised was immaterial. As the lease required the premises to be used for a particular purpose, the lessor was bound to keep them in a state of repair reasonable for that purpose. For the defendant it was submitted there was no breach of covenant since a lessor's covenant to repair did not bind him to do any repairs until he had notice from the lessee that the repairs were needed. The defendant had no notice of want of repair until July 13, 1905, and by then it was impossible effectively to repair the walls.

WARRINGTON, J.—The only question in this case with which I propose to deal is the construction and effect of the covenant by the lessor.

> "that the lessor will at all times during the said term keep the outside of the said premises in good and substantial repair."

On those facts, what is the law? It is settled—at least, so far as I am concerned —that a covenant by a lessor to repair the external wall or any part of a building is a covenant to repair on notice and not otherwise. In *Makin* v. *Watkinson* (1) the point came before the Court of Exchequer in a very neat form. There the action was brought upon a covenant to keep the main walls, main timbers, and roofs of the said building in good and substantial repair, order, and condition, the same words as we have here with the addition of order and condition. There was a plea of no notice to which the plaintiff demurred. The court held that it was a good plea. It is important to see how BRAMWELL, B., who gave his

judgment with some reluctance, felt himself bound to come to this conclusion. He said (L.R. 6 Exch. at p. 28):

> "I am also of opinion that the plea is good. To hold it to be so we must hold the defendant's covenant to be a covenant to repair on notice. I have the strongest objection to interpolate words into a contract, and think we ought never to do so unless there is some cogent and almost irresistible reason for it, arising from the absurdity of the contract if it is read without them. Does such a reason, then, exist here? I think it does. I think that we are irresistibly driven to say that the parties cannot have intended so preposterous a covenant as that the defendant shall keep in repair that of which he has no means of ascertaining the condition."

CHANNELL, B., concurred, MARTIN, B., dissented. The point came before the Court of Appeal in *Huggall* v. *McKean* (4). There as here the lease contained a covenant by the lessee to repair the inside of the premises, and to allow the lessor to enter and view the state of repair. The jury found that the defendant did not know of the want of repair, but had the means of knowing. But when the case came before the Court of Appeal, BRETT, M.R., treated *Makin* v. *Watkinson* (1) as having settled the law and said that it had been followed in other cases, and no doubt many covenants in leases had been drawn upon the faith of the interpretation placed on the covenant in that case.

It is, therefore, not open to me to decide otherwise than that there was no breach of the covenant until the landlord had notice of the want of repair. It is not necessary to decide whether the notice must come from the tenant, but I think that it must be from the tenant and not aliunde. There was, therefore, no breach until July 13. Was there a breach afterwards? That depends on the state of the house at that date. I have stated the condition of the house, and I think there was no breach of the lessor's covenant to repair. It will be sufficient to take the law from *Lister* v. *Lane and Nesham* (5). I admit there is some difference between that case and this, but the principles there laid down substantially govern the law I have to apply. LORD ESHER says ([1893] 2 Q.B. at pp. 215, 216), quoting from SMITH'S LANDLORD AND TENANT (3rd Edn.), p. 302:

> "These cases establish that, where there is a general covenant to repair, the age and general condition of the house at the commencement of the tenancy are to be taken into consideration in considering whether the covenant has been broken; and that a tenant who enters upon an old house is not bound to leave it in the same state as if it were a new one. You have to consider not only what the damage is—what is the amount of repair required—but also whether the covenant has been broken."

That I take to be the right rule, and it is derived partly from the summing-up of TINDALL, C.J., in *Gutteridge* v. *Munyard* (2), which is always cited on this point. The learned Chief Justice said (1 Mood. & R. at p. 336):

> "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord."

The judgment of CAVE, J., in *Proudfoot* v. *Hart* (3) is much to the same effect. He says (25 Q.B.D. at pp. 45, 46):

> "So with regard to the walls, the floors, the doors, the windows, and all the different parts of the house, the tenant is bound where there is a breakage—whether arising from his own family or from some external accident—to repair it to the best of his ability; but he is never bound, when a portion of the structure has become absolutely worn out and necessary to be replaced, to

substitute a new structure in the place of it. All that he undertakes to do is to patch the thing up so long as it is, in the nature of things, right and reasonable that the thing should be patched up. But where it has got to such a state that patching up is of no avail—and we all know that things do at last get to that state—then the tenant is not bound to put in anything new, or to pay any proportion of the cost of putting in the new thing, because the old one has become unfit to discharge its duty."

Both those cases were decided on the liability of the lessee in respect of a lessee's covenant, and it is contended that they do not apply to a covenant by the lessor. But in my judgment there is no difference in principle. If the lessee is not bound to give back to the lessor at the end of the term a different thing from that which was demised to him, neither, in my judgment, is the lessor bound by a similar covenant to give to the lessee during the term a different thing from that which the lessee took from him at the beginning of his tenancy. If that distinction is unsound, every word of LORD ESHER, M.R.'s judgment in *Lister* v. *Lane* (5) applies to the present case, and to the state of this house on July 13, 1903. The house had got to the state described by CAVE, J., in the passage I have read when patching up was of no avail. It had by its own inherent nature fallen into the condition in which it was then found to be. Then repairs were impossible, and it was necessary to rebuild the front wall and the greater part of the back wall, to do which was not in the lessor's covenant. It is said I must put *Lister* v. *Lane* (5) out of account, because the state of the building in that case was stated to have arisen from faulty construction. That is true, and probably the collapse happened sooner than it would have done if the construction had been different. But in this case also the state of the house was the result ultimately of faulty construction. Houses can be built so as to last considerably more than 200 years without becoming dangerous. But the state of this house resulted from the effect of time upon the materials used, and the method of construction adopted. So in this respect also *Lister* v. *Lane* (5) is an authority in the defendant's favour. It is said that this construction will afflict great hardship on the lessee. But to construe the covenant the other way would inflict an equal hardship on the lessor. I must put aside all question of hardship, and can only look at the legal construction of the covenant. I decide, therefore, that there has been no breach of the covenant, and judgment must be given for the defendant with costs.

Judgment for defendant.

Solicitors: *Richardson, Sowerby, Holden & Co.*; *Claremont & Haynes.*

[*Reported by* D. R. CHALMERS-HUNT, ESQ., *Barrister-at-Law.*]

LETHBRIDGE *v.* ATTORNEY-GENERAL

[House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Robertson, and Lord Atkinson), June 26, 28, December 3, 1906]

[Reported [1907] A.C. 19; 76 L.J.K.B. 84; 95 L.T. 842; 23 T.L.R. 123]

Estate Duty—Property passing on death—Property deemed to pass—Interest "provided" by deceased—Life policies assigned to son under deed of family arrangement—Payment of premiums out of father's estate—Policies assigned in return for son mortgaging inheritance to pay off charges on policies and father's estate—Liability to duty on moneys received under policies—Full consideration given by son for assignment and annual payments out of father's estate—Finance Act, 1894 (57 & 58 *Vict.*, *c.* 30), *s.* 2 (1) (d).

Pursuant to a family arrangement made between a father and his son in order to pay off charges of £59,000 on the father's life interest and on certain policies on the father's life, the son barred the entail and mortgaged his inheritance for £71,000. In return the father assigned the policies to the son (who had paid off the charges thereon) and settled the estate on trust to pay the son out of his life interest an annuity of £1,000 and an annual sum sufficient to pay the premiums on the policies. It was provided that even if the son surrendered the policies the amount of the premiums would still be paid to him out of the father's estate. The son kept up the policies, paying the premiums out of the annual sum from the father's estate. On the father's death estate duty was claimed under s. 2 (1) (d) of the Finance Act, 1894, on the moneys received under the policies.

Held: the policies did not constitute an "interest . . . provided by the deceased" within the meaning of s. 2 (1) (d); the son had given full consideration in money or money's worth for the policies and for the annual sum for their upkeep paid to him out of the father's estate; and, therefore, estate duty was not payable.

Per Lord Loreburn, L.C.: The fact that a transaction is a family arrangement is not inconsistent with its also being a purchase for full consideration in money or money's worth: accordingly, assuming that the policies had fallen within s. 2 (1) (d) of the Finance Act, 1894, they would still have been exempted from estate duty by virtue of s. 3 (1) of that Act on the ground that there had been a purchase for full consideration within the meaning of that section.

Notes. Applied: *A.-G.* v. *Sandwich*, [1922] 2 K.B. 500. Considered: *A.-G.* v. *Oldham*, [1940] 2 All E.R. 321; *Ward* v. *I.R.Comrs.*, [1956] 1 All E.R. 571. Distinguished: *Childs Trustee Co.* v. *I.R.Comrs.*, [1960] 2 All E.R. 209. Referred to: *A.-G.* v. *Parr*, [1924] 1 K.B. 916; *Re Bateman*, [1925] 2 K.B. 429; *A.-G.* v. *Kitchin*, [1941] 2 All E.R. 374; *Westminster Bank* v. *I.R.Comrs.*, [1957] 2 All E.R. 745.

As to annuities and interests provided by the deceased, see 15 Halsbury's Laws (3rd Edn.) 25–27; and for cases see 21 Digest 15, 16. For the Finance Act, 1894, s. 2 (1) (d), see 9 Halsbury's Statutes (2nd Edn.) 350.

Cases referred to:

(1) *Lord Advocate* v. *Earl of Fife* (1883), 11 R. 222; 21 S.L.R. 151; 21 Digest 102, *754 i.*

(2) *A.-G.* v. *Hawkins*, [1901] 1 K.B. 285; 70 L.J.Q.B. 195; 83 L.T. 531; 64 J.P. 791; 49 W.R. 320; 17 T.L.R. 85; 45 Sol. Jo. 80, D.C.; 21 Digest 15, *76.*

(3) *Brown* v. *A.-G.* (1898), 79 L.T. 572; 15 T.L.R. 109, H.L.; 21 Digest 104, *765.*

Appeal from a decision of the Court of Appeal (Sir Richard Henn Collins, M.R., Mathew, and Cozens-Hardy, L.JJ.), reported [1905] 2 K.B. 323, reversing a decision of Phillimore, J., reported 92 L.T. 88, on an information claiming estate duty under the Finance Act, 1894, ss. 1 and 2 (1) (c) and 2 (1) (d). Phillimore, J., gave judgment for the defendant.

The question was whether the proceeds of certain policies effected on the life of Sir W. A. Lethbridge, who died on Nov. 26, 1902, were, under s. 2 (1) (d) of the Finance Act, 1894, subject to estate duty. By that enactment:

> "Property passing on the death of the deceased shall be deemed to include . . . (d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

By an indenture of Mar. 4, 1885, which was part of a family arrangement between Sir W. A. Lethbridge and his son, the appellant, Sir W. P. C. Lethbridge, the family estates were disentailed and settled on such trusts as the father and son should jointly appoint, and on default of appointment on certain other trusts. At this date the father had raised about £59,000 on his life estate and certain policies of assurance. As a further part of the arrangement the property was mortgaged for £71,000, and the policies were reassigned to Sir W. A. Lethbridge. On Aug. 19, 1885, the father, as part of the family arrangement, assigned the policies to his son, the appellant. On the same date the estates were settled on trust for payment of an annuity of £1,000 to the son, and other charges, interest on the mortgage debt of £71,000, and payment of the premiums on the fifteen policies of assurance in question in this appeal and on further trusts. By an indenture of Sept. 8, 1898, for the considerations therein mentioned, Sir W. A. Lethbridge surrendered his life estate to the appellant, subject to the mortgage and the trust for keeping the fifteen policies on foot, so far as was necessary for the protection and security of the mortgagees. The appellant continued to pay the premiums on his father's policies from the date of this merger of the life estate in his own reversion. On Jan. 8, 1902, the appellant paid off the mortgages on the policies and obtained an assignment of the fifteen policies, which were thus unencumbered. The Crown claimed estate duty on the moneys received in respect of the policies.

M. Lush, K.C., and *à Beckett Terrell* for the appellant.

The Attorney-General (Sir J. Lawson Walton, K.C.), Sir R. Finlay, K.C., and *Vaughan Hawkins* for the respondent.

Their Lordships took time for consideration.

Dec. 3, 1906. The following opinions were read.

LORD LOREBURN, L.C. The question raised by this appeal is whether estate duty should be paid on a sum of money received in discharge of fifteen life policies which fell due on the death of Sir Wroth Lethbridge, deceased. I will call him the father, for the present appellant, his son, is also Sir Wroth Lethbridge.

The father originally effected these fifteen policies on his own life, and, after maintaining them for some time, assigned them to his son under a family arrangement, or series of arrangements, necessitated by his (the father's) pecuniary difficulties. In substance it came to this, that the son mortgaged his inheritance in the family estates to save his father, and the father in return assigned these policies, together with an annual sum out of his life interest in the same estates sufficient to pay the premiums, and also to pay an annuity to the son during their joint lives. In my opinion we have nothing to do with these transactions beyond what suffices to answer this question—Did the son give in money or money's worth full consideration for the policies and the other advantages which he acquired under the arrangement? It is indisputable that he gave full value and more. He made sacrifices as a son for his father's sake. Having

taken over these policies the son might have allowed them to lapse. He preferred to keep them alive, and paid the premiums, in substance, out of the moneys which he received annually from the life interest of his father pursuant to the family arrangements. He might have spent that money otherwise had he pleased, but even if he had not been free to spend it as he liked, that circumstance would have made no difference in my opinion. The son had given full value for the annual payments which were to be made to him out of the life estate. Therefore, it could not be said that the father was keeping up the premiums on these policies, though the money which kept them up came out of the life estate.

In these circumstances it was argued for the Crown that under s. 2 (1) (d) of the Finance Act, 1894, the fifteen policies constituted an interest purchased or provided by the father by an arrangement with the son, and that estate duty was accordingly payable. That was the only ground upon which the Crown rested a claim. The general purpose of this sub-section is to prevent a man from escaping estate duty by subtracting from his means, during life, moneys or money's worth which, when he dies, are to reappear in the form of a beneficial interest accruing or arising on his death. Now it is not subtracting from his means if the deceased has received a full equivalent in return for whatever he has laid out. In this case from the date when the policies were assigned, and the obligation to find out of the life estate enough to pay the premiums was created (for all of which full value was given), no further liability was incurred, nor sacrifice made by the father in connection with these policies. He purchased nothing and he provided nothing. He was compensated for what he originally expended in acquiring and maintaining the policies till their assignment; and also for what he stipulated by the family arrangements to do in future years, by the consideration proceeding from the son, and thenceforward he had no title to nor concern with the policies. I desire to limit my opinion to that ground. There may be cases where the deceased has not so fully cut himself and his estate adrift from the interest which he originally created, and yet no estate duty may be payable. But in this case it is exactly the same as if the father had never been concerned in the policies at all, and had never paid a single premium, for he parted with the whole thing to a purchaser. Accordingly the sub-section, in my opinion, has no application to the case, and the appeal prevails.

I am not quite sure that I rightly interpret what COZENS-HARDY, L.J., says in regard to family arrangements. No doubt courts of equity will sustain such arrangements if they can to save the family honour, and apart from the adequacy of the consideration on either side. But if in any proceeding it be relevant to inquire whether the consideration for assigning property was adequate or not, that can be ascertained as well in a case of family arrangement as in any other, and in the same way. The fact that the transaction was a family arrangement is not inconsistent with its being also a purchase for full consideration in money or money's worth. If I thought that the case fell within s. 2 (1) (d) (as I do not), I should still think that these policies were exempted from estate duty by virtue of s. 3 (1) of the same Act upon the ground that there had been a purchase for full value within the meaning of that section. But in the view which I take this point does not arise.

LORD MACNAGHTEN.—The learned judges of the Court of Appeal, differing from PHILLIMORE, J., hold that "estate duty must be paid on the full amount received in respect of the fifteen policies" on the life of the late Sir Wroth Acland Lethbridge, which were made over to his son in pursuance of a family arrangement when the Lethbridge estates were resettled in 1885. Their view is that

> "the fifteen policies were 'provided' by the father, by arrangement with the son, by means of the application of part of his income in paying the premiums which kept the policies alive."

They consider that the case comes under s. 2 (1) (d) of the Finance Act, 1894. They say that if nothing had occurred to disturb the arrangement and

> "the policies had been kept up under the trust of 1885 until the father's death in November, 1902, the case would clearly have fallen within sub-s. (1) (d)."

The learned judges then proceed to consider the subsequent dealings between father and son, and the purchase of the father's life interest by the son in 1898.

I do not propose to trouble your Lordships with any observations on the latter part of the judgment of the Court of Appeal, because it appears to me that the policies were not "provided" by the father within the meaning of that expression in the Act. It was not by the father's gift or at his cost or by means of any expenditure on his part that the policies were vested in the son. After they became vested in the son they were, as it seems to me, kept up at the son's sole expense, and not to any extent or in any sense by the application of any part of the father's income. The policies which had been effected in support of a charge on the father's life interest were redeemed by moneys raised by a charge upon the inheritance. The son, in my opinion, acquired them by purchase. He gave far more than they were worth. Any respectable insurance company would have dealt with him on much easier terms. If pecuniary considerations alone are to be regarded, the transaction seems to have been a most disadvantageous bargain for the son. However that may be, the son undoubtedly gave valuable consideration for the policies, and they were made over to him absolutely. The learned judges of the Court of Appeal seem to think that after the policies were assigned to the son the father still retained some interest in them or some concern in the arrangement which they describe as "the trust of 1885." They intimate that it would have been the duty of the trustees to apply any bonus declared on a policy in reduction of the annual premium. With the utmost deference, it seems to me that there is no foundation for this view. All moneys assured by or to become payable by or under the said policies—all bonuses accrued or to accrue—became by assignment for valuable consideration the absolute property of the son and payable to him alone. Neither the father nor the trustees could have prevented the son from receiving a bonus or compelled him to apply a bonus in reduction of the premium.

The only other question is what was the position of the son with regard to the annual sums which, in pursuance of the family arrangement of 1885, were to be devoted to keeping up the policies. In my opinion they belonged to the son and to no one else. The Court of Appeal say that,

> "in one event only could the son claim to be paid the £864—namely, in the event of his electing to surrender the policies."

There, with all respect, I differ. It seems to me that the son could have called upon the trustees to hand over the £864 to him whether the policies were surrendered or not. There was no trust in favour of the father or any one else—only a direction or order in the performance of which no one but the son could be interested, and he could therefore countermand it. No doubt the trustees would have made a difficulty about it. Probably they would have declined to hand the money over without the sanction of the court, and they would have been justified in so doing. The whole object of this elaborate arrangement was to prevent the son from looking upon the sums intended to be applied to keeping up the policies, and so preserving or restoring the family property, as part of his own income which he was free to spend as he liked. If the case does not fall under s. 2 (1) (d) it is not suggested that the policy moneys are caught by any other provision in the Act. In the result, therefore, I am of the opinion that the appeal ought to be allowed and the judgment of PHILLIMORE, J., restored, with costs here and below.

LORD ROBERTSON.—I agree with the judgment of the Lord Chancellor.

LORD ATKINSON.—I concur in the opinion that the decision of the Court of Appeal in this case was wrong and should be reversed, and that the decision of PHILLIMORE, J., should be restored. It has been decided many times that, in dealing with questions raised by the Finance Act, 1894, and the Succession Duty Acts, regard should be had to the substance of the transactions on which these questions turn rather than to the forms of conveyancing which the parties to them may have adopted in order to carry out their objects. If, in this case, the arrangements entered into between the appellant and his father in 1885 be so regarded, they appear to me, in substance and effect, to amount to this—that in consideration that the appellant would burden his inheritance with the sum of £71,000, fifteen policies of assurance were assigned to him, and an annuity amounting to £1,000, plus a sum equal to the amount of the premiums on those policies, was made payable to him, or for his use and benefit, out of the rents of the estate annually, during the joint lives of himself and his father. No doubt the deed of Aug. 19, 1885, created a trust to raise and pay out of the rents the premiums on these policies, but it was entirely optional with the appellant whether the policies were kept up or not. If he elected to surrender them or any of them, he would not only retain the surrender value for his own purpose, but his annuity of £1,000 per annum would be augmented by a sum equal in amount to the premiums on the policies surrendered. In a financial point of view the bargain must, I think, be taken to have been a bad one for the appellant. The moneys secured by the policies, including all the bonuses declared up to the month of June, 1885, only amounted to the sum of £30,067 4s. 2d. Their surrender value on Aug. 19, 1885, is not stated, but it must, one would think, have been considerably less than £30,000. If, therefore, the appellant had surrendered all the policies immediately after they were assigned to him, as he was quite entitled to do, and had applied the money received, assuming it to amount to £30,000, in part discharge of the mortgage debt of £71,000, the financial position would have been this: His inheritance would have remained charged with £41,000, and he would have been entitled in consideration of that charge to receive, during the joint lives of himself and his father, an annuity of £1,864, about 4½ per cent. on the amount of the encumbrance. The appellant undoubtedly gave full value in money or money's worth for all the benefits which he received. If Sir W. A. Lethbridge and the appellant had been strangers to each other, or merely friends, instead of being father and son, it would not, I think, be contended that these policies were not purchased for money or money's worth within the meaning of s. 3 of the Finance Act, 1894; but because filial affection, or family pride, or a desire to relieve a father from embarrassment, may have induced the appellant to make this bargain, and to pay an extravagant price for the benefits which he received under it, it is urged that the transaction is to be treated as a family arrangement, and not as a purchase at all. I think that to do so is to confound the motive which induces to a transaction with the transaction itself; and I utterly fail to see how a transaction which would be regarded as a purchase if it took place between strangers, and would therefore be outside the Act, is to be brought within the Act because the parties to it were members of the same family, and the interests or honour of the family induced to or were promoted or protected by it. It is clear from sub-s. (2) of s. 3 that a transaction may amount to a purchase, though the consideration given may comprise something in addition to money or money's worth. In that respect s. 3 differs altogether from s. 17 of the Succession Duty Act, 1853 [repealed]. I think that the case is covered on this point by the decision in *Lord Advocate* v. *Earl of Fife* (1). The fact that the policies of assurance were assigned out and out to the appellant distinguishes this case from *A.-G.* v. *Hawkins* (2). It is plain from the judgments of the learned judges in this latter case that if anything of the kind had existed there the decision would have been against the Crown: see *Brown* v. *A.-G.* (3). For the reasons mentioned by the Lord Chancellor and

LORD MACNAGHTEN, this case does not, in my opinion, fall within s. 2, sub-s. (1) (d). I am, therefore of opinion that the appeal should be allowed, and the decision of PHILLIMORE, J., restored.

LORD LOREBURN, L.C.—LORD JAMES OF HEREFORD, who is unable to be present to-day, concurs in the opinion that our judgment ought to be for the appellant.

Appeal allowed.

Solicitors: *Toulmin & Chitty; Sir F. C. Gore, Solicitor of Inland Revenue.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law*]

MOORE, NETTLEFOLD & CO. *v.* SINGER MANUFACTURING CO.

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.), March 11, 14, 1904]

[Reported [1904] 1 K.B. 820; 73 L.J.K.B. 457; 90 L.T. 469; 68 J.P. 369; 52 W.R. 385; 20 T.L.R. 366; 48 Sol. Jo. 328]

Distress—For rent—Sale of goods distrained—Sale by auction—Purchase of goods by landlord—Distress for Rent Act, 1689 (2 *Will. & Mar., c.* 5), *s.* 1.

A sale of goods distrained under the Distress for Rent Act, 1689, s. 1, must be a sale to a third party; accordingly, a landlord cannot himself purchase the goods distrained, even though they are sold by auction.

Dictum of BLACKBURN, J., in *King* v. *England* (1) (1864), 4 B. & S. 782, approved.

Decision of the Divisional Court, [1903] 2 K.B. 168, affirmed.

Notes. Followed: *Plasycoed Collieries Co.* v. *Partridge, Jones & Co.*, [1912] 2 K.B. 345.

As to sale of distress, see 12 HALSBURY'S LAWS (3rd Edn.) 142 et seq.; and for cases see 18 DIGEST (Repl.) 340 et seq. For the Distress for Rent Act, 1689, see 6 HALSBURY'S STATUTES (2nd Edn.) 143.

Case referred to:

(1) *King* v. *England* (1864), 4 B. & S. 782; 3 New Rep. 376; 33 L.J.Q.B. 145; 9 L.T. 645; 28 J.P. 230; 10 Jur.N.S. 634; 12 W.R. 308; 122 E.R. 654; 18 Digest (Repl.) 342, *905*.

Also referred to in argument:

R. v. *Cotton* (1751), Park. 112; 2 Ves. Sen. 288; 145 E.R. 729; 18 Digest (Repl.) 333, *795*.

Emmerson v. *Heelis* (1809), 2 Taunt. 38; 127 E.R. 989; 3 Digest (Repl.) 8, *59*.

Bishop v. *Bryant* (1834), 6 C. & P. 484, N.P.; 18 Digest (Repl.) 329, *746*.

Rocke v. *Hills* (1887), 3 T.L.R. 298; 18 Digest (Repl.) 331, *779*.

Appeal from a judgment of the Divisional Court (LORD ALVERSTONE, C.J., WILLS and CHANNELL, JJ.), reversing a decision of the judge of the Shoreditch County Court in an action brought for the conversion of a sewing machine valued at £17.

In March, 1902, the defendants let a sewing machine valued at £17 on the hire-purchase system to one Anton, the agreement containing a clause providing that the defendants should have power to seize the machine if the instalments should at any time be in arrear. Anton was a tenant of the plaintiffs, and, in July, 1902, was in arrear with his rent. The plaintiffs distrained for the rent, and seized the sewing machine. The sewing machine was put up to auction, and was bought by the plaintiffs, who then re-let it out to Anton on the hire-purchase system. In October, 1902, Anton made default in payment of the instalments due under his hire-purchase agreement with the defendants, and the defendants, in pursuance of the power contained in the agreement, seized the machine. The plaintiffs brought this action for conversion of the machine.

The county court judge held that the purchase of the machine by the plaintiffs at the auction was a valid purchase, that the property in the machine was in the plaintiffs, and gave judgment accordingly. On appeal by the defendants, the Divisional Court held that a landlord could not himself purchase goods that he had distrained for rent when they were sold by auction, and that, as the plaintiffs' purchase of the machine was invalid, the defendants were entitled to judgment. The plaintiffs appealed.

Montague Lush, *K.C.*, and *Arthur Page* (*Lincoln Reed* with them) for the plaintiffs.

Hugo Young, *K.C.*, and *Lawless* for the defendants.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal against a decision of the Divisional Court on a question arising out of a distress for rent put in by the plaintiffs as landlords. They seized among other things a sewing machine which had been let out on hire to the tenant by the defendants, and, on the machine being put up for sale by public auction, they bought it in at what was apparently a fair price and re-let on the hire-purchase system to their tenant. The defendants, a sewing-machine company who had originally let out the machine to the tenant on the hire-purchase system, seized the machine for default of instalments under their powers under their agreement. The landlords have brought this action against the defendants for conversion of the machine. That raises the question whether the landlords have any title to the machine. It seems to me that the case is really on all fours with *King* v. *England* (1). In that case, there had been an appraisement of the goods distrained, as was then necessary, and the landlord took over the goods at the appraised value with the consent of the tenant, the goods being at the time of the distress the property of a third person. The true owner of the goods then seized them, and the result was an action against him for conversion, in the same way as in the present case. The only difference is that in this case the formality of a sale by auction took place. But still the substance is the same; namely, a sale by the landlord to himself. By the Distress for Rent Act, 1689, s. 1, the landlord is to sell the goods distrained. It is true that the auctioneer selling at an auction is, for certain purposes, considered as agent both for vendor and purchaser, but primarily he is the agent of the vendor. The mischief in the present case is the same as in *King* v. *England* (1)—namely, the landlord being both seller and buyer—and that mischief was pointed out in that case by BLACKBURN, J., and in the present case by WILLS, J. It seems to me that, both on principle and authority, the decision of the Divisional Court was right, and that this appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. The case is really the same as *King* v. *England* (1). The Distress for Rent Act, 1689, s. 1, makes the matter quite clear. Under that statute the landlord is empowered to sell the goods he has distrained for rent. A sale clearly means a sale to someone else. It is said that there was a sale because there was an auction. An auctioneer is the agent of the landlord to effect the sale, and he may be the agent of the buyer to record

the sale. But, in the present case, there was no one but the landlord in the so-called sale. The case is clearly within the authority of *King* v. *England* (1), and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *James Morley*; *Gilbert Wansbrough.*

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

CASSWELL AND ANOTHER *v.* CHESHIRE LINES COMMITTEE

[King's Bench Division (Darling and A. T. Lawrence, JJ.), May 30, June 3, 1907]

[Reported [1907] 2 K.B. 499; 75 L.J.K.B. 734; 97 L.T. 209; 23 T.L.R. 580; 51 Sol. Jo. 532]

Carriage of Goods—Railway—Passengers' hand luggage—Ordinary personal luggage carried free of charge—Articles exceeding £10 in value—Liability for loss—Carriers Act, 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 68), *s.* 1, *s.* 2.

The plaintiffs, a husband and wife, who were passengers on the defendants' railway, took with them a box containing ordinary luggage which they were entitled to have carried free of charge according to a statement in the time-table of the railway company. Part of the contents of the box consisted of articles of jewellery which exceeded £10 in value, as to which no declaration was made under s. 1, or additional charge paid under s. 2 of the Carriers Act, 1830. The box and its contents were lost during the course of the journey. In an action by the plaintiffs to recover its value,

Held: the special contract entered into with the railway company, by which the company undertook to carry a specified amount of ordinary personal luggage free of charge, was not inconsistent with the right of the company to make an increased charge in respect of such articles as those enumerated in s. 1 of the Carriers Act, 1830, and, therefore, the railway company was not liable for the loss of the jewellery.

Notes. As to liability of carriers for loss of passenger's luggage, see 4 Halsbury's Laws (3rd Edn.) 168 et seq.; and for cases see 8 Digest (Repl.) 128 et seq. For the Carriers Act, 1830, s. 1 and s. 2, see 2 Halsbury's Statutes (2nd Edn.) 804, 807.

Cases referred to:

(1) *Macrow* v. *Great Western Rail. Co.* (1871), L.R. 6 Q.B. 612; 40 L.J.Q.B. 300; 24 T.L.R. 618; 35 J.P. 678; 19 W.R. 873; 8 Digest (Repl.) 129, *824.*

(2) *Hudston* v. *Midland Rail. Co.* (1869), L.R. 4 Q.B. 366; 10 B. & S. 504; 38 L.J.Q.B. 213; 20 L.T. 526; 33 J.P. 453; 17 W.R. 705; 8 Digest (Repl.) 129, *823.*

Also referred to in argument:

Pianciani v. *London and South Western Rail. Co.* (1856), 18 C.B. 226; 139 E.R. 1354; 8 Digest (Repl.) 50, *311.*

Le Conteur v. *London and South Western Rail. Co.* (1865), L.R. 1 Q.B. 54; 6 B. & S. 961; 35 L.J.Q.B. 40; 13 L.T. 325; 30 J.P. 148; 12 Jur.N.S. 266; 14 W.R. 80; 122 E.R. 1448; 8 Digest (Repl.) 50, *312.*

Flowers v. *South Eastern Rail. Co.* (1867), 16 L.T. 329; 31 J.P. 598; 8 Digest (Repl.) 52, *340.*

Dyke v. *South Eastern and Chatham Railways Managing Committee* (1901), 17 T.L.R. 651; 8 Digest (Repl.) 52, *326.*

Appeal by the defendant railway company from a decision of His Honour JUDGE SHAND, sitting at the Carlisle County Court.

The plaintiffs, husband and wife, brought an action against the defendants, a railway company, to recover damages for the loss of a bag containing various articles of jewellery and valuables belonging to the wife, amounting to more than £10 in value. No declaration was made in respect of the articles, and no charge was paid by the plaintiffs for the carriage of their luggage. The defendants, by their defence, set up that certain of the articles in question were of such a nature as to come within the terms of s. 1 of the Carriers Act, 1830, and that, as the requirements of that section had not been complied with, they were exempted from liability in respect of the loss of the articles in question. The defendant railway company's time-table contained the following provision:

> "First class ordinary and tourist passengers are allowed 150 lb. and third class ordinary and tourist passengers 100 lb. of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge."

The learned county court judge found that the box was duly placed in the defendant railway company's van, and was in their custody at the time of its loss; that the articles which the box contained formed the ordinary articles for the plaintiffs' use and were their personal luggage. He was of opinion that the Carriers Act, 1830, s. 1, did not apply to the ordinary personal luggage of passengers which railway companies within certain specified rates were bound to carry free and gave judgment for the plaintiffs for £49 3s. 2d.

By the Carriers Act, 1830, s. 1:

> "No mail contractor . . . or other common carrier by . . . land for hire shall be liable for the loss of or injury to any article or articles or property [of certain specified descriptions] contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger . . . when the value of such article or articles of property aforesaid . . . shall exceed the sum of £10 . . . unless at the time of the delivery thereof . . . the value and nature of such article or articles shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

Section 2 provides for the payment, in the circumstances set out in the previous section of

> "an increased rate or charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office . . . stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles . . ."

C. A. Russell, K.C., and *J. A. Simon* for the defendants.
Atkinson for the plaintiffs.

DARLING, J.—This case raises a question of very great importance to all persons who travel by railway. Speaking for myself, I find the question a very difficult one, and I do not for a moment suppose that our judgment will conclude the matter.

The question arises in this way. The plaintiffs, who are husband and wife, were travelling, and in the wife's box were a variety of things in the nature of jewellery and valuables such as are enumerated in s. 1 of the Carriers Act, 1830. I cannot imagine a case less favourable for a railway company to fight than the present, as the articles in question are not of very great value, although they are things enumerated in s. 1 of the Act and exceed £10 in value. The county court judge found that the things which are in dispute are all things coming properly within the definition of "ordinary personal luggage" of the

plaintiffs, and, as there was evidence before the judge on which he could come to that conclusion as a matter of fact, we cannot say that he was wrong in so finding. Therefore, we must deal with the case on the footing that all these things were ordinary personal luggage.

That being so, we are met with this difficulty. The defendant railway company set up s. 1 of the Carriers Act and say, "We are not liable because these things are over £10 in value, and they are the kind of things enumerated in the Act, and you have not declared them so that we might make an increased charge in respect of them." In ordinary circumstances, that would be a perfectly good answer, because s. 1 is aimed not only at things put into a train unaccompanied by the passenger, but to things which are accompanied by him. The answer, made on behalf of the plaintiffs is that the Carriers Act does not apply, because here there was a special contract, and it is perfectly within the competence of persons who otherwise would come within the Carriers Act to contract themselves out of the Act. If that were not so by the common law, it is plain that it is so by s. 6 of the Act, which provides that

> "nothing in this Act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandises."

The plaintiffs contend that the defendant railway company made a special contract with them, and I think they did. The special contract is contained in the time-table of the defendant railway company, which provides that

> "First class ordinary and tourist passengers are allowed 150lb. and third class ordinary and tourist passengers 100lb. of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge."

In addition to this clause in the time-table, there are expressions in some of the Acts of Parliament applicable to this case in which the words "ordinary personal luggage" are used, and that is why the judge found that these things were part of the ordinary personal luggage of the plaintiffs.

Counsel for the plaintiffs contended that this was a special contract to carry these things free; that they are ordinary personal luggage and there is a contract that, because they are ordinary personal luggage, they shall be carried free, and that, if a special charge is made for any portion of them because they are the kind of things enumerated in the Carriers Act, they are not being carried free. I was for some time inclined to think that that was right, but it is difficult to take that view, because it has obviously never been the opinion of courts of law. The point has never been absolutely raised and decided in its present form, but it has been decided by implication in *Macrow* v. *Great Western Rail. Co.* (1), where the court made it perfectly plain that they had this matter in their minds. The court consisted of Cockburn, C.J., and Blackburn and Mellor, JJ. Cockburn, C.J., delivered the judgment. He says (L.R. 6 Q.B. at p. 618):

> "The conveyance of the personal luggage of the passenger being obviously for his convenience, and, therefore, accessory, as it were, to his conveyance, it may be thought that the liability of the carrier in respect of the safe conveyance of passengers' luggage should have been co-extensive only with the liability in respect of the safety of the passenger. The law, however, is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carriers of passengers . . ."

the difference, of course, being that, in the one case they are insurers and in the other not. Later, he says (ibid. at p. 621):

> "While the authorities referred to establish that a passenger cannot claim to have carried as ordinary personal luggage articles unconnected with the

personal use and convenience of the traveller, or, as in *Hudston* v. *Midland Rail. Co.* (2), of such a size and shape as that they cannot reasonably be carried as luggage, we hold the true rule to be that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament—leaving the carrier herein to the protection of the Carriers Act, to which, being held to be liable in respect of passengers' luggage as a carrier of goods, he undoubtedly becomes entitled—but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying."

It is plain from this that the Chief Justice and the court considered that where luggage is being carried free, and where it is ordinary personal luggage of the traveller, still if it consists in part of such things as are enumerated in the Carriers Act, and if that part is over the value of £10, then the protection of the Carriers Act would be given to the railway company. Counsel for the plaintiffs' answer was that that passage was obiter dictum. That is true, but it is the obiter dictum of the Court of Queen's Bench, and of two certainly exceptionally distinguished members of the court of that day. I should myself, but for reasons to which I will allude, come to the conclusion that counsel is right when he says that there is a special contract which deprives the defendant railway company of the right to set up the Carriers Act if I could see that the special contract applies to this matter. I think the answer is that the special contract does not cover this point. The special contract is one that the defendant railway company will allow the traveller 150lb., let us say, of luggage—free in this sense, that it shall be carried as far as he goes without charge being made for the carrying of the luggage, but it does not say whether a charge is or is not to be made for anything else.

Then comes s. 1 of the Carriers Act. That section provides for an increased charge, but it does not say what it is for. It does not say that it is for carrying the goods, and what has been alluded to in the earlier part of the section is whether the carrier is to be responsible for loss. The words "hereinafter mentioned" refer to s. 2, which provides for the payment of an increased rate or charge

> "over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles."

The words to be noted are "over and above the ordinary rate of carriage" and "for the safe conveyance of such valuable articles." The ordinary rate of carriage is nothing at all in this case. Then, in respect of what is the sum which is expressed to be paid over and above paid for? Not for the carriage of the goods, but as compensation for the greater risk and care to be taken of them. Not for their conveyance, but for their safe conveyance.

I come to the conclusion, therefore, that this special contract does not cover the same circumstances as s. 1 and s. 2 of the Carriers Act. The special contract relates to the charge for the carriage of the goods. It does not relate even to that in any particular way. It relates to whether the carrier is to charge for the carriage or whether he is not. The Carriers Act does not enable the carrier to make a charge for the carriage of the goods at all, but it allows him to make an increased charge as compensation for the greater risk and care to be taken for the safe conveyance of such articles as these, and I come to the conclusion that the increased charge is a charge for the insurance of the articles. The carrier undertakes that, if this additional charge is made, he will compensate the owner for the loss of these articles, no matter how the loss arises. That is what an insurer does. I have come to the conclusion that the special contract is not inconsistent

with these sections of the Carriers Act, and, therefore, the defendants are entitled to the protection of the Act, and these articles not having been notified and an increased charge made for them, the plaintiffs are not entitled to recover, and the appeal must, therefore, be allowed.

A. T. LAWRENCE, J.—I am of the same opinion, and substantially for the same reasons. It seems to me that the decisions extending over a long number of years make it impossible now to say that the Carriers Act, 1830, does not apply to the personal luggage of a passenger. Counsel for the plaintiffs' argument is that the subsequent Acts which deal with the ordinary luggage of a passenger to be carried free amount practically to a repeal of the protection accorded to the carrier by the Carriers Act, provided that the passenger can show that the articles carried are such as would ordinarily come within the definition of ordinary luggage. I think that that is not the true interpretation of the subsequent Acts or of the contract, which, it is admitted here, is in effect made pursuant to some of those Acts. The special contract is that a passenger shall be carried with a certain amount of luggage free of charge in each case. I do not think that that means that the luggage is carried free in the most absolute sense; it means that the fare covers the carriage of the passenger and the luggage up to that specified amount. That does not necessarily mean that the protection of the Carriers Act is to be taken away entirely as to the luggage. I think, as counsel for the defendant railway company says, that the Act and the special contract are dealing with different aspects of the carrier's duty. One is dealing with his duty to carry at all, and the other with the measure of his liability in respect of the carriage. The Carriers Act was enacted to qualify the extent of his liability. It leaves him in the position of a common carrier, but entitles him in respect of certain articles to have a payment which is in the nature of a premium to insure their safe carriage. I think that the words which have been read by DARLING, J., from s. 2 of the Act show that there is nothing inconsistent in the making of an extra charge in respect of this luggage which the passenger is allowed to have carried free. If he wishes to have the liability of the carrier as a common carrier in respect of these more valuable classes of articles, then he must declare them and pay the additional charge in respect of them, which is a kind of insurance. Here the judge has treated it as if the mere fact that the articles were ordinary personal luggage had the effect of removing the protection of the Carriers Act altogether, thus working a repeal of that Act qua ordinary luggage. I do not think that that is the true way to regard the rights and duties of the parties respectively. The carrier is bound to carry the goods, but is entitled to the protection of the Carriers Act. For these reasons, I think that the appeal must be allowed.

Appeal allowed.

Solicitors: *C. Dunderdale*; *Cunliffes & Davenport*, for *Lingards & Hamp*, Manchester.

[*Reported by* PHILIP B. DURNFORD, ESQ., *Barrister-at-Law.*]

SEDDON *v.* NORTH EASTERN SALT CO., LTD.

[CHANCERY DIVISION (Joyce, J.), December 2, 3, 5, 6, 7, 8, 1904]

[Reported [1905] 1 Ch. 326; 74 L.J.Ch. 199; 91 L.T. 793; 53 W.R. 232; 21 T.L.R. 118; 49 Sol. Jo. 119]

Contract—Rescission—Misrepresentation—Innocent misrepresentation—Executed contract—Sale of shares in company—Misrepresentation as to trading loss. Misrepresentation—Innocent misrepresentation—Contract—Rescission—Executed contract—Purchase of shares.

Rescission of an executed contract cannot be obtained on the ground of innocent misrepresentation. When a contract is executed and nothing remains to be done under it actual fraud must be proved before rescission can be granted.

In September, 1903, S., a salt merchant and manufacturer, purchased all the shares in the L. Salt Co. and in October, 1903, he took over the company and began to carry on its undertaking. In January, 1904, he commenced an action against the vendors of the shares for rescission of the contract, alleging that he purchased the shares on the faith of representations made by one of the vendors and an agent of the other vendors that the company's trading loss was £250 when in fact it was considerably greater. He further alleged that the company owed debts of which he had not been informed, but no imputation of fraud was made.

Held: as the contract was executed it ought not to be set aside in the absence of an allegation of fraud.

Wilde v. *Gibson* (1) (1843), 1 H.L. Cas. 605, *Brownlie* v. *Campbell* (2) (1880), 5 App. Cas. 925, and *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (3) (1867), L.R. 2 Q.B. 580, applied.

Per Curiam: Silence does not amount to misrepresentation.

Notes. Distinguished: *Armstrong* v. *Jackson*, [1916–17] All E.R.Rep. 1117. Considered: *First National Re-insurance* v. *Greenfield*, [1921] 2 K.B. 260; *Leaf* v. *International Galleries*, [1950] 1 All E.R. 693; *Long* v. *Lloyd*, [1958] 2 All E.R. 402. Referred to: *Hindle* v. *Brown* (1907), 98 L.T. 44; *Angel* v. *Jay*, [1908–10] All E.R.Rep. 470; *Compagnie Chemin de Fer Paris-Orleans* v. *Leeston Shipping Co.* (1919), 36 T.L.R. 68; *Lever Brothers, Ltd.* v. *Bell* (1930), 47 T.L.R. 47; *Cruse* v. *Mount*, [1932] All E.R.Rep. 781; *Solle* v. *Butcher*, [1949] 2 All E.R. 1107.

As to rescission for misrepresentation and fraud with regard to executed contracts, see 26 HALSBURY'S LAWS (3rd Edn.) 878–880, and cases there cited.

Cases referred to:

(1) *Wilde* v. *Gibson* (1843), 1 H.L. Cas. 605; 12 Jur. 527; 9 E.R. 897, H.L.; 35 Digest 68, *649.*

(2) *Brownlie* v. *Campbell* (1880), 5 App Cas. 925, H.L.; 35 Digest 9, *24.*

(3) *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (1867), L.R. 2 Q.B. 580; 8 B. & S. 571; 36 L.J.Q.B. 260; 17 L.T. 62; 15 W.R. 1039; 35 Digest 118, *216.*

(4) *Soper* v. *Arnold* (1887), 37 Ch.D. 96; 57 L.J.Ch. 145; 57 L.T. 747; 4 T.L.R. 83; affirmed (1889), 14 App. Cas. 429; 59 L.J.Ch. 214; 61 L.T. 702; 38 W.R. 449; 5 T.L.R. 698, H.L.; 40 Digest (Repl.) 242, *2028.*

(5) *Walters* v. *Morgan* (1861), 3 De G.F. & J. 718; 4 L.T. 758; 45 E.R. 1056, L.C.; 35 Digest 23, *137.*

Also referred to in argument:

Redgrave v. *Hurd* (1881), 20 Ch.D. 1; 51 L.J.Ch. 113; 45 L.T. 485; 30 W.R. 251, C.A.; 35 Digest 47, *417.*

Scarf v. *Jardine* (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 30 W.R. 893, H.L.; 12 Digest (Repl.) 669, *5178.*

Smith v. *Hughes* (1871), L.R. 6 Q.B. 597; 40 L.J.Q.B. 221; 25 L.T. 329; 19 W.R. 1059; 35 Digest 107, *125.*

Sharpley v. *Louth and East Coast Rail. Co.* (1876), 2 Ch.D. 663; 46 L.J.Ch. 259; 35 L.T. 71, C.A.; 9 Digest (Repl.) 265, *1673.*

Mutual Reserve Life Insurance Co. v. *Foster* (1904), 20 T.L.R. 715, H.L.; 29 Digest 371, *2977.*

A.-G. v. *Ray* (1874), 9 Ch. App. 397; 43 L.J.Ch. 478; 30 L.T. 373; 22 W.R. 498, L.JJ.; 35 Digest 9, *23.*

Adam v. *Newbigging* (1888), 13 App. Cas. 308; 57 L.J.Ch. 1066; 59 L.T. 267; 37 W.R. 97, H.L.; 35 Digest 77, *754.*

Lagunas Nitrate Co. v. *Lagunas Syndicate*, [1899] 2 Ch. 392; 68 L.J.Ch. 699; 81 L.T. 334; 48 W.R. 74; 15 T.L.R. 436; 43 Sol. Jo. 622; 7 Mans. 165, C.A.; 35 Digest 77, *750.*

Action for the rescission of an executed contract for the purchase of shares in a company on the ground of innocent misrepresentation on the part of the vendors, and for an injunction to restrain them from selling goods to persons who were customers of the company prior to the purchase of the shares.

The London Salt Co. Ltd., was formed in February, 1903, to acquire and carry on a salt selling business which had formerly been carried on by salt dealers. The business of the company comprised dealings in coarse salt, fine salt, oil, and vinegar. The shares in the company were held by, or were under the control of, the Cleveland Salt Co., Ltd., the Tees Salt Co., Ltd., Sir Christopher Furness, the owners of the Middlesbrough Estate, Ltd., and Mr. Hewett, the managing director of the company. Some of these parties were manufacturers of coarse salt, which they sold to a company named the North Eastern Salt Co., Ltd., in which also they held shares, and which then sold it to customers in London. Salt so obtained was sold in the London market by the London Salt Co. There was also a company named the Salt Union, Ltd., which dealt in salt in the London market.

In or about September, 1903, the plaintiff Mr. Henry Seddon, a salt manufacturer and merchant, carrying on business in Cheshire and London, entered into negotiations for the purchase of, and eventually purchased, the shares in the London Salt Co. held by Mr. Hewett, the managing director. He also purchased the remaining shares in the company, the total price paid being £4,575. The negotiations, as he alleged, were carried on, on behalf of the holders of these other shares, by Mr. Hewett and Mr. W. W. Storr, a director of the Cleveland Salt Co. and chairman of the board of directors of the London Salt Co.; and he further alleged that at an interview which took place in the course of the negotiations Mr. Hewett and Mr. Storr represented and warranted to him that up to Sept. 30, 1903, the London Salt Co. had made a trading loss of only £200, or not more than £250, or that such a representation was made to him, in reply to a question, by Mr. Hewett, Mr. Storr being present and saying nothing. On the faith, as he contended, of such a representation and warranty, and induced thereby, Mr. Seddon purchased the shares. They carried a liability, at the time of the purchase, of 2s. 6d. per share, and this Mr. Seddon found it necessary to call up and pay in order to provide working capital for carrying on the undertaking. He further agreed, in consideration of the sale to him of the shares, to take from the North Eastern Salt Co. for seven years all the coarse salt required by the London Salt Co., this agreement being comprised in a letter from him to Mr. Storr, dated Oct. 8, 1903. On Oct. 9 Mr. Seddon took over the undertaking of the London Salt Co., and commenced to carry it on. On investigating the affairs of the company, however, he became dissatisfied with its position, being of opinion that the trading loss shown was much higher than £250, and that the company further appeared to owe considerable debts. He intimated this to Mr. Storr in a letter dated Oct. 12, 1903, and Mr. Storr replied in a letter of Oct. 13, in which he set out figures putting

the loss at £208 18s. 10d., and suggested with regard to the alleged debts that it would be best to wait and refrain from further comment until the audit of the company's accounts, which was to be undertaken immediately, was completed. The shares were transferred into Mr. Seddon's name, or those of his nominees, but a further correspondence ensued with regard to the affairs and position of the company, the price at which Mr. Seddon was to purchase salt for it from the North Eastern Salt Co., etc., and Mr. Seddon complained, among other matters, that the North Eastern Salt Co. were endeavouring to induce customers in London of the London Salt Co. to deal with them.

On Jan. 20, 1904, Mr. Seddon and the London Salt Co. commenced this action against the North Eastern Salt Co., the Cleveland Salt Co., the Tees Salt Co., Sir Christopher Furness, the owners of the Middlesbrough Estate, the Salt Union, and Mr. Hewett, claiming, against all the defendants except the Salt Union, a declaration that the purchase of the shares was not binding on Mr. Seddon and ought to be rescinded, repayment of the purchase money and compensation for payments made and losses sustained by him; and also, against all the defendants except Mr. Hewett, an injunction restraining them from selling in the London market, to former customers of the London Salt Co., salt manufactured or consigned by the defendants. The North Eastern Salt Co., it was alleged, acted as agent for the sale of salt manufactured by the Salt Union, as well as of that manufactured by the other salt firms. No allegation of fraud was made against any of the defendants. The alleged representation and warranty were denied by the defendants, and it was further denied that Mr. Storr had authority to negotiate with Mr. Seddon. Mr. Hewett counterclaimed for £150 due to him in lieu of notice and as arrears of salary in respect of his office of managing director of the London Salt Company.

Gore-Browne, *K.C.*, and *Muir Mackenzie* for the plaintiffs.
Younger, *K.C.*, and *A. M. Talbot* for the North Eastern Salt Co.
Montague Lush, *K.C.*, and *Sargant* for the Cleveland Salt Co., the Tees Salt Co., Sir Christopher Furness, and the owners of the Middlesbrough Estate.
Hughes, *K.C.*, and *H. E. Wright* for the Salt Union.
W. F. Hamilton, *K.C.*, and *T. A. Nash* for the defendant Hewett.

JOYCE, J.—This case arises out of an arrangement for the acquisition, by the plaintiff Mr. Seddon, of the property of the London Salt Co., by the purchase of the shares of that company from the persons who owned them. The relief asked for by the statement of claim is twofold. In the first place it is a rescission of the arrangement and restitution on the ground of misrepresentation, and the second part of the claim is for an injunction to restrain the defendants from selling on the London market to persons who were customers of the London Salt Co. prior to the arrangement, salt made or consigned by the salt manufacturing concerns.

As to the latter part of the case, it is a little difficult to say on what theory it is founded; but certainly no evidence has been adduced before me in support of it, and in point of fact there is no such evidence at all, and I need not say anything more about it.

As to the misrepresentation and the claim founded upon it, it appears to me, as it has throughout, that the plaintiff's way to success is beset with difficulties. In the first place, there is no allegation of fraud, and in point of fact the imputation of fraud has been expressly disclaimed against the defendants, and properly so. It is, therefore, a claim to rescind or set aside, on the ground of an innocent misrepresentation, a contract for the sale of property, not executory, but executed, and under which nothing whatever remains to be done. LORD CAMPBELL lays down the law in reference to this, or rather states what is the rule of law upon the question, as follows, in *Wilde* v. *Gibson* (1) (1 H.L. Cas. at pp. 632, 633):

"My Lords, after the very attentive and anxious consideration which this case has received, I have come to the clear conclusion that the decree appealed against ought to be reversed; and I must say that in the court below the distinction between a bill for carrying into execution an executory contract, and a bill to set aside a conveyance that has been executed, has not very distinctly been borne in mind. With regard to the first: If there be, in any way whatever, misrepresentation or concealment, which is material to the purchaser, a court of equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend, my Lords, that a court of equity will set aside the conveyance only on the grounds of actual fraud."

In *Brownlie* v. *Campbell* (2), LORD SELBORNE, L.C., after explaining the circumstances of that particular case, says (5 App. Cas. at pp. 936, 937):

"The contract is ultimately entered into upon those terms. Passing from the stage of correspondence and negotiation to the stage of written agreement, the purchaser takes upon himself the risk of errors. I assume them to be errors unconnected with fraud in the particulars, and when the conveyance takes place it is not, as far as I know, in either country [in Scotland or England] the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud."

I do not entertain the slightest doubt about that being the correct statement of the law. It has been acted upon by COTTON, L.J., in *Soper* v. *Arnold* (4) (37 Ch.D. at p. 102). But the rule is not only a rule of equity; it is a rule of law. In *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (3) BLACKBURN, J., in delivering the judgment of the court, says (L.R. 2 Q.B. at p. 587):

"There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation, or misapprehension, it does not authorise a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser is induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot retain the horse and claim back the whole price unless there was a condition to that effect in the contract."

In my opinion there can be no successful claim after completion for damages for misrepresentation unless that misrepresentation is fraudulent. It appeared to me from the first that the absence of fraud and of any allegation of fraud in this case is a fatal objection to the action; and I should be perfectly justified in disposing of it on those grounds, and those grounds only, and saying no more about the facts of the case, but I will add just a few words about the facts, as they have been gone into so fully.

If the plaintiff Mr. Seddon be right the contract in question is not a void but a voidable contract; and it was his duty, bearing in mind the peculiar nature of the property, to repudiate the contract at the very earliest possible moment when he found out that any misrepresentation had been made if, in fact, any misrepresentation was made. In my opinion he did not do this, but

taking possession he went on treating the property as his own in many ways for many months, and continued to do so long after the time when he had the information which would lead him and ought to have led him at once to the conclusion that he had been misinformed, if in fact he had been misinformed. Of course there is the letter of Oct. 13 from Mr. Storr; but when you read that letter in connection with the context it is quite plain to my mind that the letter, taken with the preceding letter or any other letters you like, does not amount to an arrangement that Mr. Seddon is to be entitled to go on dealing with the property as his own without prejudice to the question whether he is to be entitled to rescind the contract and repudiate the property or not. As far as I can see there never was a suggestion about repudiating the contract or the property, or rescinding the contract, until the commencement of the action.

I think I ought also to add that upon the whole evidence I am not satisfied that there was any misrepresentation that induced Mr. Seddon to enter into the contract. I very much doubt whether there was any misrepresentation at all. Mr. Seddon's account is that in answer to his question Mr. Hewett made some reply, and Mr. Storr said nothing. I was referred to a passage in LORD CAMPBELL'S judgment in *Walters* v. *Morgan* (5) (3 D.G.F. & J. at p. 724), where he says that "a word, a wink, or a smile may do," but as far as I know it has never been held that silence amounted to misrepresentation. Of course, there may be peculiar circumstances. A statement may have been made to somebody who remained silent; but as far as I know silence has never yet been held to amount to misrepresentation. [HIS LORDSHIP then held, on the evidence of Mr. Storr and Mr. Hewett, that the only representation, if any, made was that the weekly balance sheet did not show a loss of more than or as much as £250; and said that in his opinion this statement was not untrue or substantially inaccurate, and that he was not satisfied that it had the effect of causing Mr. Seddon to enter into the contract. He then continued:] I think that Mr. Seddon wanted the business, and that he intended to take all the risk whatever it was. Under these circumstances the portion of the claim founded on misrepresentation fails as well as the other, and it must be dismissed with the usual consequences. [On the counterclaim the plaintiffs submitted to judgment for £150 and costs.]

Solicitors: *Grant, Bulcraig, & Co.*, for *Parker & Ayre*, Manchester; *Crump, Sprott, & Co.*, for *Archer, Parkin, & Archer*, Stockton-on-Tees; *Field, Roscoe, & Co.*, for *Batesons, Warr & Wimshurst*, Liverpool; *J. H. Hortin.*

[*Reported by* H. W. LAW, ESQ., *Barrister-at-Law.*]

Re MELLISON. Ex Parte DAY

[King's Bench Division (Bigham and Walton, JJ.), April 2, 1906]

[Reported [1906] 2 K.B. 68; 75 L.J.K.B. 595; 94 L.T. 679; 54 W.R. 444; 50 Sol. Jo. 378; 13 Mans. 201]

Bankruptcy—Administration of estate of person dying insolvent—Onerous property—Right of trustee to disclaim—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 55, *s.* 125 (6).

In an administration in bankruptcy of the estate of a deceased debtor under s. 125 of the Bankruptcy Act, 1883 [now Bankruptcy Act, 1914, s. 130], the trustee of the insolvent estate **held** to be entitled to disclaim onerous property.

Notes. As to the administration in bankruptcy of the estate of a deceased insolvent, see 2 Halsbury's Laws (3rd Edn.) 358–364, and for cases see 4 Digest (Repl.) 542 et seq. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Cases referred to:

(1) *Re Hewitt, Ex parte Hewitt* (1885), 15 Q,B.D. 159; 54 L.J.Q.B. 402; 53 L.T. 156; 2 Morr. 184, D.C.; 4 Digest (Repl.) 545, *4764*.

(2) *Re Crowther, Ex parte Ellis* (1887), 20 Q.B.D. 38; 57 L.J.Q.B. 57; 58 L.T. 115; 36 W.R. 189; 4 Morr. 305, D.C.; 4 Digest (Repl.) 545, *4766*.

(3) *Re Gould, Ex parte Official Receiver* (1887), 19 Q.B.D. 92; 56 L.J.Q.B. 333; 56 L.T. 806; 35 W.R. 569; 3 T.L.R. 605; 4 Morr. 202, C.A.; 4 Digest (Repl.) 545, *4765*.

(4) *Hasluck* v. *Clark*, [1899] 1 Q.B. 699; 68 L.J.Q.B. 486; 80 L.T. 454; 47 W.R. 471; 15 T.L.R. 277; 43 Sol. Jo. 352; 6 Mans. 146, C.A.; 4 Digest (Repl.) 546, *4771*.

(5) *Re York, Atkinson* v. *Powell* (1887), 36 Ch.D. 233; 56 L.J.Ch. 552; 56 L.T. 704; 35 W.R. 609; sub nom. *Re Neal, Atkinson* v. *Powell*, 3 T.L.R. 548; 4 Digest (Repl.) 543, *4740*.

(6) *Re Rhoades, Ex parte Rhoades*, [1899] 2 Q.B. 347, 68 L.J.Q.B. 804; 80 L.T. 742; 15 T.L.R. 407; 6 Mans. 277; sub nom. *Re Rhoades, Ex parte Official Receiver*, 47 W.R. 561, 43 Sol. Jo. 571, C.A.; 4 Digest (Repl.) 546, *4774*.

(7) *Re Count D'Epineuil* (*1*), *Tadman* v. *D'Epineuil* (1882), 20 Ch.D. 217; 51 L.J.Ch. 491; 46 L.T. 409; 30 W.R. 423; 24 Digest (Repl.) 879, *8777*.

Appeal from the decision of the registrar of Brighton County Court granting leave to disclaim a lease to the trustee under an administration order, made against the estate of a deceased debtor under s. 125 of the Bankruptcy Act, 1883.

By s. 55 of that Act (which was within Part 3 of the Act) [now s. 54 of the Bankruptcy Act, 1914] as amended by the Bankruptcy Act, 1890:

"(1) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within twelve months after the first appointment of a trustee, disclaim the property. . . . (3) A trustee shall not be entitled to disclaim a lease without the leave of the court; except in any cases which may be prescribed by general rules, and the court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenants' improvements, and other matters arising out of the tenancy, as the court thinks just."

By s. 125:

"(1). Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the court a petition in the prescribed form praying for an order for the administration of the estate of a deceased debtor, according to the law of bankruptcy. . . . (5) Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the court, as trustee thereof, and he shall forthwith proceed to realise and distribute the same in accordance with the provisions of this Act. (6) With the modifications hereinafter mentioned, all the provisions of Part 3 of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act."

The registrar delivered a judgment in which he said: This is an application by a trustee under an administration order made against the estate of a deceased debtor under s. 125 of the Bankruptcy Act, 1883, for leave to disclaim a lease. A preliminary objection has been taken that the court has no power to authorise a disclaimer. At the hearing I reserved judgment, intimating that I thought that the objection was well founded. A further consideration, however, has not confirmed me in this view.

The short point is whether s. 55 applies to an estate being administered under s. 125. Now, s. 55 is comprised in Part 3, and primâ facie, therefore, as the lease in question is admittedly part of the property of the debtor, that section applies to an administration under s. 125. There is, however, some authority with regard to the construction of the section. It has been held, for instance, that ss. 27 and 102 are not applicable: *Re Hewitt* (1); and *Re Crowther* (2). As these particular sections, however, are not included in Part 3 of the Act, it is hardly necessary to refer further to them. But it has been further held that ss. 45 and 47 do not apply. Both of these sections are comprised in Part 3, and it is necessary to see whether the reasoning which was held to exclude them would exclude s. 55. In *Re Gould* (3), Cave, J., held that s. 47 (which avoids certain voluntary settlements) is not applicable to an administration order under s. 125, mainly, apparently, on two grounds: (i) That the property with which s. 47 deals is the property of third persons—namely, beneficiaries under the settlement—and, therefore, never vested in the trustee at all, or formed the subject of administration under s. 125; and (ii) that the condition necessary for the exercise of the powers under s. 47 (that is, that the settlor should "become bankrupt" within a certain period) had never arisen, there being no "bankruptcy" within the meaning of the section. So far there is, apparently, nothing in this decision to exclude the application of s. 55; indeed, Cave, J., expressly states that, in his opinion, this section is applicable to an administration order. His words are (19 Q.B.D. at p. 95):

"The last two [portions of Part 3 of the Act], comprising ss. 50 to 57 and 58 to 65, are headed respectively 'Realisation of Property' and 'Distribution of Property.' "

Speaking generally, there can, I think, be no doubt that the last two portions apply to an administration under s. 125, though even in those portions there are sections, such as 52 and 64, which would not be applicable. The trustee has to realise and distribute, and these are the portions of Part 3 which apply particularly to realisation and distribution. It is true that the judge's remarks as to sections other than 47 were obiter, but it is to be noted that the decision was appealed from, and that Lord Esher, M.R., in dismissing the appeal, says emphatically that he agrees "with every reason given by Cave, J., for his conclusion," and again "for the reasons given by Cave, J., every one of which I adopt." In *Hasluck* v. *Clark* (4) the Court of Appeal held that s. 45 (which

prevents the execution creditor retaining the benefit of an execution unless it has been completed before the receiving order and before notice of an act of bankruptcy) does not apply to an administration order, partly on the ground that the language of s. 45 is not applicable to administration orders, there being no "receiving order" within the meaning of the section, and partly on the ground that the execution creditor had acquired rights in the goods seized, so that they would not be simply the property of the debtor which would be administered if an order were made under s. 45, but that of the execution creditor also. So far the decision itself does not exclude a construction of the Act by which s. 55 would be applicable. But A. L. SMITH, L.J., in giving judgment makes some general observations on the effect of s. 125 which leave the matter in considerable doubt. He says ([1899] 1 Q.B. at p. 705):

> "Although in *Re Gould* (3) it was the property of third persons—namely, the trustees of the settlement—which was attempted to be dealt with under s. 125, yet the reasoning to be found in that judgment appears to me to apply to this case—namely, that rights of third parties are not to be affected, unless the intention is expressed in plain terms, and surely this cannot be found in s. 125."

It is difficult to see that the rights of third parties may not be affected if an order is made by the court under s. 55. To begin with, the rights of the landlord are probably affected though he retains a right of proof against the estate for the damage caused him by the disclaimer. But, in addition to this, s. 55 contains powers for the court to make vesting orders, and I am threatened with applications with regard to that point in this very case, and it is difficult to say that a vesting order or an order excluding certain persons from the benefits of a vesting order unless they apply within a fixed time does not affect the rights of third parties, though perhaps not very prejudicially. CHITTY, L.J., in his judgment says (ibid. at pp. 709, 710):

> "It is plain that if the order for administration had been made in the Chancery Division the rights of the execution creditor would have remained unaffected. It would be a strange result if his rights depended upon the court in which the administration takes place. This seems to show that the legislature considered it immaterial in which court the administration took place, and that the rights of persons interested would be dealt with on the same footing, whichever tribunal controlled the administration."

In these circumstances I am left in considerable doubt. On the one hand, I have a judgment of CAVE, J. (with every word of which LORD ESHER, M.R., says he agrees), which says that certain sections, which include s. 55, do apply to administration orders. On the other hand, I have the judgment of A. L. SMITH, L.J., that the administration of the estates of insolvent debtors in bankruptcy under s. 125 was not intended to affect the rights of third parties or to make them different from what they would have been had the administration been in Chancery. It is to be noted, however, that though the Court of Appeal, in *Hasluck* v. *Clark* (4) had the judgment of CAVE, J., in *Re Gould* (3) before them, they say nothing to indicate that they disagreed with CAVE, J., and in fact they apparently expressed their approval of it by calling attention to LORD ESHER'S phrases concerning it. On the whole, I am disposed to think that I am not bound by authority to hold that s. 55 does not apply to administration orders. There is nothing in the language of s. 55 equivalent to those expressions which the court in the other two cases dwelt on in their judgments. The words "receiving order," for instance, do not occur. Again, there is no question that the property with which such an order would deal is in this case the property of the deceased debtor and of any third party. It seems to me, therefore, that this s. 55, comprised in Part 3 of the Act, which relates to the administration of the property of a bankrupt, is applicable to the case of an administration order within s. 125 (6). It is also to be observed that a contrary construction would place the trustee in a position

of some difficulty. In most cases—in all cases before the Act of 1890—the trustee is the official receiver, in whom, without any choice on his part, the property of the debtor, including his leaseholds, vests. Even under the old Acts there were provisions to enable the assignees to elect as to taking land burdened with onerous covenants: see the Bankruptcy Act, 1809 (c. 121), s. 19, Bankruptcy Act, 1825 (c. 16), s. 75, and Bankruptcy Law Consolidation Act, 1849 (c. 106), s. 145, s. 146 (all repealed); and as soon as the universal compulsory vesting of all property in the trustee came into force by the Bankruptcy Act, 1869, it was at once coupled with a provision that he could free himself from detrimental property by disclaimer (ss. 23, 24). It would be a curious circumstance and an undoubted hardship on the trustee if the effect of s. 125 was to deprive him of his right to disclaim onerous property. This seems to me an argument that ought to have weight on the construction of a doubtful section in an Act of Parliament. I am most pressed on the other side with the remarks of CHITTY, L.J., as to the improbability of an intention to alter the rights of third persons in relation to debtors by a clause apparently only intended to provide for administration in bankruptcy instead of in equity. But it appears to me, on the whole, that, since under s. 55 the lessor is reserved a right to prove for any damage done by the disclaimer, the rights of incumbrancers are preserved by s. 55 (2), that the provisions as to vesting orders are, on the whole, more in the interest of third parties than against them, and that the rights of the parties are not really affected by the change of court more than necessarily follows from the change in the method of administration, and the compulsory vesting in a trustee. On this point, too, it is worthy of observation that STIRLING, J., in *Re York* (5), while declining to express a definite opinion whether a transfer of an administration from the Chancery Division to Bankruptcy under s. 125 would have the effect of depriving an executor of his right of retainer, did express the view that the court ought not to let the possible effect on the rights of the executor weigh with it in considering whether such a transfer should be ordered or not. And it is to be noted that in *Re Rhoades* (6) the Court of Appeal, while deciding that the right of retainer was not lost by the transfer, stated the effect of s. 125 as follows ([1899] 2 Q.B. at p. 354):

> "Section 125 does not enlarge the property to be distributed or deprive third parties of any rights which they have acquired to withdraw from distribution assets in their possession and which they have a right to retain. *Hasluck* v. *Clark* (4) shows this."

I desire respectfully to adopt this as expressing my view of s. 125, and I do not think such a view is inconsistent with s. 55 being applicable to an administration under the former section.

Persons interested in the estate appealed.

H. Reed, K.C., and *Hodges* in support of the appeal.—This case raises the question as to what parts of the Bankruptcy Act, 1883, are applicable to the administration of the estate of a deceased debtor under s. 125. It is true that s. 55 is within Part 3 of the Act, but there are many sections in that part which are not applicable to these administrations. In cases under this section it is the practice of the Court of Bankruptcy to follow the practice of the Chancery Division in the distribution of insolvent estates unless bound by some special provision to the contrary: *Re Crowther* (2). Disclaimer is unknown in administration by the Chancery Division, and s. 10 of the Supreme Court of Judicature Act, 1875, which lays down the rules in bankruptcy which are applicable to a Chancery administration, does not import disclaimer. There is no direct authority as to whether s. 55 applies to such an administration. [WALTON, J.—Is there anything in the section which makes it inapplicable?] Yes. Sub-section (1) refers to "the property of the bankrupt," and s. 2 speaks of disclaimer as operating "to determine the rights, interests, and liabilities of the bankrupt." There is no bankrupt in an administration. Again, by sub-s. (6)

the person who takes a vesting order takes it subject to the liabilities of the bankrupt "at the date when the bankruptcy petition was filed." Here there is no bankrupt and no such date.

E. E. Humphreys for the trustee.—The lease was part of the property of the debtor, and under s. 125 (5) it vested in the trustee. It was an onerous property, and the trustee could disclaim it under s. 55. [He referred to *Re Count D'Epineuil* (7).]

Clayton, for the lessor, took no part in the arguments.

BIGHAM, J.—The only point in this case is whether in administrations in bankruptcy of estates of persons dying insolvent the court has jurisdiction to allow the trustee to disclaim onerous property. I can see no reason why the court should not have that power, and I think there is jurisdiction to make such an order. In this case the lease was undoubtedly part of the property of the estate, and vested in the trustee as in an ordinary bankruptcy. Subsection (6) of s. 125 applies the provisions of Part 3 of the Act to such an administration, so far as they are applicable. I do not see why the trustee should not have the same right as an ordinary trustee in bankruptcy. In *Re Gould* (3) and *Hasluck* v. *Clark* (4) the courts refused to import ss. 47 and 45 into these administrations because they would have then had to deal with the property of persons other than the bankrupt, and that would be outside the scope of s. 125, but in the present case the property to be dealt with is the property of the insolvent estate, and I think the trustee is entitled to disclaim it. I consider the judgment of Cave, J., in *Re Gould* (3) an authority on this point, although but obiter dictum.

WALTON, J.—I agree.

Appeal dismissed.

Solicitors: *R. W. Beckwith*; *Cushman & Clifton*; *Hyman, Isaacs & Lewis.*

[*Reported by* J. Anwyl Theobald, Esq., *Barrister-at-Law.*]

MARTIN v. NADEL. DRESDNER BANK GARNISHEES

[COURT OF APPEAL (Vaughan Williams and Stirling, L.JJ.), May 15, 1906]

[Reported [1906] 2 K.B. 26; 75 L.J.K.B. 620; 95 L.T. 16; 54 W.R. 525; 22 T.L.R. 561]

Execution—Garnishee order—Discretion of court to make—Refusal where inequitable—Liability of garnishee to pay debt again—Discharge of garnishee as against debtor to amount paid or levied—Garnishee not subject to jurisdiction of English courts—R.S.C., Ord. 45, rr. 1, 7.

The court has a discretion under R.S.C., Ord. 45, r. 1, in making a garnishee order, and will refuse to make an order in cases where it would be inequitable to make one. A garnishee order was, therefore, refused in a case where the garnishee could be made liable in a foreign court to pay the debt over again. Ord. 45, r. 7, which provides that payment made by or execution levied on a garnishee shall be a valid discharge to him as against the debtor to the amount paid or levied, cannot affect the rights of a person who is not subject to the jurisdiction of the court.

Notes. Distinguished: *Swiss Bank Corpn.* v. *Boehriesche Industrial Bank*, [1923] 1 K.B. 673; considered: *Sedgwick, Collins & Co.* v. *Rossia Insurance of Petrograd* (1925), 133 L.T. 808; *Richardson* v. *Richardson*, [1927] All E.R.Rep. 92. Referred to: *Employers' Liability Assurance Corpn.* v. *Sedgwick, Collins & Co.*, [1926] All E.R.Rep. 388.

As to attachment of debts, see 16 HALSBURY'S LAWS (3rd Edn.) 79 et seq., and for cases see 21 DIGEST 617 et seq.

Cases referred to:

(1) *Roberts* v. *Death* (1881), 8 Q.B.D. 319; 51 L.J.Q.B. 15; 46 L.T. 246; 30 W.R. 76, C.A.; 21 Digest 629, *2131*.

(2) *Goodman* v. *Robinson* (1886), 18 Q.B.D. 332; 56 L.J.Q.B. 392; 55 L.T. 811; 35 W.R. 274; 3 T.L.R. 212, D.C.; 21 Digest 620, *2074*.

(3) *Wood* v. *Dunn* (1866), L.R. 2 Q.B. 73; 7 B. & S. 94; 36 L.J.Q.B. 27; 15 L.T. 411; 15 W.R. 180, Ex.Ch.; 21 Digest 646, *2244*.

(4) *Allen* v. *Dundas* (1789), 3 Term. Rep. 125; 23 Digest (Repl.) 238, *2887*.

(5) *London Corporation* v. *London Joint Stock Bank* (1881), 6 App. Cas. 393; 50 L.J.Q.B. 594; 45 L.T. 81; 29 W.R. 870, H.L.; 21 Digest 646, *2248*.

Appeal by the Dresdner Bank from an order made by SUTTON, J., at chambers affirming the decision of the master and making absolute a garnishee order obtained by the judgment creditors against the bank.

Montague Lush, K.C., and *R. V. Bankes* for the bank.—The garnishee order ought to be discharged. The making of an order is discretionary, and an order should not be made in circumstances where it would be inequitable to make it: *Roberts* v. *Death* (1); *Goodman* v. *Robinson* (2). Payment under this order would afford the bank no defence in an action against them by Nadel in Berlin. It would be inequitable to make the bank pay in England a debt which they could be compelled to pay over again in Germany: *Wood* v. *Dunn* (3).

Disturnal for the judgment creditors.—It is not clearly shown that payment under this order would not be a defence to an action in Germany by Nadel against the bank. The debt was incurred in consequence of the English branch of the bank becoming sureties for Nadel for the costs of an appeal to the House of Lords. That was purely an English matter.

VAUGHAN WILLIAMS, L.J.—This is an appeal from an order made by SUTTON, J., at chambers, in garnishee proceedings taken under R.S.C., Ord. 45, r. 1. The learned judge ordered that the garnishees should forthwith pay to the judgment creditors the debt due from them to the judgment debtor or so

much thereof as should be sufficient to satisfy the judgment debt. The debt due from the garnishees to the judgment debtor was contracted in Germany. Nadel, the judgment debtor, was an appellant to the House of Lords and had to give security for the costs of his appeal. He paid £200 into court, and for a further sum of £500 he got the Dresdner Bank to become bondsmen. He paid that sum into the Berlin branch of that bank, and they credited him with the amount. Nadel failed in his appeal to the House of Lords and about £300, part of the amount for which the bank had become sureties, was paid by them under their recognisance. The result was that about £200 remained in the hands of the Dresdner Bank at Berlin which they held as money had and received to the use of Nadel. That is the debt which is the subject of this garnishee order. The reason why the order was made is that the bank have a branch office in London which entered into the recognisance for Nadel.

The question is whether the order ought to have been made. It is said against the order that if the bank were compelled by it to pay the judgment creditor, they would still remain liable to an action by Nadel in Berlin, and would not be able to rely on payment by them under the garnishee order as a discharge from their debt to him. The general proposition of law laid down by the Exchequer Chamber in *Wood* v. *Dunn* (3), following *Allen* v. *Dundas* (4), has not been disputed. The proposition was thus stated by CHANNELL, B. (L.R. 2 Q.B. at p. 80):

> "The law will never compel a person to pay a sum of money a second time which he had paid once under the sanction of a court having competent jurisdiction."

It is argued that this garnishee order would put the Dresdner Bank in an unfair position because, if they paid money under it, they might be compelled to pay a second time in Berlin. There was some evidence that according to German law payment under the garnishee order would be no defence to an action by Nadel in Berlin; but, apart from that, it seems to me that garnishee proceedings, being a kind of execution, are governed by the lex fori, and by international law a court does not recognise an execution effected in a foreign country by which a man's property is taken away. The Dresdner Bank could not, therefore, set up in an action against them in Berlin an execution levied on the debt in England.

That being so, the question is whether this court should refuse to allow this garnishee order on the ground that the bank might be compelled in Germany to pay the debt a second time. I do not wish to decide this case on the fact that the debt was contracted in Germany, and that it would primâ facie be governed by German law. I think that a judgment creditor has no right to a garnishee order ex debito justitiæ. *Roberts* v. *Death* (1) decides that an order ought not to be made in cases where it would be inequitable to make one. In that case, it is true, the equity was not raised on the part of the garnishee, but by a cestui que trust who objected to the attachment of trust money. Although there is no express rule in Ord. 45 enabling a cestui que trust to come forward in that way, the court refused to make an order on the ground that it was a matter for the discretion of the court, and it would be inequitable to make the order asked for. Therefore, dealing with this matter upon that principle, and thinking that it would be inequitable to make an order against the bank in this case, I am of opinion that the order should not have been made, and that the appeal should be allowed.

STIRLING, L.J.—I am of the same opinion. I think that the court is not bound ex debito justitiæ to make an order under R.S.C. Ord. 45, r. 1, but should exercise a judicial discretion in the matter. In *Roberts* v. *Death* (1), after referring to r. 7, COTTON, L.J., said (8 Q.B.D. at p. 324):

> "But I do not rely on that, as I am of opinion that whenever the judge is informed on any reasonable ground that such an order ought not to be

made, he should withhold making the garnishee order absolute for taking the money of one person to pay the debt due from another."

MR. DICEY, at p. 318 in his treatise on the CONFLICT OF LAWS, points out the rule of law that debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced. On the facts of this case it appears that the debt of the bank to Nadel would be properly recoverable in Germany. It must be taken that the order of this court would not protect the bank from having to pay the debt a second time. To make the order would, therefore, be inequitable. I may refer to the opinion of LORD WATSON in *London Corporation* v. *London Joint Stock Bank* (5), where he says that the custom of foreign attachment in the city of London would not be a reasonable one unless it went the length of affording protection to the garnishee when he obeys the order of the court. Rule 7 of R.S.C., Ord. 45, which provides that payment made by or execution levied on a garnishee shall be a valid discharge to him as against the debtor to the amount paid or levied, cannot affect the rights of a person who is not subject to the jurisdiction of the court.

Appeal allowed.

Solicitors: *Barnett & Shirer*, for *Facon & Creassey*, Nottingham; *Oppenheimer & Southern.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

PONSFORD, BAKER & CO. *v.* UNION OF LONDON AND SMITHS BANK, LTD.

[COURT OF APPEAL (Vaughan Williams, Romer, and Fletcher Moulton, L.JJ.), July 13, 16, August 9, 1906]

[Reported [1906] 2 Ch. 444; 75 L.J.Ch. 724; 95 L.T. 333; 22 T.L.R. 812; 13 Mans. 321]

Bankruptcy—Property available for distribution—Relation back of trustee's title—No distinction between goods and money—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 43.

Section 43 of the Bankruptcy Act, 1883, [now Bankruptcy Act, 1914, s. 37 (1)] which provided that the title of a trustee in bankruptcy related back to the earliest act of bankruptcy committed by the bankrupt within a period of not more than three months preceding the presentation of the bankruptcy petition, **held**, to relate generally to the property of the bankrupt without distinguishing whether it was goods or money.

Bankruptcy—Property available for distribution—Secured creditor—Right of debtor to redeem security.

A secured creditor is not entitled to receive payment of the debt from his debtor and to surrender the security after notice of an act of bankruptcy; accordingly, a pawner, who has committed an act of bankruptcy cannot make a tender to the pawnee for the release of the pledge, and it is not open to the latter, after notice of the act of bankruptcy, to accept the money and surrender the pledge. In such a case the court will make such an order with reference to the security as will preserve the rights of both the secured creditor and the other creditors in case the debtor is subsequently made bankrupt.

Re Lawford and Lawrence, Ex parte Trustee, (1), [1902] 2 K.B. 445, overruled.

Notes. Section 43 of the Bankruptcy Act, 1883, has been replaced by the Bankruptcy Act, 1914, s. 37 (2 HALSBURY'S STATUTES (2nd Edn.) 372).

Considered: *McCarthy* v. *Capital and Counties Bank*, [1911] 2 K.B. 1088; *Re Debtor* (*No. 211 of 1912*), [1912] 2 K.B. 533; *Re Debtors* (*No. 771 of 1926*) (1926), 43 T.L.R. 9. Explained: *Re Fredericke and Whitworth, Ex parte Hibbard*, [1927] 1 Ch. 253.

As to relation back of the trustee's title, see 2 HALSBURY'S LAWS (3rd Edn.) 447 et seq., and for cases see 5 DIGEST (Repl.) 688 et seq. As to bankruptcy of pawner or pawnee, see 29 HALSBURY'S LAWS (3rd Edn.) 222; and for cases see 37 DIGEST 9, 10.

Cases referred to:

(1) *Re Lawford and Lawrence, Ex parte Trustee*, [1902] 2 K.B. 445; 71 L.J.K.B. 786; 86 L.T. 693; 50 W.R. 592; 46 Sol. Jo. 588; 9 Mans. 254; 5 Digest (Repl.) 690, *6058*.

(2) *Foster* v. *Allanson* (1788), 2 Term Rep. 479; 100 E.R. 258; 5 Digest (Repl.) 940, *7693*.

Also referred to in argument:

Vernon v. *Hankey* (1787), 2 Term Rep. 113; Cooke's Bkpt. Laws, 7th Edn., pp. 111, 559; 100 E.R. 62; 5 Digest (Repl.) 974, *7852*.

Davis v. *Petrie*, [1905] 2 K.B. 528; 74 L.J.K.B. 785; 93 L.T. 511; 21 T.L.R. 610; affirmed ante p. 356; [1906] 2 K.B. 786; 75 L.J.K.B. 992; 95 L.T. 239; 22 T.L.R. 771; 13 Mans. 344, C.A.; 5 Digest (Repl.) 1190, *9584*.

Re Pooley, Ex parte Rabbidge (1878), 8 Ch.D. 367; 48 L.J.Bcy. 15; 38 L.T. 663; 26 W.R. 646, C.A.; 5 Digest (Repl.) 975, *7859*.

Prickett v. *Down* (1811), 3 Camp. 131, N.P.; 5 Digest (Repl.) 688, *6041*.

Donald v. *Suckling* (1866), L.R. 1 Q.B. 585; 7 B. & S. 783; 35 L.J.Q.B. 232; 14 L.T. 772; 30 J.P. 565; 12 Jur. N.S. 795; 15 W.R. 13; 37 Digest 9, *43*.

Stevenson v. *Wood* (1805), 5 Esp. 200, N.P.; 5 Digest (Repl.) 1034, *8352*.

Mavor v. *Croome* (1823), 1 Bing. 261; 8 Moore C.P. 171; 1 L.J.O.S.C.P. 90; 130 E.R. 105; 5 Digest (Repl.) 1034, *8353*.

Thompson v. *Beatson* (1823), 1 Bing. 145; 7 Moore, C.P. 548; 130 E.R. 59; 1 Digest (Repl.) 639, *2167*.

Appeal from a decision of BUCKLEY, J.

Messrs. Ponsford, Baker, & Co., having become defaulters on the Stock Exchange, made an assignment of all their assets to the official assignee of the Stock Exchange for the benefit of their creditors. At the date of such default they had a loan account at interest with the defendants, the Union of London and Smiths Bank, Ltd., which was secured by securities lodged with that bank, and, inasmuch as the debtors and the official assignee were of opinion that it was desirable in the interests of the estate to redeem those securities, they tendered to the bank the amount due by the debtors and called on the bank to hand over the securities. The bank, however, having notice of the assignment to the official assignee, an act of bankruptcy, refused to accept the tender of the money or to hand over the securities, and thereupon the debtors and the assignee, as joint plaintiffs, commenced this action against the bank, claiming the return of the securities and damages for their wrongful detention, or, in the alternative, judgment for the redemption of the securities. On May 25, 1906, an interlocutory motion in the action was made before BUCKLEY, J., for an order that on payment to the bank of the sum due from the debtors to the bank the securities should be given up to the debtors, and affidavits were filed bringing before the court the facts of the case, which are not in any wise in dispute. By consent of the parties the motion was taken to be the hearing of the action, and the learned judge made an order in the terms of the motion, giving the debtors the costs of the action and providing that the bank should only be entitled to charge against the debtors interest down to the date of the tender of the money.

In other words, he treated the refusal of the bank to accept the tender of the money before action as wrongful. From this decision the bank appealed.

Warmington, K.C., and *R. J. Parker* for the bank.
Buckmaster, K.C., and *Felix Cassel* for the debtors.

Cur. adv. vult.

Aug. 9, 1906. **FLETCHER MOULTON, L.J.,** read the following judgment of the court.—The facts of the present case, so far as they are material, are very simple. Before passing to the substantial question in this case, we hold that the consent to treat the motion as the trial of the case does not in any way affect the rights of any of the parties. In a case like the present where all the facts are before the court such a procedure is nothing more than a legitimate device on the one hand to expedite the final hearing, and, on the other, to save the time of the court from being taken up uselessly.

The arguments in this case have raised important and difficult questions involving a consideration in its most general form of the effect of the provisions of s. 43 of the Bankruptcy Act, 1883, by virtue of which the title of the trustee in bankruptcy relates back to the earliest act of bankruptcy committed by a bankrupt within a period of not more than three months prior to the presentation of the bankruptcy petition. These arguments fall under two heads, the first dealing with the general power of a debtor who has committed an act of bankruptcy to use the courts for the purpose of enforcing his rights against third parties, and the second dealing specifically with his power of enforcing, either with or without the assistance of the courts, the special rights which exist in the case of a person who has borrowed money on security. It will be convenient to deal with the points in this order.

The argument of the debtors under the first head was as follows. Relation back of the title of the trustee in bankruptcy, meaning thereby the person in whom the bankrupt's estate becomes vested by the bankruptcy, by whatever name he may have been called, has existed under English statute law ever since 13 Eliz. 1, c. 7. In that statute the formal bankruptcy might take place at any time subsequent to an act of bankruptcy and the title of the trustee dated back to the date of the act of bankruptcy, i.e., he was entitled to the possession of the bankrupt's property, such as it was, at that date. The effect of subsequent legislation has been not to create but merely to limit this relation back until, under the Acts now in force, its period has been reduced to a maximum of three months, so that if the requisite bankruptcy proceedings are not taken within that period, the act of bankruptcy ceases to be effective, and there can be no relation back to the date of that act of bankruptcy, even though bankruptcy should subsequently supervene. But it is urged that this process of limitation of the extent of relation back has not altered its nature. Numerous cases under the earlier statutes were referred to which establish that an act of bankruptcy in the plaintiff, though known to the defendant, constituted no defence at common law to an action for debt, and one case was cited to us to show that a court of equity would decline to interfere with an action at common law if brought under such circumstances. It was contended, therefore, that relation back had no operation where legal proceedings were concerned, but only where payment was made voluntarily and not under legal compulsion, and it was suggested that the explanation of this apparent contradiction of the doctrine that a debtor may not pay a debt to his creditor after notice of an act of bankruptcy available for adjudication is that the legal proceedings enable the defendant in the action to obtain a valid discharge of his debt (which could not otherwise have been given to him by his creditor) by reason of the well-established doctrine that payment under the order of a court of competent jurisdiction is a complete answer to a claim.

The results of such a doctrine are startling. Nothing is more firmly established in bankruptcy law than that a man who has committed an act of bankruptcy is not entitled to deal with his estate. He has no right to gather it in if it is

not already in his hands or to make payment to his creditors out of that which he has actually at his command. He can give no good discharge to a debtor who pays him with notice of the act of bankruptcy because the debts may by subsequent bankruptcy proceedings be turned into a debt due to his trustee and not to himself. This is a principal and fundamental part of our bankruptcy administration, and yet, if the doctrine contended for were established, the mere issue of a writ would nullify the whole of the precautions taken by the legislature in this respect. The debtor having no defence could not prevent judgment being recovered and execution had, and if such claims could thus be enforced notice of an act of bankruptcy would be no impediment to a debtor effectively collecting and getting into his own hands all moneys due to his estate. We are of opinion, however, that this doctrine is not well founded.

For the purpose of deciding this point it is necessary to examine carefully the exact legal position of a man who has committed an act of bankruptcy under the statutes at present in force. Until commission of the act of bankruptcy he was, of course, the beneficial owner of whatever assets he possessed, but by the act of bankruptcy his title to be regarded as such beneficial owner is no longer absolute, but is contingent on no bankruptcy petition being presented within three months of the date of the act of bankruptcy which leads to a receiving order being made. If such receiving order be made the whole of the assets vest in his trustee as from the date of the act of bankruptcy. He is, therefore, in the position that should such a contingency occur he is from the date of the act of bankruptcy something less than a mere trustee of his assets for the creditors in his bankruptcy. Until this state of suspense has been removed either by a receiving order or by lapse of time, he has no right to deal with those assets that were in his hands, and can give no title in them to any transferee with notice. Similarly with regard to the debts and other choses in action which form part of his estate, he cannot collect them or give a valid discharge for them, and anyone making a payment to him with notice of the act of bankruptcy does so at his peril.

But these statutory provisions have been enacted for the benefit only of the creditors of the bankrupt, and not for the benefit of his debtors. They are not intended in any way to weaken or postpone the duties of the debtors of the estate to discharge their obligations to it, nor is this period of three months from the act of bankruptcy intended to act in any wise as a moratorium to those debtors so as to give them relief or respite from payments immediately due. It may be greatly in the interest of the estate that these obligations should be promptly enforced, and therefore the probable imminence of effective bankruptcy proceedings furnishes no motive to the court for interposing any delay in the use of its normal procedure to compel their fulfilment. But the debtor is the only person who at the moment can initiate legal proceedings for this purpose, and hence the courts have naturally refused either to treat him as incapable of bringing an action, or to regard notice of an act of bankruptcy on his part as affording a defence to such an action if otherwise well founded. The difficulties and complications that arise from his commission of an act of bankruptcy have in their nature nothing in common with matter of defence. They do not weaken the obligations of the defendant in such an action, they only affect the question who is to benefit by the performance of those obligations. But although there is no reason why any delay should be interposed in requiring the defendant in such a case duly to discharge his legal liabilities, it does not follow that the consequence of a judgment against him ought to be that the money recovered is paid to the plaintiff. The statutes clearly provide that payments shall not be made to the debtor with knowledge of the act of bankruptcy, thus indicating that the law does not consider him the proper person to collect his estate. It is quite true that if payment be made under order of the court, the defendant who makes the payment obtains thereby a valid discharge, but so far from this fact establishing the right of

the plaintiff to receive the results of the judgment, it only puts the court on its guard against allowing its process to be used as a means of defeating the clear purpose of the bankruptcy laws. The powers of the court are not so limited that it cannot prevent such a result.

The safe and, in our opinion, the right course for the court to pursue after notice of an act of bankruptcy on the part of a plaintiff is to direct the money recovered from a defendant to be kept in court until it shall be seen whether the person who is entitled to it is the plaintiff or the representative of his estate. This is the natural and proper result of the action, because the court, being made aware of the act of bankruptcy, is informed of the flaw in the plaintiff's title, and while it can decide that the defendant is liable to pay, cannot at the moment decide who is entitled to receive the money recovered under the judgment. We are aware that in the cases which have been quoted to us no such course was pursued. We must, however, remember that prior to the Judicature Act the powers of a court of common law to adapt its procedure to the necessities of the particular case before it were far more restricted than they are at present, when it has all the powers of the Court of Chancery. But there is a further reason. Under the older Acts the relation back was unlimited as to time. Under the statute of Elizabeth I bankruptcy proceedings might be taken at any date, and the title of the assignee would relate back to the earliest act of bankruptcy, so that during the whole of the rest of the man's life there would be the possibility of setting aside any transactions relating to his then estate to which he had been a party. This was so extravagant and harsh that the courts would naturally lean against the application of the principle and would be unlikely to exercise any powers they might possess of keeping the results of a judgment in suspense for what might, and perhaps must, be an unlimited time. Having established the principle that the judgment constituted a good discharge to a defendant they were almost forced to allow the creditor to enjoy the results of the judgment, because there might for an indefinite time be no other representative of the estate. If the judgments in *Foster* v. *Allanson* (2), which is relied on as establishing that an act of bankruptcy by a plaintiff is no defence, be examined it will be seen that the judges gave weight to the consideration that a long time had elapsed since the act of bankruptcy had taken place, and that further bankruptcy proceedings were unlikely. They also expressly guard themselves from being supposed to say that payment in such circumstances under a judgment obtained by collusion would be a good discharge, though it is difficult to understand what collusion could exist in the payment of a debt admittedly due, and which they had just decided was enforceable, if it did not mean that the process of law was being used by the parties to evade the responsibilities imposed by the bankruptcy laws.

The period during which the bankruptcy proceedings must be taken so as to give rise to relation back are so definitely limited under the present laws to the comparatively short period of three months that the court is faced by no such difficulty, and, in our opinion, it is its duty to give full effect by all the means which its procedure permits to the substance of the bankruptcy enactments with regard to the property of a man who has committed an act of bankruptcy, and the procedure which we have indicated appears to us to be within the power of the court and to be effective for this purpose, and it should therefore be followed. We have examined thus fully the case of the recovery of a debt after notice of an act of bankruptcy by the plaintiff, because it is the simplest case of legal proceedings for collecting the estate, and because the decisions in relation to it were those mainly relied on by the debtors to support their contention that notice of an act of bankruptcy has no effect upon legal proceedings. But the actual case before us is the more complicated case of a secured creditor, and we will now pass to the second point, which deals with the special rights arising from the existence of that relationship.

In the present case tender of the amount due to the bank was made by the

defaulting debtor and the official assignee of the Stock Exchange jointly, and the action is brought in their joint names. But for simplicity's sake we shall assume that it was done by the debtor alone. The addition of the assignee could not give additional rights to or impose additional obligations upon anyone seeing that his title rested on an assignment which was in itself an act of bankruptcy. The question, therefore, is this: Has a person who has committed an act of bankruptcy the right to require a secured creditor who has notice of it to give up his securities on payment of the amount due, and can he, in case of refusal, enforce that right by action? It was at first urged that s. 9 (2) of the Bankruptcy Act, 1883 [now s. 7 (2) of the Bankruptcy Act, 1914] assisted the debtors. The subsection reads as follows:

> "But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise, or deal with it if this section had not been passed."

We are of opinion that this sub-section has no application to the present case. Even if the secured creditor might safely have accepted the money and given up the securities under that section he has not done so, and this is an action brought against him to compel him to do so. An enabling provision such as the one referred to imposes no obligation on the secured creditor, in whose interests it is passed, to act under the powers there given, and therefore could not support the present action. But although it is not necessary to pronounce any opinion on the subject it must not be supposed that we give any countenance to the view that this sub-section would entitle the creditor to receive payment of his debt from his debtor and give up the securities provided he had notice of the act of bankruptcy. The invalidity of such a transaction would arise not from any limitation in the creditor's power of dealing with the securities but from the fact that the person who proposed to pay the money was personally incapacitated from making any such payment or from receiving the securities in return for the same. This is no real limitation of or encroachment upon the creditor's power to deal with the securities. It is only a consequence of his debtor having incapacitated himself from tendering the money.

The main question, however, depends on the point decided by WRIGHT, J., in *Re Lawford and Lawrence* (1). The decision in that case was, of course, binding on BUCKLEY, J., and warranted, and indeed compelled, him to decide the present case in the way that he did decide it. In that case the learned judge held that a pledgee of goods remained subject to the duty to re-deliver the goods to the pledgor on receipt of the money due and had a right to discharge himself of that liability under the contract, even though the pledgor had to his knowledge committed an act of bankruptcy prior to the tender of the money. He seems to have been influenced in his decision by a supposed distinction between goods and money in respect of the relation back of the title of a trustee under s. 43 of the Bankruptcy Act, 1883, and the provisions as to the protection of certain bonâ fide transactions under s. 49 of that Act [now s. 45 of the Bankruptcy Act, 1914]. We can see no justification for holding that there is any such distinction between goods and money, nor do the decisions give warrant for it. Section 43 relates generally to the property of the bankrupt without distinguishing whether it is goods or money, and s. 49 speaks of "payment or delivery to the bankrupt," the word "delivery" obviously referring to the delivery of goods. Nor is there any reason in the nature of things why the Bankruptcy Act, 1883, should make any such distinction between goods and money. In our opinion, the learned judge failed to realise that by the act of bankruptcy the pledgor disqualified himself from making a tender to his pledgee, and that, therefore, it was not open to the latter to accept the money.

We are of opinion, therefore, that a secured creditor is not entitled to receive payment of the debt from his debtor after notice of an act of bankruptcy. But,

as in the case which has already been examined at length, we see no reason why this should prevent the help of the courts being called in to render effective the obligations of third parties towards the debtor or his estate. There seems to us to be no sufficient ground why notice of an act of bankruptcy should necessarily form a defence to an action of redemption any more than to one of debt subject to the court properly safeguarding the consequences of its acts. But the problem here is much more complex. In the first place, it is clear that the court must do nothing to prevent the creditor from dealing with the securities in any way in which he is entitled to deal with them by virtue of his contract with the debtor so as to repay himself the money due to him. Nor can the court require the creditor to surrender the securities without authorising the payment to him of the amount due thereon. But, even with these restrictions, the aid of the court may, with advantage, be invoked in many cases. Whereas in the present case there is an assignee who is not incapacitated from making payments, the court might direct the bank to deliver up the securities on payment by the assignee of the amount due, such securities to be held by him until it is decided whether bankruptcy will ensue or not. In such a case, inasmuch as the court would act upon equitable principles, the assignee would, in case of bankruptcy supervening, be relegated to the position of the secured creditor, and the trustee in bankruptcy could only obtain the securities by repayment of the sum paid by the assignee to obtain their delivery over to him. And even in certain cases where the action was brought by the bankrupt alone, the court might sanction the payment by the bankrupt himself in order to save the estate from suffering disproportionate injury on principles analogous to the cases in which the court has held that payments to save forfeiture were good against the trustee in a subsequent bankruptcy where the estate has benefited by the forfeiture having been thus averted. But we apprehend that, in cases where it was not clearly to the interest of the estate that the securities should be redeemed, the court would hold its hand and would not permit the debtor's estate to be used in this way until it was clear whether or not the debtor or his trustee in bankruptcy were the party entitled to redeem. A creditor is a secured creditor whether or not the securities are adequate to protect him from loss, and the court would, I think, be averse to authorise an election by the debtor to redeem the securities when it might well happen that his trustee in bankruptcy might prefer not to do so.

In the present case the learned judge has, by his judgment, treated the bank as having wrongfully refused to allow the debtor or his assignee to redeem. For the reasons above given, we are of opinion that this judgment was wrong and should be set aside. If the assignee is prepared to pay the money due on the securities and to undertake to hold them until bankruptcy proceedings are taken, or the period of three months has expired, we are of opinion that we ought to make an order empowering him so to do. But, if he is not, we do not think that we ought to give any immediate judgment in this action, but ought to direct it to stand over until the court can see who is the person entitled to redeem. There is no such clear balance of advantage shown by the evidence as would, in our opinion, justify us in treating this as a case in which a payment should be made of the nature of salvage. But, whatever be the order in these respects, the bank is entitled to their costs of action, as well as to interest on the amount due until actual repayment, and they are entitled until repayment to exercise any rights they may possess enabling them to realise the securities. They are in the position of secured creditors to whom no tender has been made because the so-called tender before the action was one which they were not entitled to accept.

Appeal allowed.

Solicitors: *Morley, Shirreff & Co.*; *Hollams, Son, Coward & Hawksley.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

Re KEET

[COURT OF APPEAL (Vaughan Williams, Romer and Stirling, L.JJ.), May 19, June 9, 1905]

[Reported [1905] 2 K.B. 666; 74 L.J.K.B. 694; 93 L.T. 259; 54 W.R. 20; 21 T.L.R. 615; 12 Mans. 235]

Bankruptcy—Annulment—"Payment of debts in full"—Payment of proved debts to amount of 20s. in £—Effect of creditors' assent to annulment and absolute release of their debts—Bankruptcy Act, 1883, (46 & 47 *Vict.*, *c.* 52), *s.* 35 (1).

Under the Bankruptcy Act, 1883, s. 35 (1) [see now Bankruptcy Act, 1914, s. 29 (1)], which enabled the court to annul an adjudication where (inter alia) the debts of the bankrupt "are paid in full," "payment in full" means payment in cash to the amount of 20s. in the £ of at any rate all the debts that have been properly proved. The assent of the creditors to an annulment of the bankruptcy by having given to the bankrupt absolute releases of their debts is not payment in full. The power of the court to annul an adjudication is in any event discretionary.

Per VAUGHAN WILLIAMS, L.J. (ROMER, L.J., and STIRLING, L.J., expressing no opinion on this point): "Payment in full" means payment only of debts admitted to proof, and does not mean provable debts.

Per STIRLING, L.J.: In the absence of special circumstances an order under the Bankruptcy Act, 1883, s. 35 (1), for annulment ought not to be made where, if the bankrupt were applying for an order of discharge, it would not be granted.

Notes. The Bankruptcy Act, 1883, ss. 35 and 36 have been replaced by the Bankruptcy Act, 1914, s. 29.

Applied: *More* v. *More*, [1962] 1 All E.R. 125. Referred to: *Re Aron* (1905), 21 T.L.R. 693.

As to annulment of an adjudication order, see 2 HALSBURY'S LAWS (3rd Edn.) 354–355; and for cases see 4 DIGEST (Repl.) 208 et seq., 590 et seq. For the Bankruptcy Act, 1914, s. 29, see 2 HALSBURY'S STATUTES (2nd Edn.) 362–363.

Cases referred to:

(1) *Re E.A.B.*, [1902] 1 K.B. 457; 71 L.J.K.B. 356; 85 L.T. 773; 50 W.R. 229; 9 Mans. 105, C.A.; 4 Digest (Repl.) 277, *2543*.

(2) *Re Pilling, Ex parte Board of Trade*, [1903] 2 K.B. 50; 72 L.J.K.B. 392; 88 L.T. 667; 51 W.R. 465; 19 T.L.R. 388; 47 Sol. Jo. 435; 10 Mans. 142, C.A.; 5 Digest (Repl.) 1161, *9384*.

Also referred to in argument:

Re Burnett, Ex parte Official Receiver (1894), 63 L.J.Q.B. 423; 70 L.T. 385; 42 W.R. 368; 38 Sol. Jo. 311; 1 Mans. 89; 10 R. 159; 4 Digest (Repl.) 208, *1884*.

Re Gyll, Ex parte Board of Trade (1888), 58 L.J.Q.B. 8; 59 L.T. 778; 37 W.R. 164; 5 Morr. 272, D.C.; 4 Digest (Repl.) 204, *1830*.

Re Painter, Ex parte Painter, [1895] 1 Q.B. 85; 64 L.J.Q.B. 22; 71 L.T. 581; 43 W.R. 144; 11 T.L.R. 9; 39 Sol. Jo. 168; 1 Mans. 499; 15 R. 16, D.C.; 4 Digest (Repl.) 204, *1836*.

Re Harmony and Montague Tin and Copper Mining Co., Spargo's Case (1873), 8 Ch. App. 407; 42 L.J.Ch. 488; 28 L.T. 153; 21 W.R. 306, L.JJ.; 9 Digest (Repl.) 91, *401*.

Re Hester, Ex parte Hester (1889), 22 Q.B.D. 632; 60 L.T. 943, D.C.; on appeal, 22 Q.B.D. 637; 60 L.T. 945; 5 T.L.R. 326; 6 Morr. 85, C.A.; 4 Digest (Repl.) 182, *1660*.

Hardwick v. *Brown* (1873), L.R. 8 C.P. 406; 28 L.T. 502; 37 J.P. 407; 21 W.R. 639; 33 Digest 48, *281*.

Re Beer, Ex parte Beer, [1903] 1 K.B. 628; 72 L.J.K.B. 366; 88 L.T. 334; 51 W.R. 422; 19 T.L.R. 319; 47 Sol. Jo. 367; 10 Mans. 136, C.A.; 4 Digest (Repl.) 212, *1901*.

Re Burr, Ex parte Board of Trade, [1892] 2 Q.B. 467; 61 L.J.Q.B. 591; 66 L.T. 553; 8 T.L.R. 515; 9 Morr. 133, C.A.; 4 Digest (Repl.) 190, *1722*.

Re Taylor, Ex parte Taylor, [1901] 1 K.B. 744; 70 L.J.K.B. 531; 84 L.T. 426; 49 W.R. 510; 45 Sol. Jo. 382; 8 Mans. 230, D.C.; 4 Digest (Repl.) 211, *1900*.

Re Rowe, Ex parte Derenburg & Co., [1904] 2 K.B. 483; 73 L.J.K.B. 594; 91 L.T. 220; 52 W.R. 628; 48 Sol. Jo. 475; 11 Mans. 130, C.A.; 4 Digest (Repl.) 364, *3315*.

Ex parte Dewdney, Ex parte Seaman (1809), 15 Ves. 479; 33 E.R. 836; 4 Digest (Repl.) 277, *2544*.

Appeal by the official receiver against a decision of a Divisional Court (BIGHAM and DARLING, JJ.) sitting in Bankruptcy affirming an order made by the registrar of the Leeds County Court annulling the order of adjudication in the bankruptcy of the debtor.

The debtor was an outside stockbroker, and on Sept. 24, 1903, a receiving order was made against him on a creditor's petition, and on Oct. 1, 1903, he was adjudicated a bankrupt. His liabilities being about £9,700 and his assets only £189, an order was made for the summary administration of his estate, and the official receiver became the trustee in the bankruptcy. Only one dividend of 2d. in the pound was paid. All the creditors, except a few whose debts amounted to £41 and who were paid in full, being desirous of helping the debtor, executed a deed by which they released their debts and agreed to withdraw their proofs.

In September, 1904, the debtor applied to the county court to annul his adjudication on the ground that his debts had been paid in full, and put in evidence the deed of release. The registrar made the order, and the official receiver appealed to the Divisional Court. The Divisional Court dismissed the appeal, holding that the order of the registrar was right. BIGHAM, J., said that the creditors had released their debts, which was equivalent to payment in full. The court had a discretion and might look into the facts, and here there was no reason to suppose that anything improper had been done or to doubt the honesty of the transaction. DARLING, J., said the words of the section were not very grammatical nor logical, but he thought that the section was meant to apply to debts existing as debts until they were paid, and did not apply to those debts which were destroyed by another process. The official receiver appealed.

The Bankruptcy Act, 1883, s. 35 (1), provided:

> "Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, by order annul the adjudication."

The Attorney-General (Sir R. Finlay, K.C.) and *S. G. Lushington* for the official receiver.

A. H. Carrington for the debtor.

Cur. adv. vult.

June 3, 1905. **VAUGHAN WILLIAMS, L.J.**, read the following judgment.—The bankrupt applied to the county court for an annulment of his bankruptcy on the ground that all his debts which had not been released had been paid in full. The registrar made the order for annulment. The Divisional Court affirmed the order of the registrar. Not without some hesitation I have come to the conclusion that this appeal from the decision of the Divisional Court must be allowed.

I cannot agree with BIGHAM, J., that the release of a debt is equivalent to or the same as "payment in full," which, by s. 35 of the Bankruptcy Act, 1883, is the condition precedent to the jurisdiction to annul, a condition which the bankrupt contends has happened in the present case. I have had more doubt whether DARLING, J., was not right when he treated s. 35 as dealing with debts which continued to be debts throughout the bankruptcy until they were paid—that is, extinguished by payment in full—and does not apply to those which have been put an end to by release. I agree with him

that the language of the Act is inaccurate, and does not strictly describe what Parliament meant to say. The wording of s. 36, which runs thus,

> "For the purposes of this part of this Act, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into court,"

rather supports the view of DARLING, J. Suppose the debtor alleges that he has paid all his debts and disputes the right of a creditor, who has executed an unconditional release, to be paid anything, and suppose thereupon the debtor entered into the necessary bond to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt. It is not easy to see how the creditor suing could succeed unless the issue raised was whether, at the commencement of the bankruptcy, the creditor had a provable debt. An issue whether the creditor, at the moment of the application to annul, had a provable debt would, so far as I can see, let in a replication by the debtor of a release. Moreover, it is not the debtor only who is affected by a released debt being regarded as continuing for the purposes of s. 35 as capable of payment. If a debt has been in truth and in fact unconditionally released, the proof ought to be expunged on the application of any creditor who, by reason of his proved debt, has a right to rank upon the debtor's estate.

With regard to s. 36, the only way out of the difficulty, in my opinion, would be to hold that, according to the true construction of that section, a bankrupt cannot dispute a proved debt, but is bound by the admission of the proof by the trustee administering his estate, and to read the words in s. 35 "that the debts of the bankrupt are paid in full" as meaning that the proved debts are paid in full—that is to say, not the debts only of those still entitled to share in the distribution of the bankrupt's estate, but also all debts which, having been proved, have not been discharged by payment in full; and on the whole I think this, and not the view of DARLING, J., is the right view. I believe, although I cannot find the case reported, that I, when acting as Judge in Bankruptcy, expressed my approval of this construction. The section is not very clear, but I think that in practice it has always been construed as meaning that the condition of annulment is payment in full of all debts which have been admitted to proof, unless the proof has been expunged on the ground that it never ought to have been admitted.

In the present case it appears by the report of the official receiver that the bankrupt personally obtained the signatures to the deed of release, and at the same time obtained the consents of the creditors to the proofs being expunged, which consents, together with the executed deeds of release, were exhibited to the bankrupt's affidavit, but no application to expunge the proofs, or any of them, has been made, and the proofs remain on the file. But, if the construction which I am putting on the section is right, the decision of the court would have been the same, even if the proofs of the released debts had been expunged and removed from the file. No one can doubt that the words of the section will support this construction, although another construction may be possible, and to construe the section in the way contended for on behalf of the bankrupt would undoubtedly open the door to arrangements with creditors under which the court, in ignorance of the true facts, might in the exercise of its discretion (for a bankrupt paying all his debts in full can only obtain an order for annulment if the court thinks fit, and not ex debito justitiae) order annulment of a bankruptcy, when the court, if it had known the circumstances under which the releases were obtained, would have refused to annul.

I have only to add that cases like *Re E. A. B.* (1) and *Re Pilling, Ex parte Board of Trade* (2), which for the purposes of schemes of arrangement under s. 3 of the Bankruptcy Act, 1890, treat, for the purpose of the sanction of the court to a scheme of arrangement, the "debts" as those debts of the debtor existing at the time of the application to the court for its sanction to the scheme, to the exclusion of debts unconditionally released under circumstances which the court considered did not preclude it from giving

its sanction to the scheme, do not really affect the question of the construction of s. 35 at all. I think that the court ought to read "debts" in s. 35 as meaning debts admitted to proof, because to hold "debts" to mean "provable debts" would make the payment in full by a bankrupt of debts for advances by relations and friends, who have not proved conditionally or otherwise, or in any way intervened in the bankruptcy, a condition precedent to the power of the court to annul.

ROMER, L.J.—I have come to the same conclusion, and I can state my reasons very shortly. In the first place, I cannot agree with BIGHAM, J., that a debt which has been voluntarily released by the creditor can be said to have been paid in full. In the second place, it is clear from the section that the word "debts" refers to debts not existing as such at the date of the application for annulment; and, without considering to what debts previously owing the section refers, I think that it must, at any rate, be meant to refer to and cover debts which have been proved, and rightly proved, in the bankruptcy.

STIRLING, L.J.—I am of the same opinion. I think that s. 35 must be read in connection with the other provisions of the Bankruptcy Act. I refer particularly to those found in s. 28 of the Bankruptcy Act, 1883, which has been repealed but has been re-enacted by s. 8 of the subsequent Act of 1890, with modifications and extensions [see now the Bankruptcy Act, 1914, s. 26, as amended by the Bankruptcy (Amendment) Act, 1926, s. 1]. Section 28 provided that the court should refuse discharge in all cases where the bankrupt had committed any misdemeanour under the Act, or part 2 of the Debtors Act, 1869, or any amendment thereof; and also should, on proof of any of the facts therein mentioned, either refuse the order or suspend the operation of the order for a specified time, or grant the order of discharge subject to certain conditions. It follows from that, that in granting an order of discharge the court exercises a discretion.

By s. 8 of the Act of 1890, among the other facts which the court has to take into consideration is this—that the bankrupt's assets are not of a value equal to 10s. in the pound on the amount of his unsecured liabilities [see now the Bankruptcy Act, 1914, s. 26 (3) (a)]. In the present case, the debts of the bankrupt amounted in round figures to £10,000, and the assets have been sufficient to pay a dividend of 2d. in the pound, a very serious fact which would have to be taken into consideration if the bankrupt was applying for an order of discharge. He is not applying for an order of discharge, but he is applying for an order of annulment under s. 35 of the Act of 1883—that is to say, he is asking the court to wipe out the bankruptcy altogether and put him in the same position as if there had been no adjudication.

The question is whether such an order ought to be made in the present case, and the first point which must be considered is whether the bankrupt had satisfied the condition which is prescribed by the legislature—namely, is it proved to the satisfaction of the court that the debts of the bankrupt are paid in full? On this point we must consider what are the debts referred to, and I agree with my brethren in thinking that the debts there referred to include at least all debts which have been actually and properly proved in the bankruptcy. How have the debts been got rid of here? The large mass of them have been got rid of by means of releases from the creditors. Those releases have been given without any consideration. But, to test the case, let us suppose for a moment that it had been proved that those releases had been given by the bulk of the creditors in consideration of a payment of 6d. in the pound. Would that be a payment in full? I cannot think that that is the meaning of the Act at all, and I respectfully differ from BIGHAM, J., who appears to have been of that opinion. The language of the Act, interpreted according to its natural meaning, appears to me to require a payment in full—a payment of money—something which in an action at law could under the old practice have been pleaded as a payment. If these releases had been given in consideration of a small payment, in my judgment they would not have satisfied the requirements of the Act, and still less can releases given without any consideration at all do so. I think, therefore, that the bankrupt has not satisfied the requirements of the Act in order to entitle him to an order for annulment.

But I desire to add this that the jurisdiction which is conferred by s. 35 is discretionary. The Act provides simply that the court may, on the application of any person interested,

by order annul the adjudication, and in my judgment, in the absence of some more special circumstances, it would not be a good exercise of discretion that an order for annulment should be made where if the bankrupt were applying for his order of discharge an order of discharge would not be granted. For these reasons I think that the order which has been made cannot be supported, and that this appeal ought to be allowed.

Solicitors: *Solicitor to the Board of Trade*; *Vincent & Vincent*, for *North & Co.*, Leeds.

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

WATT *v.* WATT

[House of Lords (The Earl of Halsbury, L.C., Lord Davey and Lord Robertson), November 29, December 1, 1904, April 3, 1905]

[Reported [1905] A.C. 115; 74 L.J.K.B. 438; 92 L.T. 480; 69 J.P. 249; 53 W.R. 547; 21 T.L.R. 386; 49 Sol. Jo. 400]

House of Lords—Damages—Assessment by jury—Review by appellate court—Order for new trial.

Libel—Damages—Mitigation—Admissibility of facts that would constitute justification—Inflation of damages—Offensive cross-examination of plaintiff—Evidence—Cross-examination of plaintiff—Credit—Questions as to facts that would constitute justification.

Except with the consent of both parties, an appellate court has no power to alter the amount of damages awarded by a jury, and can only intervene by ordering a new trial. The power to order a new trial is, however, discretionary, and the court may impose terms as to costs and other matters within its jurisdiction.

In an action for libel, the defendant cannot in mitigation of damages bring evidence of facts which, if proved, would constitute justification. Such facts may, however, be put in cross-examination to discredit the plaintiff as a witness.

If the plaintiff is subjected to an insulting and offensive cross-examination, this may inflame the damages, but if the jury are misled by prejudice or passion so that their verdict is unreasonable, an appellate court will intervene.

Belt v. *Lawes* (1) (1884), 12 Q.B.D. 356, overruled.

Notes. The power of the Court of Appeal to alter the amount of damages awarded by a jury is now governed by R.S.C., Ord. 58, r. 10, sub-r. (4).

In *Mechanical and General Inventions Co., Ltd., and Lehwess* v. *Austin and the Austin Motor Co., Ltd.*, [1935] All E.R.Rep. 22, the House of Lords dealt with the question of the review of damages by an appellate court, the present case not being cited. It was there held that the Court of Appeal has power to review an award of damages by a jury where no reasonable proportion exists between the assessment and the circumstances of the case. The question to be decided is whether the evidence so preponderates against the verdict as to show it was unjust and unreasonable. The principle must be, however, that the judgment upon the facts is to be the judgment of the jury and not that of any other tribunal. The rule of conduct for an appellate court when considering whether a verdict should be set aside on the ground that the damages given by the jury are excessive is as nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence.

Considered: *Jenkins* v. *Taff Vale Railway* (1912), 106 L.T. 715. Explained and Distinguished: *Barber & Co., Ltd.* v. *Deutsche Bank (Berlin) London Agency*, [1918–19] All E.R.Rep. 407. Considered: *Wing Lee* v. *Lew*, [1925] A.C. 819; *Hobbs* v. *Tinling, Hobbs* v. *Nottingham Journal*, [1929] All E.R.Rep. 33. Distinguished: *Reaney* v.

Co-operative Wholesale Society, Ltd. (1932), 173 L.T.Jo. 262. Referred to: *Ley* v. *Hamilton* (1934), 151 L.T. 360; *Owen* v. *Sykes*, [1935] All E.R.Rep. 90; *Newstead* v. *London Express Newspaper, Ltd.*, [1939] 4 All E.R. 319.

As to variation of an award by the Court of Appeal, see 11 HALSBURY'S LAWS (3rd Edn.) 311–312, and 24 HALSBURY'S LAWS (3rd Edn.) 121–122. For cases see 17 DIGEST (Repl.) 177 et seq. and 32 DIGEST 166.

Cases referred to:

(1) *Belt* v. *Lawes* (1884), 12 Q.B.D. 356; 53 L.J.Q.B. 249; 50 L.T. 441; 32 W.R. 607, C.A.; 17 Digest (Repl.) 181, *769*.

(2) *Watson* v. *Christie* (1800), 2 Bos. & P. 224; 126 E.R. 1248; 17 Digest (Repl.) 113, *263*.

(3) *Speck* v. *Phillips* (1839), 5 M. & W. 279; 7 Dowl. 470; 8 L.J.Ex. 249, 277; 3 J.P. 421; 151 E.R. 119; 17 Digest (Repl.) 107, *213*.

(4) *Cuming* v. *Sibly* (1769), 4 Burr. 2489.

(5) *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q.B.D. 78; 41 L.T. 121; 43 J.P. 749; 28 W.R. 10, C.A.; 17 Digest (Repl.) 190, *860*.

(6) *Leeson* v. *Smith* (1834), 4 Nev. & M. K.B. 304; 17 Digest (Repl.) 181, *764*.

(7) *Price* v. *Severn* (1831), 7 Bing. 316; 5 Moo. & P. 125; 9 L.J.O.S.C.P. 99; 131 E.R. 122; 17 Digest (Repl.) 183, *784*.

Also referred to in argument:

Gatty v. *Farquharson* (1893), 9 T.L.R. 593.

Appeal from an order of the Court of Appeal (SIR RICHARD HENN COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.), made in an action for libel brought by the respondent, Julia Watt, formerly the wife of Hugh Watt, against the appellant, the Hon. Violet Julia Charlotte Maria Watt, now the wife of Hugh Watt, and formerly the wife of Sir Reginald Beauchamp.

The respondent was married to Mr. Watt on May 8, 1880. The marriage was not a happy one, and for some years the couple lived apart from each other. In October, 1895, the respondent presented a petition for divorce, but a decree for judicial separation only was granted. There were reconciliations, however, and for two subsequent periods Mr. and Mrs. Watt lived together again. Mr. Watt, however, became intimate with Lady Violet Beauchamp, and his wife again sought a divorce; and a decree nisi was made on Mar. 5, 1903. Meanwhile, Sir Reginald Beauchamp sought a dissolution of his marriage with the appellant, and a decree absolute had been made on Nov. 25, 1901. Subsequently Mr. Watt married Lady Violet Beauchamp.

On July 26, 1901, the present action was commenced for libel contained in a letter from the appellant to Mr. Watt. Five thousand pounds damages were claimed. The action was tried by BRUCE, J., and a special jury on Oct. 29 and 30, 1902, and a verdict was given for the respondent for the amount claimed.

The Court of Appeal ordered that the judgment of BRUCE, J., should be set aside, and a new trial had between the parties unless the plaintiff the present respondent should, within fourteen days from that date consent to a reduction of the damages to the sum of £1,500. On June 23, 1903, the respondent's solicitors wrote a letter to the appellant's solicitors consenting, on behalf of the respondent, to a reduction of the damages to the sum of £1,500; and on July 15, 1903, an order was made that the judgment of BRUCE, J., should be amended by reducing the damages to £1,500, in accordance with the order of the Court of Appeal, and the judgment was accordingly so amended. The defendant appealed.

Rufus Isaacs, K.C., and *J. R. Atkin* for the appellant.

Lawson Walton, K.C., and *T. Mathew* for the respondent.

The House took time for consideration.

April 3, 1905. The following opinions were read.

THE EARL OF HALSBURY, L.C.—In this case I think that there ought to be a new trial. I say this quite independently of what I have to say hereafter upon the subject of the jurisdiction of the court to direct the amount of the damages without the consent

of both parties to the litigation. I think that the trial itself was most unsatisfactory, and the verdict ought not to be permitted to stand.

The learned counsel for the plaintiff in his opening speech read a letter which was written without prejudice, and was undoubtedly well calculated to influence the jury against the defendant. It is only justice to the learned counsel to say that he was under the impression that it was not written without prejudice—an impression which he retained up to the time of the argument before your Lordships—and he was only undeceived when the letter itself was produced. It is not necessary to discuss how it could have been evidence against the defendant under any circumstances. It was a letter written by the husband to one of the solicitors in the case, and assumed to be evidence of malice on the part of the defendant, because it was a copy in her handwriting. I will only say that I do not assent to its being evidence against her—its only relevancy being to show malice by her, and simply without more proof of authorship than that it was in her handwriting and a copy of her husband's letter. On the other hand, the plaintiff was encountered by a most insulting and offensive cross-examination, for some parts of which there does not seem to be the least justification.* Even in mitigation of damages it is well settled that you cannot go into evidence which, if proved, would constitute a justification. Nor does it appear to me that it makes any difference that the evidence is offered in cross-examination: *Watson* v. *Christie* (2); *Speck* v. *Phillips* (3). Of course, speaking generally, parties take their risk of such a course and inflame the damages against themselves by such a proceeding; but in an extreme case, such as this is, I think that the courts ought not to allow such an extravagant result, even though the parties have procured it by the conduct of which their representatives have been guilty.

The whole theory of the jurisdiction of the courts to interfere with the verdict of the constitutional tribunal is that the court is satisfied that the jury have not really acted reasonably upon the evidence, but have been misled by prejudice or passion; and the conduct to which I have referred was what could not have been prevented by the learned judge, because if an objection had been made to the cross-examination in question the reply would have been that the party here was a witness, and every question to her credit was admissible; but that does not affect the controlling power of the court if the court is satisfied that the jury have been misled. I remember a new trial being granted because the learned counsel for the plaintiff read to the jury the amount of damages claimed in the declaration. Under the circumstances I think that it is the duty of the court to interfere and remit the cause to be heard again under circumstances better calculated to secure a reasonable verdict. I do not think it a case in which your Lordships should follow the precedent of *Cuming* v. *Sibly* (4) or Ord. 39, r. 7.

I am, however, further of opinion that the court has no jurisdiction to fix the amount of damages without the consent of both parties. This question was raised in *Belt* v. *Lawes* (1), and, though it was not necessary for the decision in that case, a weighty opinion was given by LINDLEY, L.J., which has made me hesitate before I come to a conclusion opposed to his. There has been doubtless some confusion in discussing the question of damages rising out of the mode in which our law has grown up. The court itself has the right, and has exercised it in various ways when the question has been raised upon demurrer or default. It may send it, as has been commonly the practice, to the sheriff to assess; but it has the right, which has always been asserted, to decide that question for itself—probably because that question is often a question of law, where the damages are fixed by law, and where it was mere matter of law it was established in very early times (YEAR BOOK, 10 Hen. 6, 25) that the court itself could even increase the damages, and so the learned editor of REEVES'S HISTORY OF THE ENGLISH LAW says (1869 Edn.) vol. 2, p. 610:

> "There was always this distinction between trial by jury and mere inquisition or inquiry by a jury to assess damages—that in the latter case the inquisition was only

* The cross-examination referred to by the Lord Chancellor was not conducted by either of the learned counsel who appeared for the appellant (plaintiff below) in the House of Lords.

to inform the mind of the court, and it was at their discretion whether they would award judgment for the amount found by the jury, whereas upon a trial they had no jurisdiction to interfere as to the amount of damages in cases of tort";

but, where the jury had found larger damages than were laid in the declaration, the court held that they were entitled to restrict them to the amount claimed (YEAR BOOK, 2 Hen. 6, 7). The courts, however, adopted the somewhat unconstitutional proceeding of refusing to give the plaintiff judgment unless he would consent to reduce his claim to what ought to be considered reasonable, and hence the practice and the impression that the court, with the consent of the plaintiff, could reduce the amount of damages. I am unable, after a very anxious examination of the earlier authorities, to assent to the legality of this proceeding unless by the assent of both parties. The very indirect method of the proceeding that they would not give the plaintiff judgment shows that they could not do it without the plaintiff's assent, and one can well understand that the defendant was not very likely to refuse his assent to a proceeding intended for his benefit. The theory of all the cases seems to me to be that the right of the court to interfere with a jury's verdict was only to be by the assent of both parties.

Assume it to be the constitutional view that a person can only have damages assessed against him for a tort by a jury, what right has a court to intervene and say that damages which in its judgment are appropriate shall be the amount assessed against him? The only judgment by a jury is one which the court itself by the hypothesis says is unreasonable and excessive. Has not the defendant a right to say, I refuse to have judgment assessed against me by a court? The law gives me a right to a jury, and, because a jury have already found a verdict against me, which you decide cannot be allowed to stand because it is unreasonable and excessive, how does that displace my right to have the verdict of a jury upon the question?

Hesitating as I do to differ from the opinion expressed by LINDLEY, L.J., in *Belt* v. *Lawes* (1), I have come to the conclusion that there is no power in the court to alter the verdict except by ordering a new trial; and for these reasons I move your Lordships that the judgment appealed from be reversed and a new trial had.

LORD DAVEY.—I agree that this appeal ought to be allowed. It will be sufficient for me to rest my judgment on the second ground stated by the Lord Chancellor. It appears to me an important question of principle.

I assume that in an action of tort a defendant against whom a verdict has been found is entitled to have the damages to be paid by him assessed by the jury which has found the verdict. This right was perhaps of greater importance in former days than it is at present, but it is one which has always been recognised, and effect is given to it in the present rules of court, Ord. 36, r. 2. If, therefore, the court takes upon itself to fix the amount of damages which the defendant is to pay, it is primâ facie usurping the functions of the jury and invading the right of the defendant. The court, however, has jurisdiction to set aside the verdict of the jury and direct a new trial where it considers the damages given by the jury excessive or (in certain cases at any rate) inadequate. To quote the words of JAMES, L.J., delivering the judgment of the court in *Phillips* v. *London and South Western Rail. Co.* (5) (5 Q.B.D. at pp. 85, 86):

> "The verdicts of juries as to the amount of damages are subject, and must, for the sake of justice, be subject, to the supervision of a court of first instance, and if necessary of a Court of Appeal in this way, that is to say, if in the judgment of the court the damages are unreasonably large or unreasonably small, then the court is bound to send the matter for reconsideration by another jury."

But can the court, when it considers that the damages are disproportionate and excessive, say there shall be no new trial if the plaintiff is willing to accept a verdict for a reduced amount or (in other words) with the consent of the plaintiff, impose upon the defendant without his consent the payment of damages, the amount of which has been fixed by the court and not by a jury? It was held by the Court of Appeal in *Belt* v. *Lawes* (1) that the court has this jurisdiction. SIR W. B. BRETT, M.R., says (12 Q.B.D. at p. 357):

"Where the complaint is only that the damages are excessive and the verdict cannot be otherwise impeached, and it is a case where the plaintiff is entitled to substantial damages, the court has power to refuse a new trial without the consent of the defendant, on the plaintiff's consenting to the amount of the damages being reduced to such an amount as, if it had been given by the jury, the court would not have considered excessive."

The learned judge also expressed the opinion that, on the converse case, where the damages are inadequate, the court might, without the consent of the plaintiff, refuse a new trial if the defendant were willing to submit to a verdict for an increased amount.

The first observation that occurs to one is that, if the jurisdiction can only be exercised with the consent of one party, it is difficult to understand why that of the other party should not be equally necessary. I do not doubt that such orders have been frequently made, but they have not been challenged, and in the vast majority of cases the defendant is well advised to submit to a verdict for the reduced amount rather than incur the risk and expense of a new trial. Nor do I doubt that the power (if it exists) would be convenient, and in most cases do substantial justice, and save expense. It is said that the power to grant a new trial is a discretionary power. So it is; but it is a judicial discretion to be exercised in accordance with settled principles of law. The court, no doubt, is not bound to exercise the power on the ground of some technical misdirection or wrong admission or rejection of evidence if the court can see that the result was not affected by it, and substantial justice has been done. And the court may impose terms as to costs and other matters within its jurisdiction.

No authority for the proposition laid down in *Belt* v. *Lawes* (1) is quoted by the learned judges in that case, and no authority earlier than that case was brought to our attention by counsel for the plaintiff in his very careful argument. On the other hand, there are numerous dicta of learned judges to the contrary. The express words of JAMES, L.J., delivering the judgment of the court in *Phillips* v. *London and South Western Rail. Co.* (5) which I have already quoted, may, perhaps, be explained by saying that this point was not present to the learned judge's mind. But in *Leeson* v. *Smith* (6) LORD DENMAN, C.J., said (4 Nev. & M.K.B. at p. 306):

"It is clear that the verdict is at all events for too much; we cannot, however, reduce the damages without the consent of both parties, and therefore the rule must be made absolute for a new trial,"

and in *Price* v. *Severn* (7) ALDERSON, J., said (7 Bing. at p. 320):

"But nothing is more usual than in cases of assault, where an excessive verdict has been given, to suggest to the counsel to agree on a sum, to prevent the necessity of a new trial."

In the present case the jury gave the plaintiff a verdict for £5,000, which has been reduced by the Court of Appeal to £1,500. The appellant succeeded in convincing the court that the amount of damages given by the jury was excessive, and that the verdict could not be allowed to stand, but she had not been heard on the question whether the reduced amount was not also excessive. What was she to do? Could she appeal from the order on the merits? It would be difficult to convince the appellate tribunal that the reduced amount was outrageous, when three experienced judges had suggested it as fair.

I am quite aware that I am differing from learned judges more conversant with cases of this kind than I am. But having with all the caution imposed upon me by that knowledge come to the conclusion that the order of the Court of Appeal is contrary to principle and unsupported by any reported authority except *Belt* v. *Lawes* (1), I am of opinion the appeal should be allowed.

LORD ROBERTSON concurred.

Appeal allowed and new trial ordered.

Solicitors: *Michael Abrahams, Sons, & Co.; Charles Russell & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re GRASSI. STUBBERFIELD *v.* GRASSI

[CHANCERY DIVISION (Buckley, J.), March 16, 1905]

[Reported [1905] 1 Ch. 584; 74 L.J.Ch. 341; 92 L.T. 455; 53 W.R. 396; 21 T.L.R. 343; 49 Sol. Jo. 366]

Conflict of Laws—Will—Will validly made under foreign law—Disposition of "personal estate"—Leaseholds in England—Wills Act, 1861 (24 & 25 *Vict.*, *c.* 114), *ss.* 1, 2, 4.

A naturalised British subject made a will out of the United Kingdom which was unattested, but was validly executed according to the law of the place where it was made. The testator at his death owned certain leaseholds in England. On a summons to determine whether his will disposed of his beneficial interest in these leaseholds,

Held: (i) the will, falling within the Wills Act, 1861, s. 1, was as regards "personal estate" well executed for the purpose of being admitted to probate in England; (ii) "personal estate" included leaseholds; (iii) where a will was admitted to probate under this section, it took effect so far as the law of England allowed; (iv) as the provisions of the will did not infringe English law, for example by infringing the rules as to perpetuities or accumulation, it was competent to dispose of the leaseholds in England.

Notes. It would appear that the phrase "a British subject" in the Wills Act, 1861, s. 1, includes a naturalised British subject: see 7 HALSBURY'S LAWS (3rd Edn.) 51 note (v).

Considered: *Re Lyne's Settlement Trusts, Re Gibbs, Lyne* v. *Gibbs*, [1919] 1 Ch. 80.

As to nature of and succession to immovables, see 7 HALSBURY'S LAWS (3rd Edn.) 27 et seq., 50–52; and for cases see 11 DIGEST (Repl.) 392–393. For the Wills Act, 1861, see 26 HALSBURY'S STATUTES (2nd Edn.) 1356–1358.

Case referred to:

(1) *Freke* v. *Lord Carbery* (1873), L.R. 16 Eq. 461; 21 W.R. 835; 11 Digest (Repl.) 393, *500*.

Also referred to in argument:

Re Watson, Carlton v. *Carlton* (1887), 35 W.R. 711; 11 Digest (Repl.), 401, *568*.

Stanley v. *Bernes* (1836), 3 Hag. Ecc. 373; 162 E.R. 1190; 11 Digest (Repl.) 384, *455*.

Pepin v. *Bruyère*, [1902] 1 Ch. 24; 71 L.J.Ch. 39; 85 L.T. 461; 50 W.R. 34; 46 Sol. Jo. 29, C.A.; 11 Digest (Repl.) 366, *336*.

Gibbs v. *Davis* (1730), Mos. 269; 25 E.R. 389; sub nom. *Davis* v. *Gibbs*, Fitz-G. 116; 3 P.Wms. 26; 2 Eq. Cas. Abr. 326, L.C.; 44 Digest 715, *5629*.

Hood v. *Lord Barrington* (1868), L.R. 6 Eq. 218; 40 Digest (Repl.) 30, *139*

Butler v. *Butler* (1884), 28 Ch.D. 66; 54 L.J.Ch. 197; 52 L.T. 90; 33 W.R. 192; 44 Digest 661, *5001*.

Originating Summons to determine whether the testator's will disposed of his English leasehold properties.

By his will made at Parma in Italy and dated Nov. 1, 1901, Carlo Omobono Grassi bequeathed the usufruct for life of all his property to his wife Louisa Frances wherever the said property might be situate and existing. He gave legacies and annuities to various persons, which were to be paid within two years from his death without opposition from his wife, who was to renounce the usufruct of the corresponding capital. He appointed as his universal heirs to the bare ownership of his property the Congregation of Charity of Viadana, in order that upon the death of his wife a charitable institution to be called the Carlo and Louisa Grassi Institution might be founded. He appointed Socrate Zangelini Francesco Grassi and W. J. Stubberfield to be his testamentary executors. On Dec. 22, 1901, the testator died at Viadana in Italy. The will was a holograph will written in the Italian language, and was not attested by witnesses. In February, 1902, the will was proved in England by Mr. Stubberfield, power being reserved to make a like grant of probate to the other executor.

An action was commenced in the Chancery Division by Stubberfield against Louisa Frances Grassi (the widow of the testator), Socrate Zangelini, the Congregation of Charity of Viadana, and Luigia Grassi, representing the testator's next-of-kin for administration of the real and personal estate of the testator. In this action an order was made directing certain inquiries, including an inquiry as to the technical meaning of "usufruct" in Italian law. By the master's certificate, dated Aug. 9, 1904, it was certified (i) that the testator was a naturalised British subject at the time of making his will and from thence up to and at the time of his death; (ii) that at the time of making his will the testator had ceased to be an Italian subject in pursuance of the law of Italy; (iii) that the testator at the time of making his will and from thence up to and at the time of his death was domiciled in England; (iv) that the testator's will was made according to the forms required by the law of Italy where it was made; (v) that the word usufruct had a technical meaning in the Italian law, being defined by art. 477 of the Italian Civil Code to be

> "the right to enjoy things the ownership of which belongs to another in the manner in which the owner would enjoy the same, but with the obligation to preserve the substance of them as regards both the matter and the form thereof;"

(vi) that every species of property movable and immovable might be the subject of an usufruct.

At the time of his death the testator owned leasehold premises in London. This was a summons taken out by Stubberfield asking (inter alia) that it might be determined whether, having regard to the provisions of the Wills Act, 1861, s. 1, the beneficial interest in the testator's leaseholds was disposed of by his will, and, if so, whether the defendant Louisa Frances Grassi was entitled to the specific enjoyment thereof during her life or for any other or what period during the continuance of the lease under which the testator held the premises. The summons was adjourned into court.

Section 1 of the Wills Act, 1861 (otherwise known as Lord Kingsdown's Act), is as follows:

> "Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicil of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicil of origin."

Section 2 of the Act provides:

> "Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicil of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made."

Section 4 of the Act provides:

> "Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act."

H. B. Cohen for the plaintiff.
Birrell, K.C., and *A. J. Chitty* for the donee of the life interest in the leaseholds.
F. Whinney for the residuary legatees.
Buckmaster, K.C., and *Sheldon* for the next-of-kin.

A **BUCKLEY, J.**—The question to be decided is whether the words "personal estate" in s. 1 of Lord Kingsdown's Act include leaseholds. The divisions between movables and immovables and real and personal estate are familiar to most of us, and are not coterminous. Leaseholds are immovables, but are nevertheless personal estate in a sense, although they savour of the realty. A door is thus opened to controversy whether the words "personal estate" in Lord Kingsdown's Act are confined to movables.

B When the Wills Act was passed in 1837 care was taken to define personal estate, and in s. 1 it was provided that the words "personal estate" should extend to leasehold estates and other chattels real. Section 11 of the same Act provides that

> "any soldier being in actual military service or any mariner or seaman being at sea may dispose of his personal estate as he might have done before the making of this Act."

C It could not be disputed that the words "personal estate," as there used, would include any leasehold property which the soldier or mariner might possess. Section 26 of the Wills Act, 1837, provides that a general devise of a testator's lands is to include leasehold estates where he has no freehold estate to which the description could apply; but the Act generally proceeds on the footing that leasehold property is not real estate. All the

D sections indeed tend to show that the Wills Act, 1837, proceeds, not on the division between mobilia and immobilia, but on that between real and personal estate; and that was the distinction recognised when Lord Kingsdown's Act was passed.

Lord Kingsdown's Act was passed in 1861, and is intituled

> "An Act to Amend the Law with Respect to Wills of Personal Estate Made by British Subjects."

E That title does not, it is true, refer to the Wills Act, but the law which Lord Kingsdown's Act was going to amend was, in fact, contained in the Wills Act, 1837. The Wills Act required wills to be executed and attested in the manner there pointed out. Lord Kingsdown's Act was going to affect that law and to say that in certain cases wills should be admitted to probate although that Act had not been complied with. The first section of Lord Kingsdown's Act relates to wills made out of the United Kingdom by

F British subjects. The second section relates to wills made in the United Kingdom by British subjects. The framework of the sections is substantially the same, but there are certain verbal differences between the two sections, which may have arisen from a want of scanning the language, and not from the existence of any purpose of producing different results. For instance, s. 1 refers to "a British subject," whereas s. 2 speaks of "any

G British subject." One section refers to "the law of the place," another refers to

> "the laws for the time being in force in that part of the United Kingdom where the same is made."

Again, in s. 1 there is another difference of language, inasmuch as it says that the will shall, as regards personal estate,

> "be held to be well executed for the purpose of being admitted . . . to probate,"

H whereas s. 2 says that the will

> "shall, as regards personal estate, be held to be well executed and shall be admitted . . . to probate."

I must look to see whether s. 1 means that the will is to be well executed for the purpose only of being admitted to probate, and not for any other purpose. I cannot understand

I how that can possibly be held to be the meaning. The variance between the two sections is, in my judgment, one of words only, and not of meaning. What is the effect of being "well executed for the purpose of being admitted to probate"? Does that extend to make a gift of leasehold property to a certain person effectual? I cannot see why it should not. In the Act which is amended personal estate is defined as including leaseholds. Section 4 of Lord Kingsdown's Act says that nothing in that Act contained shall invalidate any will, "as regards personal estate," which would have been valid if that Act had not been passed, unless such will has been revoked or altered by the instrument rendered valid by this Act. The personal estate there referred to is the same thing as

that referred to in s. 1 and that referred to in s. 11 of the Wills Act. I see no reason whatever why the expression "personal estate," as used in Lord Kingsdown's Act, should not be held to include leasehold property.

There is another reason which appears to me to support the conclusion at which I arrive. Before Lord Kingsdown's Act, where a British subject domiciled abroad made a will according to the law of his domicil, and that will was admitted to probate here, although the legal title in any leaseholds given by the will passed, the will would not pass the beneficial interest in the leaseholds. Counsel for the next-of-kin argued that nothing was done by Lord Kingsdown's Act to help the person wishing to dispose of that beneficial interest. But it seems to me that the Act has done something for the testator in such a case by giving him the right to dispose of the beneficial interest in the lease. I need not refer to the cases cited, which are only authorities for familiar propositions. It is a different thing to say that a disposition by a will to which Lord Kingsdown's Act applies can be effectual in any way other than that which results from its being admitted to probate; for example, although it might be admitted to probate it is clear, on the authority of *Freke* v. *Lord Carbery* (1), that provisions in a will infringing Thellusson's Act or the English law against perpetuities would not be validated by Lord Kingsdown's Act. Therefore s. 1 of that Act does not say that the will shall be well executed for all purposes. The section says, in effect, that the will shall be valid for the purposes of being admitted to probate, and will then take its place and be effectual for such other purposes following on probate as the law of England allows.

This testator was an Italian by origin, but at the time of his death he was naturalised and domiciled in this country, and for all purposes material to this case was an Englishman. He went on a visit to Italy and died there, and his case clearly falls within s. 1 of the Act of 1861. The will was made out of the United Kingdom by a British subject, and was valid according to the law of Italy, and has been admitted to probate here. By his will he left the usufruct in his property in the manner indicated therein. The effect is that his widow is entitled to a life interest in his leaseholds, and it is not disputed that she has the right to enjoy them in specie.

Solicitors: *Herbert F. Oddy*; *Markby, Stewart & Co.*; *T. Richards & Co.*

[*Reported by* R. C. Carter, Esq., *Barrister-at-Law.*]

HOOPER *v.* HERTS AND ANOTHER

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Romer and Cozens-Hardy, L.JJ.), February 13, 14, 1906]

[Reported [1906] 1 Ch. 549; 75 L.J.Ch. 253; 94 L.T. 324; 54 W.R. 350; 50 Sol. Jo. 271; 13 Mans. 85]

Company—Shares—Transfer—Registration—Right of transferee to registration—Duty of transferor not to prevent transferee obtaining benefit of transfer—Breach—Damages—Measure.

On the transfer of shares in a company there is implied, as arising out of the relation thus created between the transferor and the transferee, a duty on the transferor not to do anything to prevent or to interfere with the transferee getting the full benefit of his grant, as, for instance, writing to the company and stating, without justification, that the transfer was not in order and should not be registered. A breach of this implied duty renders the transferor liable in damages to the transferee, and where there has been a fall in the value of the shares the measure of damages is the difference between the value of the shares when the transfer ought to have been registered and that when registration was in fact effected.

Notes. As to transfer of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 248–262; and for cases see 9 DIGEST (Repl.) 358 et seq.

Cases referred to:

(1) *London Founders' Association, Ltd.* v. *Clarke* (1888), 20 Q.B.D. 576; 57 L.J.Q.B. 291; 59 L.T. 93; 36 W.R. 489; 4 T.L.R. 377, C.A.; 9 Digest (Repl.) 365, *2337.*

(2) *Stray* v. *Russell* (1860), 1 E. & E. 916; 29 L.J.Q.B. 115; 1 L.T. 443; 6 Jur.N.S. 168; 8 W.R. 240; 120 E.R. 1154, Ex. Ch., 9 Digest (Repl.) 365, *2335.*

Also referred to in argument:

Skinner v. *City of London Marine Insurance Corpn.* (1885), 14 Q.B.D. 882; 54 L.J.Q.B. 437; 53 L.T. 191; 33 W.R. 628; 1 T.L.R. 426, C.A.; 9 Digest (Repl.) 362, *2318.*

Re Tahiti Cotton Co., Ex parte Sargent (1874), L.R. 17 Eq. 273; 43 L.J.Ch. 425; 22 W.R. 815; 9 Digest (Repl.) 378, *2439.*

Gurney v. *Seppings* (1846), 2 Ph. 40; 1 Coop. temp. Cott. 12; 15 L.J.Ch. 385; 7 L.T.O.S. 317; 47 E.R. 719, L.C.; 35 Digest 386, *1282.*

Moore v. *North Western Bank*, [1891] 2 Ch. 599, 60 L.J.Ch. 627; 64 L.T. 456; 40 W.R. 93; 7 T.L.R. 430; 9 Digest (Repl.) 398, *2551.*

Sanders v. *Kentish* (1799), 8 Term Rep. 162; 17 Digest (Repl.) 97, *134.*

Owen v. *Routh* (1854), 14 C.B. 327; 23 L.J.C.P. 105; 22 L.T.O.S. 260; 18 Jur. 356; 2 W.R. 222; 2 C.L.R. 365; 139 E.R. 134; 4 Digest (Repl.) 337, *3068.*

Shepherd v. *Johnson* (1802), 2 East, 211; 102 E.R. 349; 17 Digest (Repl.) 97, *135.*

Appeal from a decision of KEKEWICH, J., in an action in which the plaintiff, Charles Hooper, claimed from the defendants, A. C. Herts (who did not appear) and A. Whatton, a declaration that the second defendant, in breach of a duty which he owed him (the plaintiff), had prevented a company registering a transfer of shares which that defendant had purported to transfer to him, and damages for the breach of duty. KEKEWICH, J., held that an action by the plaintiff was maintainable, but that in the circumstances he was not entitled to damages.

The plaintiff appealed from that decision, asking by his notice of appeal that it might be reversed as regards the direction that the action should stand dismissed so far as the same related to the claim for damages against the defendant Whatton, and that it might be adjudged that the plaintiff was entitled against that defendant to damages for breach of contract or obligation.

P. Ogden Lawrence, K.C., and *Bateman Napier* for the plaintiff.

Stewart-Smith, K.C., and *Cozens-Hardy* for the defendant, Whatton.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal from the decision of KEKEWICH, J., upon one particular point in the case. The plaintiff originally claimed a declaration that, under and by virtue of the deposit with him of a transfer in blank signed by the defendant Whatton relating to shares in the Smelting and Refining Co. of Australia, Ltd., which stood in the name of that defendant in the books of the company, together with the certificate of the shares, by the defendant Herts under the authority of the defendant Whatton, the plaintiff was entitled to a mortgage or charge on such shares for the sum of £700 and interest. On that claim the learned judge made a declaration in the terms asked for by the plaintiff. The defendant Herts has dropped out of this discussion. He did not appear. We have, therefore, only to deal with the defendant Whatton. The shares in question are now of little or no value, and, therefore, the declaration was not of any great pecuniary advantage to the plaintiff. But the plaintiff had also introduced, by amending his statement of claim, a claim for damages for breach of the implied contract or obligation by the defendant Whatton not to do anything to prevent or delay the registration of a bona fide transferee for value of the shares referred to. It is upon that amendment that the question now before us arises. The learned judge, having found, as I have said, in favour of the plaintiff upon the question of the declaration, felt himself in a difficulty in ordering damages to be paid under the amended claim. He held that there was not any obligation between the plaintiff and the defendant Whatton and, although there was a breach of that obligation, in the circumstances the plaintiff could not prove that he had sustained any damages by virtue of the breach. It is upon that point that the appeal comes before us. The decision of the learned judge has narrowed the points in controversy before us very much indeed. It has cut away (because the defendants are not appealing here) a point that might be raised as to the invalidity of the actual ultimate transfer—the only transfer in the case—the transfer by the defendant Whatton in favour of the plaintiff.

Shortly stated the circumstances were these. The defendant Herts was a person engaged in financial operations. The defendant Whatton is a clergyman who appears also to have embarked on some speculative transactions. At all events the relations between him and Herts seem to have been intimate; and the learned judge found that the defendant Whatton appeared to have been very much in the hands of Herts. Whatton was possessed of the shares mentioned in the statement of claim, and he was desirous of raising money upon them. He had been joint adventurer with Herts in some former transactions. Herts also was in need of money, and there seems to be no doubt upon the evidence that Whatton was willing that Herts should use the shares belonging to him (Whatton) as a security for a temporary loan to be raised by Herts for his own purposes. I think that he was also desirous, but at a later date, of raising money himself upon them. The method which he adopted to bring about this result was that he put into the hands of Herts a transfer of 1467 preference shares in the Smelting company and also handed him his certificate of those shares to enable him to raise a temporary loan, as I have said, for his own purposes. Whether Whatton also authorised Herts to raise a loan for himself and Whatton or not is immaterial. He handed him those documents in order that he might use them for the purpose of raising the loan. Herts went to the plaintiff, with whom he had had some transactions of borrowing money before and he got from the plaintiff on the security of this transfer and the share certificate, one or two loans of comparatively small amount at first—£150 or, probably, £200. But more money was wanted, and Herts took steps to induce the plaintiff to raise it from a bank called the Mines and Banking Corporation, Ltd. Accordingly, the plaintiff, armed with the transfer and the certificate, put himself into communication with the bank, and the result was that they lent him £700 upon the deposit of those securities with them. The result of that transaction, as between Herts and Whatton, appears to have been that Herts had put himself in such a position that he could not impugn the liability of the plaintiff, or the right of the bank from whom the plaintiff had got the advance to deal with the transfer in the way that they did deal with it. The way that it was dealt with between the bank and the plaintiff was, Herts not repaying the money as he undertook to do in a very short time, the bank began to press for their money, and, in order to get it back they filled in the name of the plaintiff

as transferee in the blank transfer so as to make it a transfer from Whatton to the plaintiff. They and the plaintiff were acting together in the matter. The plaintiff was responsible to them for the money they had advanced, they had the security of the transfer and the certificate of the shares which the plaintiff had handed to them, and the plaintiff had a charge upon the shares to the extent of his own liability. That being done, it was done for the common purpose, it seems to me, of realising all that could be got out of the securities. The plaintiff then applied to the company to register the transfer; and then comes the act on the part of Whatton, which gives rise to the suggested course of action which is the matter in controversy on this appeal. Whatton, instead of assisting in carrying out the transfer, which he was estopped from denying, on Mar. 26, 1904, wrote to the company putting a stop to their registering the transfer. The result was that the shares could not be registered, and any dealing with them on the part of the plaintiff or of the bank to realise their security was suspended. It was not until the date of the writ, or possibly later that these shares were taken up. In the meantime they had depreciated in value so much that it is very doubtful whether they have any value at the present moment. It is said that they had some considerable value at the time that the stoppage was put on them, and the question is whether, under those circumstances, there is any right of action in the plaintiff against the defendant Whatton.

The question is whether a transferor of shares who has transferred, I will assume for value, is under an obligation not to do anything to hinder the transferee getting the full benefit involved in the fact that the shares have been transferred. I will read the passage in which LORD ESHER, M.R., expressed himself in *London Founders' Association Ltd.* v. *Clarke* (1). But before reading the observations of his Lordship perhaps I ought to state the facts of the case from the head-note, which is as follows (20 Q.B.D. 576):

> "A contract for the sale of shares in a registered company was made through brokers upon and subject to the rules of the Stock Exchange. In accordance with the practice of the Stock Exchange the transferee of the shares paid the price of them to the vendor upon the delivery to him of a duly executed transfer. An application for registration of the transfer being subsequently made to the directors of the company, who were empowered by the articles of association in their discretion to decline to register a person claiming by transfer of shares, they refused to register the transferee as a member of the company. The transferee thereupon brought an action to recover back the price of the shares from the vendor as money had and received to his use. HELD, following *Stray* v. *Russell* (2) that the contract for the sale of shares on the Stock Exchange did not import an undertaking by the vendor that the company would register the transferee, and that the action was not maintainable."

The Master of the Rolls said: (20 Q.B.D. at p. 582):

> "It seems to me that to hold the plaintiff's contention to be correct would be in direct contravention of [an argument that there was a total failure of the consideration, giving the plaintiff the right to recover back his money]. I have no doubt that the seller must not prevent or do anything to prevent the company from accepting the purchaser or his nominee. What the remedy would be if he did it is unnecessary now to consider. There is nothing here to show that the seller in this case did anything of the kind. . . . The purchaser takes that risk on himself [i.e. the risk of the company approving the transfer] and the seller's liability is satisfied by handing to the purchaser the transfer, and certificates of the shares, in proper form, and doing nothing, either before or subsequently, to prevent the registration of the purchaser."

In the case now before us the learned judge in the court below had no doubt whatever upon that part of the case. He thought that an obligation had arisen upon the defendant Whatton not to interfere with the lawful result of anything done under authority of the transfer of the shares in question. Therefore, the only question in his mind was whether, there being a breach of that obligation on the part of Whatton by intervening and stopping the registration of the shares, the plaintiff was in a condition to claim damages. Before us the point has been raised, and insisted upon, that there is no such obligation,

as that acted upon by KEKEWICH, J., to the extent I have named, which is asserted as existing by LORD ESHER, M.R. That point has been argued before us by counsel on behalf of the defendant, Whatton, and they rely strongly on the other point upon which KEKEWICH, J., decided—namely, that the plaintiff is not in a position to claim damages.

To take the first point first, it seems to me quite clear, for the reason given by LORD ESHER, M.R., that by the transfer there does arise a duty arising out of the relation constituted between the parties that the grantor shall do nothing to interfere with the grantee getting the benefit of his grant. The duty is not one which is in express terms contracted for between the parties, and it is not to be found in express terms in the transfer itself. The transfer itself contains the grant by which the relation between the parties of grantor and grantee is created, and that carries with it an obligation on the part of the grantor not to interfere with the full fruition by the grantee of what the grantor has purported to give him under the grant. That seems to me enough to establish the obligation, and the breach of it is not denied.

Then we come to the question of damages—aye or no, is the plaintiff entitled to claim damages? My first answer to that is: Why not? Here is a legal transferee, suing a legal transferor for an admitted breach of a proved obligation. Why is he not to have his damages? If we were in a court of common law I do not think that there could be much doubt about it. Here you have what appears to me primâ facie to be a clear right in a legal transferee, who is entitled to the performance of a particular obligation to have damages paid to him measured by the loss which he in his legal position as owner can be fairly said to have suffered by reason of the breach of that obligation. What is the reason urged that he is not entitled to have damages? The suggestion made is that his right in this was not a beneficial right in himself. But that contention must go thus far to be of any use at all—that he was a mere nominee for the bank, who had lent the money on the security of the transfer, and, being a mere nominee, he has no right of action in himself; it must be assumed that the real parties to the action are those for whom he is nominee; and, inasmuch as the bank who have lent this money have got the security of a solvent person—namely, the plaintiff—they cannot complain that they have suffered anything through the interference by the defendant Whatton with the complete fruition of the shares embraced in the transfer. In other words, since the plaintiff can and did pay them, the bank were unable to sue, and though the plaintiff must, and did pay them, he cannot sue either.

It seems to me that is to shut one's eyes to the common sense of the matter in endeavouring to appreciate a very subtle, equitable distinction. I think we are entitled here to look broadly at the facts. It is not the case of the plaintiff putting in suit his right against the rights of the bank. On the contrary, he and the bank were acting together in this matter for the common purpose of realising to the best advantage, having regard to their relations, the value of the security. Undoubtedly, as between the lenders, the bank, and the plaintiff, the value of that security would come in in reduction of the obligation of the plaintiff to the bank. The person primarily interested—since he was the person who would ultimately have to pay under any hypothesis—in introducing the value of that security into the discussion was the plaintiff. If the value of these shares could be realised, it would enure ultimately for the benefit of the plaintiff, because it would reduce his obligation to the bank if the bank took it at the time. If, on the other hand, he paid off the bank then he would apply the security in mitigation, so far as it would go, of his own damages. If this were the case of an assessment of damages by a jury they could not ascertain with mathematical nicety the precise damage that a person must suffer. They have to look at the reasonable probabilities of the case, and compensate a person so far as they can for the loss which in their view, having regard to all the circumstances of the transaction, he has suffered arising naturally out of the breach for which the defendant is responsible. In the present case the act of the defendant Whatton has prevented the benefit accruing to the person entitled to the right to deal with the shares at the time when he entered into his obligation. If that right existed the plaintiff was the person who in law, as between him and Whatton, was entitled to the benefit of the transfer. It might be enough as against Whatton to say:

"You are the transferor in this matter, and you cannot as against me, your transferee, set up these nice considerations, or go behind the real transaction." If the court does go behind the transaction, we must not take leave of our common sense, and we find that, taking all the equities into consideration, the net result of the matter is that the bank are not sufferers, because they have been paid by the plaintiff. In those circumstances, why should not he have the benefit which he was entitled to from the transferor. It seems to me that the person who really suffers in this matter by the act of the defendant Whatton—namely, the plaintiff—is the person who is entitled to receive damages. Therefore, I am unable to take the view which KEKEWICH, J., has taken on the question of damages. I think that his mistake was in treating the plaintiff as a person who was a person with no beneficial interest. But when we examine into the facts of this case we see that the plaintiff was not a mere nominee. He was really the person beneficially interested in the realisation of the value of the security.

What is the result of that? There is a right to damages measured by the loss to the plaintiff, and the loss to him was what, as a reasonable person, he might have got by realising that security at the time of the breach. That does not seem to me to involve that he must be taken as bound to go on the market, and force the whole of these shares on the market at one and the same time. I think if the matter were before a jury they would be asked to treat it as reasonable men. They would be asked to consider what in their view would be the value of shares realised by a person anxious to realise his security to the best advantage, but acting reasonably and not taking an undue time about it—dealing with the matter prudently. They would suppose the shares to be realised to the best advantage, having regard to the nature of the shares, the state of the market, and the possible depreciation of the shares by waiting an undue time. A man would, I repeat, have to act reasonably, and the jury would have to make the best estimate they could of how much he would have got by realising the shares, acting as a reasonable man. To that extent, and to that extent only, the loss is measured by the difference between the ultimate value at the time when the transferee got the dominion of the shares and their value had he had the opportunity of realising them as I have suggested. That will be the standard in the present case, and that will have to be ascertained by the master. I do not think, however, that there will be any very great difficulty about it, because there was evidence before the learned judge in the court below of the state of the market during the material period in question. It is not a case of a given sale on a particular day. The master will have to consider all the circumstances—the amount that had to be disposed of, and the prices, so far as he can learn them, ruling during the time. Therefore, it seems to me that, this appeal must be allowed to the extent which I have named, and there must be the inquiry that I have suggested.

ROMER, L.J.—I am of the same opinion. The learned judge in the court below has found—and there is no appeal from that part of his judgment—that the transferor of the shares, the defendant Whatton, must be held to have authorised what was in fact done in this case with regard to the shares—namely, the filling in, in the blank transfer executed by Whatton, of the name of the plaintiff as transferee, and the charge in the plaintiff's favour and the subsequent mortgage by the plaintiff of the shares to the Mines and Banking Corporation, Ltd. That being so as between Whatton and the plaintiff, Whatton is in the position of a transferor to the plaintiff. It is to be noticed that the plaintiff has a direct interest in the shares, not only in respect of the Mines and Banking Corporation, Ltd., but in his own right as equitable mortgagee before the mortgage to the Mines and Banking Corporation, Ltd., and because of his position as mortgagor to that corporation. With reference to the argument addressed to us on behalf of the defendant Whatton, when it was said that for the purpose of the Mines and Banking Corporation, Ltd., or that corporation and the plaintiff, the latter's name was put in as transferee of these shares, it appears to me impossible to say that the plaintiff, in regard to that proposition, is to be considered as having no other interest whatever in the shares except as a mere nominee for the Mines and Banking Corporation, Ltd. I think on the facts that the plaintiff must be taken to have been put in as nominee because he also occupied the position of mortgagor, and had otherwise an interest in the shares. That

being so, it appears to me that the defendant Whatton cannot say as against the plaintiff that the latter, as transferee, has no interest in the shares except as representing the Mines and Banking Corporation, Ltd. It is not necessary for me to decide the point, but I should like to state that I am not sure that any difference would arise in this case if the plaintiff's name had not been put in as transferee and a third name had been put in. I am not at all sure that even in that case it could not be said on behalf of the plaintiff and of the Mines and Banking Corporation, Ltd., that the name of that third person had been used for the purpose of both. But I need not consider that in the present case. It is sufficient to say here that to my mind it is established that Whatton is the transferor of these shares to the plaintiff, and that the plaintiff stands in the position of having acquired that position of transferee for valuable consideration. Under those circumstances I have, speaking for myself, no doubt that there is an implied duty and obligation as between Whatton and the plaintiff that Whatton will do nothing to prevent the plaintiff from being put on the register of shares, so as to acquire the full benefit to be derived from the transfer. What happened was that an application was made to the company by which the shares were issued to register the plaintiff's name as transferee. That application was made at a time when there was no dispute of any kind between the Mines and Banking Corporation, Ltd., and the plaintiff. In fact, there never has been any dispute between those two. They appear always to have acted amicably, their interests being practically identical. The application to register having been sent in, registration, but for the conduct of Whatton, to which I am about to refer, would have followed in due course, and that registration would have enured for the benefit of the plaintiff and of his mortgagees, the Mines and Banking Corporation, Ltd. What happened, then, was this. In breach of his duty or obligation, the defendant Whatton gave notice to the company—the shares of which were the subject of the transfer—not to recognise the transfer, representing, in fact, that the transfer was not valid as against him. To my mind, that was a clear breach of the duty or obligation he owed to the plaintiff. The result of that breach of his duty was that the shares were not registered. Who suffered from that? The plaintiff certainly suffered from it. He, as the transferee, whose name ought to have been put on the register, by the breach of duty to him on the part of the defendant Whatton, failed to get on the register. He, as representing both himself and his mortgagees, the Mines and Banking Corporation, lost the benefit at that time of the transfer, through the defendant Whatton's breach of duty or obligation. It was by reason of that breach of duty that the plaintiff, as representing both himself and his mortgagees, failed to get the full benefit of the transfer, or, indeed, any benefit from the transfer till the judgment in this action, when their right to have the transfer perfected by registration was decided against the defendant Whatton. To my mind, there has clearly been damage caused through the delay which has arisen by reason of the defendant Whatton's breach of duty to the plaintiff, for it is admitted that between the date when this transfer ought to have been registered and when the plaintiff, as representing both himself and his mortgagees, could have obtained, and would have obtained if the registration had been proceeded with, the full benefit of the transfer of the shares, and the time when, ultimately, he was able to get a decision in his favour as against Whatton, there was a falling off in the value of the shares. To my mind, the measure of damages caused by the breach of duty and the delay is the difference between those two values. I cannot add to what the Master of the Rolls has said as to how that damage ought to be ascertained. In estimating the value of those shares at the time when registration ought to have been effected, the master must ascertain the value in a reasonable way. Among other considerations, he must bear in mind that the large number of shares involved in this transfer was such that probably they could not have been sold on the market in one block, but they would have to be dealt with by degrees. That, and all other material considerations bearing upon the question, will, of course, without special direction, I should hope, from us, be taken into consideration by the master. With regard to the proceedings by the plaintiff, to my mind, when he started this action he must be held to have made his claim for damages for delay on behalf of those who claimed through him—that is to say, if any damage had been suffered by his mortgagees, he would have been held, I should have thought, to sue as representing them

no less than as representing himself. But in the events that have happened, seeing that pending the trial he has paid those mortgagees off, it follows that the full amount of damages which will be found as the result of the inquiry before the master will have to be paid to him alone. In my opinion, an order should be made that so much of the order of KEKEWICH, J., as dismissed the plaintiff's claim for damages be discharged, and, in lieu of that, an inquiry be directed as to damages, reserving the costs, the defendant, Whatton, to pay so much of the costs of the action as related to the damages which the plaintiff did not get below, and the costs of this appeal.

COZENS-HARDY, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors: *G. L. Matthews & Co.*; *Thorp & Saunders.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

MERSEY DOCKS AND HARBOUR BOARD *v.* MARPESSA (OWNERS)

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Ashbourne, Lord Macnaghten, Lord Robertson and Lord Atkinson), March 4, 5, May 29, 1907]

[Reported [1907] A.C. 241; 76 L.J.P. 128; 97 L.T. 1; 23 T.L.R. 572; 51 Sol. Jo. 530; 10 Asp.M.L.C. 464]

Damages—Measure of damages—Loss of use of chattel—No substituted chattel hired—Value of chattel's services—Depreciation—Owner's profit

House of Lords—Damages—Correction of minute mistakes.

A sand dredger which brought in no profits, but was necessary for the purpose of keeping open the channels of its owner's harbour, was damaged by a collision with a steamship, and was disabled for nine days. No vessel was hired to take the place of the disabled dredger and no damage through loss of its use was proved. On a claim by the owners of the dredger for damages for the time that the dredger was disabled,

Held: the damages recoverable were to be assessed having regard to the value of the dredger's services based on the daily cost of maintaining and working the dredger, with an allowance for depreciation, but with no allowance for owners' profit.

Per Curiam: The House of Lords will not interpose to correct small mistakes on both sides of an account.

Notes. Applied: *The Tugela* (1913), 30 T.L.R. 101. Distinguished: *Admiralty Comrs.* v. *Valeria* (*Owners*), [1922] All E.R.Rep. 463. Considered: *Admiralty Comrs.* v. *Chekiang* (*Owners*), *The Chekiang*, [1926] All E.R.Rep. 114; *Admiralty Comrs.* v. *Susquehanna* (*Owners*), *The Susquehanna*, [1926] All E.R.Rep. 124; *The West Wales*, [1932] P. 165. Referred to: *The Bodlewell*, [1907] P. 286; *The Astrakhan* (1910), 102 L.T. 539; *The Kingsway*, [1918–19] All E.R.Rep. 360; *Re Mersey Docks and Admiralty Comrs.*, [1920] 3 K.B. 223; *The Edison*, [1933] All E.R.Rep. 144; *The London Corpn.*, [1935] All E.R. Rep. 393; *Sunley & Co.* v. *Cunard White Star, Ltd.*, [1940] 2 All E.R. 97; *The Carslogie, Carslogie Steamship Co.* v. *Royal Norwegian Government*, [1952] 1 All E.R. 20; *The Hebridean Coast*, [1960] 2 All E.R. 85.

As to measure of damages for loss of a non-profit-earning chattel, see 11 HALSBURY'S LAWS (3rd Edn.) 250, 251, 263–265; and for cases see 17 DIGEST (Repl.) 102. As to measure of damages for loss of use of a non-profit-earning ship, see 35 HALSBURY'S LAWS (3rd Edn.) 714, 715; and for cases see 41 DIGEST 808. As to when the House of Lords

will not interfere with the finding of the courts below, see 9 HALSBURY'S LAWS (3rd Edn.) 363, 364.

Case referred to:

(1) *No. 7 Steam Sand Pump Dredger* (*Owners*) v. *Greta Holme* (*Owners*), *The Greta Holme*, [1897] A.C. 596; 66 L.J.P. 166; 77 L.T. 231; 13 T.L.R. 552; 8 Asp. M.L.C. 317, H.L.; 17 Digest (Repl.) 83, *56*.

Also referred to in argument:

Mediana (*Owners*) v. *Comet* (*Owners*), *The Mediana*, [1900] A.C. 113; 69 L.J.P. 35; 82 L.T. 95; 48 W.R. 398; 16 T.L.R. 194; 44 Sol. Jo. 259; 9 Asp.M.L.C. 41, H.L.; 17 Digest (Repl.) 76, *10*.

Appeal from a decision of the Court of Appeal (SIR RICHARD HENN COLLINS, M.R., ROMER and COZENS-HARDY, L.JJ.), reported [1906] P. 95, affirming a decision of SIR GORELL BARNES, P., reported [1906] P. 10.

The appellants were the owners of a suction dredger which was built in 1895 at a cost of £56,700, and was designed for and employed in dredging operations at the bar and sea channels at the mouth of the Mersey, and was worked continuously day and night throughout the year except on Sundays and holidays, unless prevented from working by bad weather. Dredging operations were necessary in order to deepen the channels, and keep them from silting up. On Oct. 6, 1904, the dredger was injured by a collision with the respondents' steamship *Marpessa*. The respondents admitted their liability, and it was agreed that the damage should be assessed by the registrar and merchants. The dredger was disabled for nine days, and the appellants claimed demurrage for that period of time at the rate of £102 5s. 9d. a day. The registrar allowed demurrage at the rate of £35 a day. The appellants contended that the demurrage had been assessed upon an erroneous principle. This was the only matter in dispute between the parties, all the other heads of damage being agreed. The registrar arrived at the amount which he awarded by a calculation of the working expenses of the dredger per diem, with an allowance for depreciation. The paragraphs of his report relating to the point are set out in the report of the case when it was before SIR GORELL BARNES, P. No vessel had been hired to take the place of the dredger while it was disabled, and the appellants' engineer admitted that he could not point to any definite injury or inconvenience caused by the loss of the services for that time.

The learned President confirmed the report of the registrar, and his judgment was affirmed by the Court of Appeal.

Sir R. Finlay, K.C., *Butler Aspinall, K.C.*, and *Leslie Scott* for the appellants.
Pickford, K.C., and *Greer* for the respondents.

Their Lordships took time for consideration.

May 29, 1907. **LORD LOREBURN, L.C.**—The only question raised on this appeal is whether the damages awarded to the appellants are rightly measured. It was a case of collision, in which the steamship *Marpessa* ran down the sand pump dredger *G. B. Crow*, and disabled her for nine days. This dredger is used by the Mersey Docks and Harbour Board in the necessary work of dredging the bar outside Liverpool. She earns nothing in money and costs a good deal, but she does indispensable service in clearing away the sand. Negligence on the part of the steamship *Marpessa* being admitted, the case came before the registrar to ascertain damages. No dispute was raised by the defendants, the present respondents as to any of the items claimed except one—viz., the claim for demurrage for nine days at £104 per day, afterwards reduced to £102. The registrar found that £35 per day sufficed, and his report was confirmed by the President and also by the Court of Appeal. I need hardly say that your Lordships are not likely to interfere, unless it is made clear that a wrong principle was adopted for the ascertainment of these damages. Until *The Greta Holme* (1), the view appears to have prevailed that no damages beyond the actual loss in repairs, loss of wages, and so forth, could be recovered where an injured vessel made no money for its owners and merely rendered services in dredging. That case corrected the error, and decided that in such case general damages might be recovered as well as the cost of procuring another vessel to do the work; but it

did not, and could not, lay down a rule of universal application for the ascertainment of the damages in each particular case. For the damages depend on the facts and on the actual loss sustained by the owner, which will vary in different cases. It seems to me that the loss sustained in the present case under the claim of demurrage is the value of the work which would have been done by the dredger during those days, had she not been disabled. So many tons of sand would have been removed, which it is the duty and interest of the appellants to remove, and by reason of the respondents' negligence they were not removed. If the appellants had hired another vessel to do this work they could have recovered the cost of doing it. They have not done so, no other vessel being available at so short a notice, and, perhaps, not being available at all; for the construction is peculiar. Failing that evidence, the appellants were entitled to put their case in another way. They might say the cost to us of maintaining and working this dredger, while it is working, amounts to so much per day, and its depreciation daily amounts to so much more. We take the total daily sum which it costs us as a fair measure of the value of its daily services to us. Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation.

In fact the appellants put in a mixed claim, made up mainly on the basis of what the dredger's services cost them; but they added an item for owners' profit, which was appropriate enough if they had paid it to the owner of a vessel which they hired, but had no place in a claim based on the cost to themselves of the services rendered by the dredger. The registrar allowed them something on this head to which they were not entitled. He also deprived them of something to which they were entitled, when he gave only the daily supplies requisite in dock instead of the daily supplies requisite when the dredger was working. There is a confusion in the registrar's award in these respects, and also in regard to general damage in the circumstances of this particular case, but the original confusion was in the claim as stated by the appellants. I certainly am not disposed to disturb the findings of three tribunals on such a point, when the difference between what was found and what in rigorous logic ought to have been found is trifling. And so with the complaint that the percentage allowed for depreciation was taken not on the original but on the reduced value of the dredger. I cannot say that in point of law the depreciation must be taken on the original value, nor am I prepared to exact mathematical precision in matters such as this. In my opinion, though there is error in the registrar's report, there is no case for the interposition of this House. We cannot correct every minute mistake. And if we think, as I think, that after correcting the errors on both sides the registrar might quite well arrive at substantially the same figure as he has already found, we ought to dismiss the appeal.

LORD ASHBOURNE, LORD MACNAGHTEN, LORD ROBERTSON, and **LORD ATKINSON** merely stated that they agreed with the Lord Chancellor.

Appeal dismissed.

Solicitors: *Rawle & Co.*, for *Thorne & Co.* Liverpool; *Thomas Cooper & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

HOARE *v.* ROBERT GREEN, LTD.

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Phillimore, JJ.), April 25, 26, 1907]

[Reported [1907] 2 K.B. 315; 76 L.J.K.B. 730; 96 L.T. 724; 71 J.P. 341; 23 T.L.R. 483]

Factory—Place in which "manual labour exercised"—"Making of article"—"Adaptation for sale"—Florists' premises—Making of bouquets and wreaths and arranging floral decorations—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149.

G., Ltd. were retail florists, and occupied a shop with a room behind it. They employed ten young women as florists' assistants and eight girls as beginners. The assistants were selected from the beginners on account of their artistic taste and without reference to their manual dexterity. The assistants and beginners were employed in attending retail customers in the shop, and in making bouquets, wreaths, and crosses, and arranging floral decorations in the room behind. In arranging floral decorations flowers were fastened to frames of wood or wire. On the question whether the room was a "place . . . in which . . . any manual labour is exercised by way of trade or for purposes of gain in or incidental to . . . the making of any article or any part of an article . . . or the adaptation for sale of any article" and so was subject to the requirements of the Factory and Workshop Act, 1901, by virtue of the definition in s. 149 [corresponding to the definition in s. 175 (1) of the Factories Act, 1961],

Held: the making of the wreaths and crosses was the "making" and the adapting for sale "of articles," and so the room was one in which manual labour was exercised by way of trade, and was subject to the Act.

Notes. The Factory and Workshop Act, 1901, has been repealed, but the expressions considered in this case occur in the definition of a factory contained in s. 175 (1) of the Factories Act, 1961.

Considered: *Paterson* v. *Hunt* (1909), 101 L.T. 571; *Stoke-on-Trent Revenue Officer* v. *Stoke-on-Trent Assessment Committee and Potteries Electric Traction Co., etc.* (1930), 143 L.T. 650; *Longhurst* v. *Guildford Godalming and District Water Board*, [1961] 3 All E.R. 545. Doubted: *Paul Popper, Ltd.* v. *Grimsey*, [1962] 1 All E.R. 864. Referred to: *Stimson* v. *Standard Telephones and Cables, Ltd.*, [1939] 2 All E.R. 441; *Fatstock Marketing Corpn., Ltd.*, v. *Morgan* (*Valuation Officer*), [1958] 1 All E.R. 646.

As to the definition of "factory," see 17 HALSBURY'S LAWS (3rd Edn.) 11–13, para. 13; and for cases see 24 DIGEST (Repl.) 1021–1031, *3–56*. For the Factories Act, 1961, s. 175 (1) see 41 HALSBURY'S STATUTES (2nd Edn.) 402.

Cases referred to:

(1) *Bound* v. *Lawrence*, [1892] 1 Q.B. 226; 61 L.J.M.C. 21; 65 L.J. 844; 56 J.P. 118; 40 W.R. 1; 8 T.L.R. 1; 36 Sol. Jo. 11, C.A.; 24 Digest (Repl.) 1098, *460*.

(2) *Fullers, Ltd.* v. *Squire*, [1901] 2 K.B. 209; 70 L.J.K.B. 689; 85 L.T. 249; 65 J.P. 660; 49 W.R. 683; 45 Sol. Jo. 539, D.C.; 24 Digest (Repl.) 1025, *27*.

(3) *Cook* v. *North Metropolitan Tramways Co.* (1887), 18 Q.B.D. 683; 56 L.J.Q.B. 309; 56 L.T. 448; 57 L.T. 476; 51 J.P. 630; 35 W.R. 577; 3 T.L.R. 523, D.C.; 24 Digest (Repl.) 1098, *458*.

(4) *Morgan* v. *London General Omnibus Co.* (1884), 13 Q.B.D. 832; 24 Digest (Repl.) 1098, *455*.

(5) *Kent* v. *Astley* (1869), L.R. 5 Q.B. 19; 10 B. & S. 802; 39 L.J.M.C. 3; 21 L.T. 425; 34 J.P. 374; 18 W.R. 185; 24 Digest (Repl.) 1027, *38*.

Also referred to in argument:

Palmer's Shipbuilding and Iron Co. v. *Chaytor* (1869), L.R. 4 Q.B. 209; 10 B. & S. 177; 38 L.J.M.C. 63; 19 L.T. 638; 33 J.P. 327; 17 W.R. 401; 24 Digest (Repl.) 1024, *23*.

R. v. *Louth Justices*, [1900] 2 I.R. 714; 24 Digest (Repl.) 1099, **145*.

A *Law* v. *Graham*, [1901] 2 K.B. 327; 70 L.J.K.B. 608; 84 L.T. 599; 65 J.P. 501; 49 W.R. 622; 17 T.L.R. 474; 45 Sol. Jo. 485; 3 W.C.C. 131; 19 Cox, C.C. 709, D.C.; 24 Digest (Repl.) 1021, *4*.

Maynard v. *Peter Robinson, Ltd.* (1903), 89 L.T. 136; 19 T.L.R. 492; 67 J.P.Jo. 244; 24 Digest (Repl.) 1099, *463*.

B *Hoare* v. *Truman, Hanbury, Buxton & Co.* (1902), 71 L.J.K.B. 380; 86 L.T. 417; 66 J.P. 342; 50 W.R. 396; 18 T.L.R. 349; 46 Sol. Jo. 299; 4 W.C.C. 58; 20 Cox, C.C. 174, D.C.; 24 Digest (Repl.) 1021, *5*.

Case Stated on an information preferred by the appellant prosecutor for that the respondent employers on Oct. 2, 1906, at a certain workshop within the intent and meaning of the Factory and Workshop Act, 1901, of which workshop they were then the C occupiers, did not affix the prescribed abstract of the Act as required by s. 128 of the Act, contrary to the statute.

The following facts were admitted or proved: The respondents were a limited company carrying on the business of florists at Crawford Street, Marylebone, which was an ordinary florists' retail business. There was a shop in front and a room behind, which room was used as hereinafter stated. The respondents permanently employed ten D young women as florists' assistants and eight girls as beginners, the ages of the assistants being from seventeen years to twenty-three years, and the ages of the beginners being from fifteen to seventeen. The women and girls served in the shop and arranged flowers in the room behind, which they called the workshop, which was the room in which it was alleged that the abstract should have been affixed. The assistants were selected from the beginners on account of their artistic taste and without reference to their manual E dexterity. These assistants were employed and paid throughout the year, although it was only during the months from May to July that there was sufficient to occupy them fully—the reason being that the services of persons with the necessary artistic taste and skill could not be secured in any other way. In the other months of the year the assistants employed their spare time in practising and in teaching the beginners the artistic arrangement of flowers.

F These assistants and beginners were employed in attending retail customers in the shop, in making bouquets, wreaths, and crosses, and in arranging floral decorations in the room behind. They also went to private houses and hotels and arranged flowers. Part of the work of arranging floral decorations in the room consisted of fastening flowers to frames of wood or wire. These frames were not made or sold by the respondents, but were purchased by them ready made and lent to their customers. Slight alterations G in these frames had sometimes to be made, and when this was necessary it was done by one of the men employed who did not work in the room. This was done so rarely that it could not be said to be part of the respondents' ordinary business. In arranging flowers upon the wire frames it was sometimes necessary to cover small parts with indiarubber tubing made in imitation of the bark of rose trees. The respondents, as employers had the right of access to and control over the room. The magistrate dismissed the infor- H mation.

Section 149 of the Factory and Workshop Act, 1901, provided:

> "The expression 'workshop' means (inter alia) any premises, room, or place not being a factory, in which premises, room, or place or within the close or curtilage or precincts of which premises any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes—namely: (i) the I making of any article or of part of any article, or (ii) the altering, repairing, ornamenting, or finishing of any article, or (iii) the adapting for sale of any article, and to or over which premises, room, or place the employer of the persons working therein has the right of access or control."

S. A. T. Rowlatt for the appellant.

Avory, K.C. (*S. C. R. Crawford* with him), for the respondents.

LORD ALVERSTONE, C.J.—This case has raised a very interesting point, and a very important point, and I need not say, having regard to the counsel before us, we have

derived great assistance from their arguments. The judgment of the learned magistrate, which we had the advantage of having read to us, seems to have proceeded largely upon the view that the things made in this establishment by these young ladies are not "articles." It is true that he says at the end of his judgment that there is nothing to which "manual labour" can properly apply, but the main ground of his decision, the greater part of it, proceeded on whether it was an "article." The statement of the Case says that there are a certain number of young ladies who are assistants, who are of the age of seventeen years to twenty-three, and who have been selected because of their artistic taste and skill, without reference to their manual dexterity. Under their directions are, for periods of about two or three years, eight girls (as the establishment was then being carried on) who are "beginners." Those girls it is not suggested are selected for their artistic taste apart from their manual dexterity, but, if they show it, they may come on to be, and will in all probability become, "assistants." These young ladies are employed in attending to the retail customers of the shop, and making bouquets, wreaths, and crosses, and arranging floral decorations in the room behind. If it was found, as it was in *Bound* v. *Lawrence* (1) and some other cases, that what they do in the back is only an incidental part of their work, that they really go in and out for the purpose of fetching flowers from the counter, or for the purpose of tying up in bundles so many daffodils, or so many bunches of violets, different considerations might arise, but we must infer from the way the Case is stated that in this room, which is not part of the shop, there does go on the production of crosses and wreaths, and I daresay finished or elaborate bouquets. Counsel for the respondents has contended before us that because the thing produced is a collection of natural articles untouched by hand, except by being possibly fastened with wire, one is to regard the cross or wreath as being nothing more than a natural article or made article. I cannot take that view. I do not want to quote cases, but we have one case before us, *Fuller's, Ltd.* v. *Squire* (2), and many others have been mentioned, and it seems to me, having regard to the purview of the Factory and Workshop Act and what it was intended to enforce—proper ventilation and sanitary accommodation, etc.—that it would be very dangerous indeed to say that because the thing which goes into the place is an article produced by nature, and what comes out of the place are those same articles arranged in a special form, made up in a special way, the Act cannot apply. I come to the conclusion the making of the wreaths and crosses and bouquets, and I should think also really buttonholes when a collection of flowers, was both the making of articles and the adapting for sale of articles. Under the circumstances I think the main ground on which this summons was dismissed fails.

I have had more difficulty on the question whether or not the young ladies could be fairly said to be in a place where manual labour was exercised by way of trade. I think there must be some limit; on the other hand, I think it is probably answered in the way counsel for the appellant answered it, and, if the substantial purpose for which the place is used is that people shall be engaged there in manual labour, some special circumstances are required to prevent it coming within the Factory Act, and within the protective section. Of course, if the place is only incidentally used for such a purpose, being part of a shop, and not devoted specially to the purpose, different considerations would arise—as, for instance, counsel for the appellant says, if the manual labour done there was only incidental to the general business of the shop; but in this case, if it is stated fairly and properly, the room behind is not used for this purpose. I therefore come to the conclusion that, apart from any decision which would bind us, the "place" here was a place in which manual labour was exercised by way of a trade. I will only say a few words about these decisions. A series of decisions have been quoted to us under the Employers and Workmen Act, 1875, the words in s. 10 of that Act being, any person being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour is to come within the meaning of the Act. There are cases which decide that a grocer's assistant was not within the Act (*Bound* v. *Lawrence* (1)), that a tram driver was not (*Cook* v. *North Metropolitan Tramways Co.* (3)), and that an omnibus conductor was not (*Morgan* v. *London General Omnibus Co.* (4)). For myself, I think those cases proceeded largely on the words in this Act apart from the general statement of "engaged in manual labour"; but there is this further point, that

those are descriptions of persons, and if it turns out that the main object of the person's employment is not to perform manual labour, but only incidentally to that employment he does so, very different considerations arise. Here we are dealing with a "place," and when we find that the place was used substantially for the purpose of manual labour, then it is subject to the provisions of the Factory Act, and I think, therefore, the appeal must be allowed.

DARLING, J.—I am of the same opinion. In my view a single cut flower is not properly to be described as an "article" within the Act of Parliament, nor should I say that a bouquet is an article certainly if it be merely of cut flowers and not wired—merely a bunch of flowers tied together after selection and sale, and for convenience in carrying them away. But with regard to crosses, wreaths, and such like things as were made in this shop, they being constructed of frames and flowers and when finished made of these composite materials, I think they are when finished properly to be called "articles" within the statute. They are made in the shop, and therefore, the making of them makes the shop a workshop within the Act if the making of them necessitates manual labour. I am not convinced myself that there is any distinction—any accurate distinction at all events—between "manual labour" and "manual work." I do not think that manual labour need be labour requiring a great exertion of strength, and it seems to me that the kind of labour indicated by this particular Act of Parliament may be very light labour indeed. The Act appears to contemplate that even the plaiting of straw, which is a thing that one would do with one's finger and thumb, may be properly described as "manual labour," and, if it were done in certain circumstances by certain people, would be manual labour within the Act of Parliament. That leads me to the conclusion that the arranging of these flowers in the shape of crosses and wreaths, using not only the natural flowers, but other things, is the making of them by "manual labour" into an "article," and therefore, the place where that is done is a workshop within this Act of Parliament.

PHILLIMORE, J.—I am of the same opinion. It is obvious the word "article" here means something made or manufactured. As to the amount of dealing with the natural article which produces a manufactured article, there is a case illustrating what comes within such dealings which I referred to in the course of the argument—namely, *Kent* v. *Astley* (5). Here I have no doubt that some at least of the products turned out from this room were "articles" within the meaning of this Act. It is not necessary to go into details as to which of the products were, or whether all were not articles within the meaning of this Act. Then comes the question whether this room is a workshop. In my opinion it is a workroom, if not a shop, and therefore, it is a workshop. No doubt it is necessary there should be manual labour, and no doubt we ought to go further and say that the manual labour is not to be incidental to the principal part of the duty of the employee, but is to be the principal part of the duty of the employee. Here it is not merely the principal, but almost the only part of the duty of the employee to work in that room. On reflection, I agree with my Lord that there is a shade of difference of meaning between work and labour, and the word "labour" implies more laboriousness than the word "work," and I have looked at this Act in this case with that feeling present to my mind. Still, I am of opinion that these people are "engaged in manual labour." I really do not think it necessary to consider the question very much when once one has referred to s. 114. It is not an artificial definition of labour, but the statute shows it contemplates by manual labour such simple industries and industries which, unless prolonged to a great length, are not tiring, such as straw plaiting and pillow lace making. Apart from that, work of this kind or labour of this kind may be properly considered as manual labour. Just consider what would happen if we held the contrary; bonnet making, millinery, very likely dressmaking workrooms would be excluded from the purview of this Act. In my opinion these young women were engaged in manual labour, and this is a workshop within the meaning of the Act.

Appeal allowed.

Solicitors: *Treasury Solicitor*; *Freke Palmer.*

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*

HENNAN & CO., LTD. *v.* DUCKWORTH

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Wills and Kennedy, JJ.), April 18, 1904]

[Reported 90 L.T. 546; 20 T.L.R. 436; 48 Sol. Jo. 436]

Dentist—"Dental operation"—Fitting of false teeth in patient's mouth—Manufacture and supply of teeth—Dentists Act, 1878 (41 & 42 *Vict., c.* 33), *s.* 5.

For the purposes of the Dentists Act "operation" means an operation on the mouth of the patient, and so includes the fitting of false teeth into a patient's mouth, but does not include the manufacture or supplying of false teeth.

The plaintiffs who were not registered under the Dentists Act, 1878, made for a patient and fitted to the patient's mouth a set of false teeth, which the patient kept and used, but refused to pay for. In an action by the plaintiffs for the agreed price of the teeth the patient relied on s. 5 of the Dentists Act, 1878, which prohibited an unregistered person from recovering any fee or charge for "the performance of any dental operation, or for any dental attendance or advice."

Held: the plaintiffs could recover the price of the set of teeth but not their charge for fitting them.

Notes. The Dentists Act, 1878, has now been repealed and replaced by the Dentists Act, 1957, s. 34 (1) of which prohibits (subject to certain exceptions) the practice of dentistry by unqualified persons, and s. 33 (1) of which provides that the practice of dentistry is deemed to include the performance of any such operation as is usually performed or given by dentists. This case therefore remains good authority on the meaning of these words in the 1957 Act.

Considered: *Twyford* v. *Puntschart*, [1947] 1 All E.R. 773. Referred to: *Seymour* v. *Pickett* (1905), 74 L.J.K.B. 413.

As to definition of practice of dentistry, see 26 HALSBURY'S LAWS (3rd Edn.) 80, para. 168, as to prohibition of practice of unqualified persons, see ibid. 81, para. 172 and 82, para. 175; and for cases see 34 DIGEST 564, *222–225*. For the Dentists Act, 1957, s. 33 (1), s. 34 (1), see 37 HALSBURY'S STATUTES (2nd Edn.) 703, 704.

Case referred to in argument:

Lee v. *Griffin* (1861), 1 B. & S. 272; 30 L.J.Q.B. 252; 4 L.T. 546; 7 Jur.N.S. 1302; 9 W.R. 702; 121 E.R. 716; 34 Digest 564, *224*.

Appeal by the defendant patient against the judgment of the Lancashire County Court, held at Blackburn, in favour of the plaintiff dentist for £4 4s. 0d.

The plaintiffs, J. B. Hennan & Co., Ltd., were a registered company with a registered office at Blackburn, who carried on the practice of dentists by means of unregistered managers who were not duly qualified to act as dentists under the Dentists Act, 1878, and they brought the present action to recover the sum of £5, the price agreed to be paid by the defendant for a set of artificial teeth and fillings. The particulars of the plaintiffs' claim were as follows:

"To upper and lower sets of artificial teeth and fillings, £5."

John B. Hennan said that he was the managing director of the plaintiff company, that he was not in the register, but that he was apprenticed to a dentist for seven years; that the patient called on him on April 23, last, when he was wearing a set of teeth with which he was not satisfied; and the witness said that he would make a set of teeth and do some filling for £5; that the patient visited him four times, and that on April 27 the set was fitted in; that a Mr. Aynley fitted them in; that the patient took them away, and that he had a conversation with the patient about not being qualified; that the patient came and complained, and the witness offered to remedy the set.

Mr. Aynley said that the price was fixed for the teeth; that he fitted them in the patient's mouth about April 27; and that the teeth were in his opinion a good fit; that the day before the action was entered he offered to alter them, but that the patient said he could not spare them.

The patient said that the set was bad; when he had worn them a week he went and complained, and he saw Mr. Hennan, who did something to them and told him to keep them in for some weeks; he again saw Mr. Hennan in August and said they were wrong, and that he would come in and see him at a later time; he went in September, when Mr. Hennan wanted them for the purpose of altering them, but he could not spare them then. The patient kept the teeth and ultimately this action was brought.

For the defendant it was objected that the plaintiffs could not recover on the ground that the action was brought to recover fees or charges for the performance of a dental operation or for dental attendance or advice, and came within the provisions of s. 5 of the Dentists Act, 1878. The learned county court judge held that the claim, so far as it was for making the set of teeth, as distinguished from the fitting of the same and the fillings, was not within the Act, and he assessed the amount to be recovered in respect of such making at the sum of £4 4s. for which amount he gave judgment, with leave to appeal, as he considered the matter of public interest. The patient appealed on the grounds that the judge was wrong in law in not holding that the Dentists Act, 1878, s. 5, was a defence to the action, and in not entering judgment for the defendant or non-suiting the plaintiffs; and that there was no evidence on which the judge could arrive at the decision he did.

By s. 5 of the Dentists Act, 1878:

> "A person registered under this Act shall be entitled to practise dentistry and dental surgery in any part of Her Majesty's dominions, and from and after Aug. 1, 1879, a person shall not be entitled to recover any fee or charge, in any court, for the performance of any dental operation, or for any dental attendance or advice, unless he is registered under this Act, or is a legally qualified medical practitioner."

R. W. Turner for the defendant.

J. R. Randolph for the plaintiffs.

LORD ALVERSTONE, C.J.—It would be very desirable that the Dentists Act, 1878, should be amended if it is thought by persons who are acquainted with dental matters that it is desirable that only registered and qualified persons should supply false teeth to go into person's mouths. I can well imagine that although, in one sense, it is quite a different thing to perform an operation on the teeth, the mouth, the gums, or the jaw, yet at the same time it may be an extremely uncomfortable and unsuitable thing, and I daresay, perhaps in rare cases, a dangerous thing to have improperly fitted teeth; but, I think that, taking the language of s. 5 of the Dentists Act, 1878, it does not go far enough to include such a case as this, and we must take it that, at any rate in 1878, the common use of false teeth was perfectly well known. The language used in s. 5 is that the unregistered person shall not be entitled to recover any fee or charge "for the performance of any dental operation, or for any dental attendance or advice." In my opinion, primâ facie certainly, the words in that section "dental operation" mean operation upon the person—on the mouth of the patient; "dental attendance" would mean advising in respect of the condition of the mouth, or as to what should be done, and "advice" would, of course, mean something of the same character. If it had been intended by the legislature that the section should go on and say: "And nothing supplied by the dentist in pursuance or in consequence of such advice shall be charged for"; I think we should expect to find those words there. I myself am a little pressed by the fact that, in the corresponding section in the Medical Act, which was passed in 1858, the legislature did add the words: "For any medicine which he shall have both prescribed and supplied"; whereas in the Dentists Act they did not add: "For any teeth prescribed or supplied." The reason given by counsel for the defendant—namely, that those words were inserted in the Medical Act because chemists then existed who supplied medicines without prescribing—does not seem to me quite a sufficient answer. This Act, being an Act which prevents an unregistered person from being entitled to recover charges and fees, must be construed strictly; and while I should be glad if it should be thought desirable that the Act should be amended in the direction I have indicated, it would, in my opinion, be going too far to hold that the learned judge, who has expressly excluded any charge for fitting and advice and so on, was wrong in the view he took. Whether he has given the

plaintiffs too much is a point we cannot deal with. He has assessed the amount recoverable on a right principle, unless the Act makes the supply of the false teeth part of the "dental operation," the "dental attendance" or "advice," which I do not think it does. I was for the moment pressed by counsel's suggestion that the non-registered person could protect himself by requiring payment beforehand, and by saying "You shall not take the thing away until you have paid your money for it"; but we have here to deal with a statute which prevents a person from having the ordinary rights of being paid for articles which he has supplied, and the language of the section is not sufficient to bring such a case as the present within its terms. We must hold, therefore, that the county court judge was right, and that this appeal must be dismissed.

WILLS, J.—I come, with some reluctance, to the same conclusion. I say "with some reluctance," because, probably, there is no part of a dentist's work which requires more care and very often more skill than the preparation and the manufacture of false teeth, and it might very well have been that the words would have covered such a case as this; but I do not think that it is possible to say that making the teeth can come under "dental attendance or advice." Therefore, we are really driven to the question whether the words "dental operation" are sufficiently large to include such work as this. It seems to me that a dental operation—an operation in respect of the teeth—really means an operation in a surgical sense, something that is to be done, not upon the false teeth, but upon the living person, and that what really is charged for here is that which was not done upon the person, but was done upon the incomplete set of false teeth, in order to make them fit the person; and I do not think that "dental operation" can reasonably be construed to cover such a state of things as that.

KENNEDY, J.—I concur.

Appeal dismissed.

Solicitors: *Busk, Mellor & Norris*, for *T. J. & H. Backhouse*, Blackburn; *Bowman & Curtis Hayward*, for *H. Duckworth*, Blackburn.

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

Re NISBET AND POTTS' CONTRACT

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Romer and Cozens-Hardy, L.JJ.), January 15, 16, 1906]

[Reported [1906] 1 Ch. 386; 75 L.J.Ch. 238; 94 L.T. 297; 54 W.R. 286; 22 T.L.R. 233; 50 Sol. Jo. 191]

Sale of Land—Restrictive covenant—Acquirement of title by squatter—No actual notice to purchaser—Failure to require forty years' root of title—Enforcement of covenant against purchaser.

A contract made in 1903 for the sale of land provided that the title should commence with a conveyance dated Aug. 11, 1890. A deed dated 1872 created restrictive covenants over a large part of the land purchased. The vendor had bought in 1901 from a person who had himself purchased from a person who had acquired a possessory title in 1890. On both sales the title required went back only to 1878. The vendor had no actual notice of the restrictive covenants. The purchaser, having received notice of the restrictive covenants, objected to complete.

Held: the restrictive covenants were in the nature of negative easements binding the land in equity, and were paramount to the title of the dispossessed owner; as the vendor and the person from whom he purchased had not insisted on a forty years' title, they had constructive notice of the restrictive covenants, which they would have discovered had they insisted on a title of forty years, and which, therefore, were enforceable against them; accordingly, the purchaser's objection should be upheld.

London and South Western Rail. Co. v. *Gomm* (1) (1882), 20 Ch. D. 562, and *Re Cox and Neve's Contract* (2), [1891] 2 Ch. 109, applied.

Decision of FARWELL, J., [1905] 1 Ch. 391, affirmed.

Notes. The Real Property Limitation Act, 1833, s. 34, has been repealed and replaced by the Limitation Act, 1939, s. 16 (13 HALSBURY'S STATUTES (2nd Edn.) 1175).

Considered: *Abbey* v. *Gutteres* (1911), 55 Sol. Jo. 364; *Wilkes* v. *Spooner*, [1911] 2 K.B. 473; *London County Council* v. *Allen*, [1914–15] All E.R.Rep. 1008. Referred to: *Long* v. *Gray* (1913), 58 Sol. Jo. 46; *Meyer* v. *Charters* (1918), 34 T.L.R. 589.

As to restrictive covenants, see 14 HALSBURY'S LAWS (3rd Edn.) 559 et seq.; and for cases see 40 DIGEST (Repl.) 339 et seq.

Cases referred to:

(1) *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620, C.A.; 40 Digest (Repl.) 331, *2716.*

(2) *Re Cox and Neve's Contract*, [1891] 2 Ch. 109; 64 L.T. 733; 39 W.R. 412; 40 Digest (Repl.) 80, *611.*

(3) *Tulk* v. *Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, *2774.*

(4) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest (Repl.) 340, *2769.*

(5) *Formby* v. *Barker*, [1903] 2 Ch. 539; 72 L.J.Ch. 716; 89 L.T. 249; 51 W.R. 646; 47 Sol. Jo. 690, C.A.; 40 Digest (Repl.) 333, *2727.*

(6) *Haywood* v. *Brunswick Building Society* (1881), 8 Q.B.D. 403; 51 L.J.Q.B. 73; 45 L.T. 699; 46 J.P. 356; 30 W.R. 299, C.A.; 40 Digest (Repl.) 331, *2714.*

(7) *Spencer's Case* (1583), 5 Co. Rep. 16a; 77 E.R. 72; 31 Digest (Repl.) 153, *2907.*

(8) *Patman* v. *Harland* (1881), 17 Ch.D. 353; 50 L.J.Ch. 642; 44 L.T. 728; 29 W.R. 707; 40 Digest (Repl.) 166, *1286.*

Also referred to in argument:

Keates v. *Lyon* (1869), 4 Ch. App. 218; 38 L.J.Ch. 357; 20 L.T. 255; 33 J.P. 340; 17 W.R. 338, L.JJ.; 40 Digest (Repl.) 343, *2780.*

Mann v. *Stephens* (1846), 15 Sim. 377; 10 Jur. 650; 60 E.R. 665, L.C.; 40 Digest (Repl.) 344, *2784.*

Wilson v. *Hart* (1866), 1 Ch. App. 463; 35 L.J.Ch. 569; 14 L.T. 499; 30 J.P. 582; 12 Jur.N.S. 460; 14 W.R. 748, L.JJ.; 40 Digest (Repl.) 355, *2845.*

Coles v. *Sims* (1854), 5 De G.M. & G. 1; 2 Eq. Rep. 951; 23 L.J.Ch. 258; 22 L.T.O.S. 277; 18 Jur. 683; 2 W.R. 151; 43 E.R. 768, L.JJ.; 40 Digest (Repl.) 345, *2794.*

McLean v. *McKay* (1873), L.R. 5 P.C. 327; 29 L.T. 352; 21 W.R. 798, P.C.; 40 Digest (Repl.) 344, *2788.*

Hall v. *Ewin* (1887), 37 Ch.D. 74; 57 L.J.Ch. 95; 57 L.T. 831; 36 W.R. 84; 4 T.L.R. 46, C.A.; 40 Digest (Repl.) 342, *2775.*

Jacobs v. *Revell*, [1900] 2 Ch. 858; 69 L.J.Ch. 879; 83 L.T. 629; 49 W.R. 109; 40 Digest (Repl.) 113, *872.*

Leech v. *Schweder* (1874), 9 Ch. App. 463; 43 L.J.Ch. 487; 30 L.T. 586; 38 J.P. 612; 22 W.R. 633, L.JJ.; 31 Digest (Repl.) 129, *2673.*

Clegg v. *Hands* (1890), 44 Ch.D. 503; 59 L.J.Ch. 477; 62 L.T. 502; 55 J.P. 180; 38 W.R. 433; 6 T.L.R. 233, C.A.; 31 Digest (Repl.) 113, *2544.*

Tichborne v. *Weir* (1892), 67 L.T. 735; 8 T.L.R. 713; 4 R. 28, C.A.; 31 Digest (Repl.) 447, *5745.*

Bailey v. *Barnes*, [1894] 1 Ch. 25; 63 L.J.Ch. 73; 69 L.T. 542; 42 W.R. 66; 38 Sol. Jo. 9; 7 R. 9, C.A.; 30 Digest (Repl.) 341, *698.*

Burroughs v. *M'Creight* (1844), 1 Jo. & Lat. 290; 32 Digest 460, *c.*

Bolling v. *Hobday* (1882), 31 W.R. 9; 32 Digest 453, *1196.*

Knight v. *Bowyer* (1858), 2 De G. & J. 421; 27 L.J.Ch. 520; 31 L.T.O.S. 287; 4 Jur.N.S. 569; 6 W.R. 565; 44 E.R. 1053, L.JJ.; 32 Digest 467, *1319.*

Appeal from an order of FARWELL, J. On Jan. 1, 1903, S. L. Potts executed an agreement with Vickers Nisbet to purchase certain freehold hereditaments, known as Wallwood Farm, for the sum of £3,200. Paragraph 2 of this agreement was as follows:

"The title to the property shall commence with an indenture of conveyance dated Aug. 11, 1890, in which indenture it is stated that Thomas Headde and his father had at that date been in possession of the said property for thirteen years. This indenture has been produced to the purchaser before the signing hereof, and the purchaser shall be deemed and considered as having had full notice and knowledge of the contents thereof, and shall buy subject thereto and be bound thereby."

Paragraph 5 provided:

"The property is believed and shall be taken to be correctly described, and is sold subject to all rights of way, water, and other easements, if any, subsisting thereon, and no error, mis-statement, or misdescription shall annul the sale, nor shall any compensation be claimed or allowed in respect thereof."

Neither the abstract of title nor the agreement contained any reference to, nor any stipulations concerning, the existence of any restrictive conditions or covenants affecting the user of the land, nor to any claim that could be set up in respect of such restrictions, and Potts, who had purchased the land for building purposes, consulted an architect with a view to the making of a road and the erection of shops and houses on the land in question. On Feb. 23, 1903, a firm of solicitors wrote to Potts informing him that the land was bound by restrictive covenants entered into by a former owner of the land, and were contained in a deed of 1872, whereby the owner was prevented from erecting shops upon the property.

Nisbet contended that he had purchased without notice of the restrictive covenants, and, having regard to the fact that the title was one by adverse possession, those covenants would not now bind the land. It appeared that Thomas Headde acquired a possessory title to the hereditaments in 1890, and sold and conveyed the premises on Aug. 11, 1890, to the person from whom the present vendor purchased in 1901; and that neither the present vendor nor the purchaser under the deed of 1890 had actual notice of the covenants at the time they respectively purchased, but on neither of those occasions was any inquiry made into the title prior to 1878.

The purchaser took out a summons asking for a declaration that no title had been shown, and for a return of the deposit. Farwell, J., held that the vendor had not shown a good title, and the vendor appealed.

Jenkins, K.C., and *Romer Macklin* for the vendor.
Upjohn, K.C., and *Jessel* for the purchaser.

SIR RICHARD HENN COLLINS, M.R.—This appeal has been most clearly and succinctly argued on behalf of the vendor but I have come to the conclusion that the learned judge's judgment is right. In point of fact, so exhaustive does his judgment appear to me to be that I should not venture to add or substitute anything of my own for it, except that I feel bound, in deference to the very able arguments which have been addressed to us, to give my decision in my own language.

The question arises in this way: The vendor had himself bought what he describes in his affidavit as a squatter's title. A certain person had remained in possession of land for more than the statutory period, and had acquired such right as a person who has occupied land for the statutory time acquires under the Statute of Limitations, with the result that the title of the true owner was extinguished. The vendor when he purchased contented himself with a squatter's title—i.e., he contented himself with limiting his inquiries to the state of things subsequent to the commencement of that title. But when the title was being investigated by the purchaser, he ascertained, not from any materials actually placed before him in the consideration of the title, but from independent information, that, in point of fact, the person who had been dispossessed by the squatter had in 1872, being then the owner of the land in question, entered into a covenant with the owner of the adjoining land whereby certain restrictions were placed on the user of the land in question in the matter of building.

In answer to a requisition by the purchaser based on it, the vendor contended two things—first, that it was a matter with which he was absolutely unconcerned; that no right could be claimed as arising, or asserted as existing, under something done by a predecessor of the squatter—I will not say a predecessor in the proper sense of the term, but by the person whose right was extinguished as against the squatter; that by virtue of the Statute of Limitations the squatter under whom the vendor claimed had acquired a title paramount to any preceding covenants or obligations accepted or imposed by the former owners of this property, and that, as it were, there was a clean slate in the possession of the squatter, and that he was able to pass the property entirely free from any obligations incurred by former owners; and that, inasmuch as the purchaser was a purchaser from the squatter, he received the land discharged from those obligations and was able to pass it on to his purchaser, and that therefore it was a matter not material to the discussion whether or no a former owner had imposed these obligations on himself and on the land. The second point was that, even if it were the fact that what the owner of the land had done was effectual to create a burden under certain conditions, the purchaser from the squatter was a purchaser for value without notice, and that, even if this was an obligation which could pass through the squatter, or to the purchaser from him, then, unless that purchaser was a purchaser with notice of the burden, he was discharged from it; and it was contended that the vendor Nisbet when he purchased had neither actual nor constructive notice of the burden.

With regard to the first point, the question, it seems to me, turns on whether or not the effect of the Statute of Limitations was to vest in the squatter, at the expiration of the statutory period, the land in question, discharged from the obligation of the covenant which had been created by the owner, whose title was extinguished. Unless that is so, the burden of that covenant was on the land to which the squatter had become entitled simply through the extinguishment of the right of anybody else to turn him out; and being imposed on the land still, notwithstanding his acquisition of it, every person who took that land would take it subject to the obligation of that covenant, unless he could prove that he was a purchaser for value without notice. Whether or not that burden was imposed on the land in the hands of the squatter depends on the nature of the obligation created by a restrictive covenant entered into by the owner of land. If the right created by the covenant is to be treated as Sir George Jessel, M.R., treated it—

namely, as a right in the nature of a negative easement—then it is not contended, or hardly contended certainly, by the vendor here that that right was one which could have been extinguished on the acquisition of the land by the squatter. It was admitted that a squatter could not take land freed from positive legal easements, and I understand it to be admitted also that if the right arising on the acceptance of the restrictive covenant by the owner of the land was analogous to a negative easement, then the squatter would take subject to the paramount right created by the obligation imposed by the covenant which adhered to the land, and which passed to those persons who became assignees of it or acquired in any way a title to it. On behalf of the vendor it was contended that the squatter was never an assignee—he was never a purchaser—and that, therefore, he does not come under the condition that a purchaser for value with notice of a covenant is bound by it, but he takes by a title given to him by operation of law, which is paramount to and overrides any such obligation as would have attached to the land if it had passed merely by assignment, and takes independently, and freed from all such collateral obligations. Whether that contention is right must depend on the statute itself. Therefore we have got to see what the machinery of the statute is, and what, in point of fact, its effects.

The Real Property Limitation Act, 1833, [repealed] as one would expect, does not purport to annul by lapse of time any rights other than those which persons might and ought to have exercised. The statute does not begin to run in any case against a person until that person has been put to what is generally called his right of entry. Unless the circumstances have been such as to put the person who is to be barred by the lapse of time upon the assertion of his right, the time does not begin to run against him. The Act provides in s. 34 [see now the Limitation Act, 1939, s. 16] that, at the determination of the time limited by the Act to any person for making an entry, or distress or bringing an action, the right and title of such person to the land or rent for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished. That is the whole right that the squatter gets as regards the extinguishment of a title adverse to his own. But how does that affect the question here? What machinery is there in the Act which would affect the right of a covenantee having the benefit of a restrictive covenant? Nothing has been pointed to in this Act which touches it at all. There is no reason in principle why it should be touched, because, unless and until the right of that person has been in some way infringed, so that he has been called on to exercise his rights, it would be clearly unfair, and there would be no reason in principle why his right should be affected; and the person who stands simply with the benefit of a negative easement is certainly not put on the assertion of his right unless and until that right has been interfered with in some way. It is a matter of absolute indifference to the person who owns the benefit of that obligation who is the owner of the intervening land until that land, over which that right exists, has been used in some manner incompatible with the assertion of that right on the part of the person entitled to it. It seems to me, therefore, that the principal point of the discussion here is whether or not Sir George Jessel, M.R., was right in the view that he took, that an obligation created by a restrictive covenant is in the nature of a negative easement creating a paramount right in the person entitled to it over the land to which it relates. If that is so, then this gentleman by his squatting simply acquired a right to land subject to this incident. Of course, the burden of that incident would pass to all persons who become assignees of the land, and the squatter is not entitled to hand it over freed from that obligation in regard to the person whose title he has ousted by his possession.

Is that the law or not? I do not think that there was anything inconsistent with that view in the law as laid down in the leading case of *Tulk* v. *Moxhay* (3) though no doubt words are used there pointing to the equity as arising from the injustice which would accrue if a person getting land at a reduced price, by reason of a restriction being accepted, were afterwards enabled to pass that land to other persons without disclosing that obligation, receiving in return a fair price. That element no doubt does enter into the discussion when we come to criticise, as we always have to criticise, what the position of a person is who acquires for value a legal estate in land. The right created is an equitable right, and is one capable of being defeated by a person who acquires the legal estate for

value; and the question therefore arises whether, in the circumstances of the case, there is something which would make it inequitable for that person to avail himself of his legal estate. That, as counsel for the purchaser pointed out, is an inquiry which is inevitable in cases where we are dealing with equitable rights and legal estates. But that does not in the least prevent the right in question being what Sir George Jessel considered it to be—namely, a burden imposed on the land, and passing with the land, subject, of course, to this, that it might be defeated by a purchaser for value without notice; but, in order to defeat it, the burden would be on the person who took the land to show that he had acquired it under such conditions as to defeat the right as against him—namely, that he had acquired it for value and without notice. That being Sir George Jessel's view in *London and South Western Rail. Co.* v. *Gomm* (1), it seems to me that that view has been adopted more than once in this court. I think, in particular, it was adopted in *Rogers* v. *Hosegood* (4), although the point that arose in that case was strictly the running of the benefit and not the running of the burden, as has been pointed out by the counsel for the vendor. Still, I think the principle which was dealt with there was not one limited only to the running of the benefit, but extended also to the running of the burden, and I cannot help thinking that the court there did guide themselves by and adopt as expressing the true view in this matter the view taken by Sir George Jessel, M.R., in *London and South Western Rail. Co.* v. *Gomm* (1). It seems to me, therefore, that that view stands not only on the great authority of Sir George Jessel, but it has also the authority of this court, not only in *Rogers* v. *Hosegood* (4), but certainly also, as far as one of the learned lords justices goes, in the later case of *Formby* v. *Barker* (5), and I think also in *Haywood* v. *Brunswick Building Society* (6). Therefore it seems to me that the law is clearly established in accordance with Sir George Jessel's view of that matter, and therefore that this burden remained on the land binding on any person who could not show that he had bought for value and without notice. Therefore I think the squatter's title does not help the vendor in this case.

That brings us to the second point. Has the vendor here shown—and the burden is on him to show—that, having bought for value, he has bought without notice of this incumbrance? It seems to me quite clear that he has not discharged that burden. He admits that he accepted—he may have bound himself to do so or not—but he did accept a title commencing in 1878. He was entitled to demand a title of forty years, and it seems perfectly clear now that if he had insisted on a title of forty years he must have had before him the existence of a covenant made as late as 1872 by the person whose title was extinguished, in the words of the statute, by possession for the statutory period by the person through whom Nisbet now claims. That is equivalent to notice. By reasonable care in demanding the title to which he was reasonably entitled, he must have discovered the fact that there was this burden; and, if so, that is proof that he must be taken as having had constructive notice of it. It is not even necessary to go as far as that, because I agree with Farwell, J., in this, as in other points of the case, that, the burden being on the vendor to show that when he bought he had bought for value without notice, he has not discharged that burden by simply stating, "I did not push my inquiries beyond that." Whether he could have discovered the existence of this covenant or not, I do not know. I believe that is in doubt. But that does not seem to me to discharge his burden, and therefore it appears to me, on all grounds, that the vendor is not in a position to enforce the purchase against the purchaser. The appeal therefore fails.

ROMER, L.J.—I also have come to the same conclusion as that arrived at by Farwell, J., and for the reasons given in his very clear judgment. I also agree with what the Master of the Rolls has said, and I might be contented with leaving the case as stated in those two judgments, but, having regard to the importance of the case, I desire to add a few words of my own on certain of the important points that arise in it.

In the first place, with regard to the general doctrine concerning a negative covenant, such as we are dealing with in this case, I think that, whatever reasons may have been given for the doctrine in the earlier cases, and notwithstanding the way in which the doctrine has been referred to in some judgments in early cases, yet, at the present day,

the doctrine ought to be regarded as well settled. I think the law is that such a covenant, when validly created, binds the land in equity, and can be subsequently enforced as against subsequent owners of the land, subject only to the limitation that, being equitable it cannot be enforced as against a bona fide purchaser of the legal estate without notice. This was clearly pointed out by SIR GEORGE JESSEL in *London and South Western Rail. Co.* v. *Gomm* (1), where he says (20 Ch.D. at p. 583):

> "The doctrine of [*Tulk* v. *Moxhay* (3)], rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* (7) to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. . . . This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not."

As has been pointed out by my Lord, that view of the law has been adopted by this court in subsequent cases. Indeed, to hold otherwise would lead to a result which, in my opinion, would be lamentable; for, according to the contention of the vendor, it would result that, while any person in occupation of the land, claiming through the covenantor, even though only a tenant from year to year, or a mere occupant by permission, would be bound by the covenant, yet a squatter going into occupation, without any right or any permission of the true owner, could say that, as between him and the covenantee, the land was freed from the covenant. In other words, he could, as against the covenantee, successfully plead his own trespass as putting him in a better position than if he had gone on the land by right.

I cannot think that the law necessitates any such result. On the contrary, as I have said, in my opinion the negative covenant does bind the land in equity; and I think that with regard to a subsequent squatter, dealing in the first place with the time before that squatter has acquired any statutory right by lapse of time, inasmuch as he could not say he was a purchaser of a legal estate without notice, he would be bound by the covenant during his squatting, and accordingly the covenant could be enforced against him, if he sought to break it, at the instance of the covenantee. That being, in my opinion, the position of the squatter before he has acquired a statutory right under the Statute of Limitations, let us consider what would be his position after a twelve years' occupation. By that occupation he would, no doubt, have acquired a statutory title as against the covenantor, or the heirs or assigns of the land of the covenantor, who, during those twelve years, has or have been so remiss as not to eject him; but he does not thereby of necessity become entitled to hold the land free from the obligation of the negative covenant. That obligation was one existing against the title of the true owner of the land. The right of the true owner, no doubt, has gone as against the successful squatter, who has acquired a title against him under the statute, but the equitable right of the covenantee still exists. It was not a right that could be barred by the operation of the Statute of Limitations in favour of the squatting owner. The covenantee was not an assign of the land, or of any part of the land, or of any estate in the land which was capable of being barred by the operation of the Statute of Limitations; nor was the covenantor a trustee, in any sense, of the land for the covenantee, or of any part of it, or of any estate in it. The covenantee could not, directly or indirectly, by any person representing him, in respect of his right under the restrictive covenant, take proceedings to recover possession against the squatter during the twelve years; and in the case I am considering the covenantee would, in my opinion, be no more barred by the operation of the Statute of Limitations by not taking proceedings against the squatter during the twelve years,

than he would have been barred by not taking proceedings against the true owner, had that true owner remained in possession during that period.

There is a fallacy, as it appears to me, in the argument on behalf of the vendor. It seems to assume that the statutory owner becomes, at the end of the statutory period of limitation, in the same position as if he had ousted by statutory title all the prior owners of the estate so as to destroy all negative covenants validly created by them. That is not so. If A., being really entitled to land, ousts, by his superior good title, one B., who has created restrictive covenants, or purported to create them, at a time when B.'s title was bad as against A., then, of course, when A. recovers possession he is not bound by the restrictive covenants, for they were not originally validly created as against him (A.); but if A. is admittedly the true owner in fee in possession of the land at the time when he enters into valid restrictive covenants binding the land in equity, then a subsequent squatter, even when he ultimately by twelve years' occupation becomes entitled to the land as against A., or his heirs or assigns, cannot be heard to say that A. had no right to enter into the covenants originally, or that those covenants never had any validity as against him (the squatter), or ceased to have validity directly the twelve years elapsed. And certainly that squatter, who, if he did not know of the restrictive covenants entered into by the true owner validly, at best could only say that he did not know of them then because he made no inquiry as to the title before he squatted, cannot say that he is in the position of a purchaser, as it were, of the land for value without notice. So to hold would, in my opinion, be most unjust towards the covenantee, and lead to what appears to me would be most undesirable consequences affecting many estates in this country now usefully regulated by such restrictive covenants as I am now considering.

That being so, it remains to be considered whether, in the present case, the vendor, or his vendor, was a purchaser for value without notice. In my opinion, if a purchaser chooses, either by agreement with his vendor, or otherwise, to take less than a forty years' title, he cannot, by so restricting his investigation, and by not inquiring into the title for part of the period, say that he was not affected with notice of equities affecting the land, which he would have ascertained by reasonable inquiries into that part of the title. The present vendor seems to contend that the case where a vendor has acquired a title merely by possession under the Statute of Limitations is to be treated as an exception to the rule I have indicated, and that a person who buys from a trespasser who has acquired a good title by successful trespass for twelve years or more is not bound, or should be treated as not being bound, to make any inquiries whatever as to an earlier title. I cannot agree with that contention. I cannot see why a successful trespasser for twelve years, or a purchaser from him, should be placed in a better position than an ordinary owner or vendor, or a purchaser from such ordinary vendor. I do not see that he is entitled to be regarded as being in any peculiarly favoured position. That being so, in the present case neither the present vendor nor the vendor to him can say he was a purchaser without notice. If the present vendor, or his vendor, had insisted on a proper title in regard to length being given to him, or had made proper inquiries into that title, it is clear that he must have ascertained the existence of the negative covenants in question. It certainly is, in my opinion, for the vendor in this case to prove the plea of purchaser for value without notice on his behalf, or on behalf of the vendor to him. He has not discharged the onus cast on him. For these reasons I think the appeal fails.

COZENS-HARDY, L.J.—I am of the same opinion, and I so entirely agree with all that was said by FARWELL, J., in his judgment, and with the judgments of the Master of the Rolls and ROMER, L.J., that I almost doubt whether I ought to occupy even a few minutes of the time of the court; but, having regard to the great importance of the case, perhaps it is right that I should add a few words. The suggestion which is at the root of the vendor's argument is that a squatter can wholly disregard restrictive covenants affecting a building estate. That is so startling a proposition, and so wide reaching, that it seems it must be wrong. The value of estates in the neighbourhood of London and all large towns, and the amenity of those estates, depends almost entirely on the continuance of the mutual restrictive covenants affecting the user and the enjoyment of the property; and when one is told that the squatter, notwithstanding that he is a mere trespasser, is

to be in a different and better position from that occupied by a person deriving a title strictly through the original covenantor, one feels that there must be an answer to the argument, and I think the elaborate discussion and investigation of the authorities makes the answer quite plain. A restrictive covenant of this kind, or rather the benefit of a restrictive covenant of this kind, is a paramount right in the nature of a negative easement not in any way capable of being affected by the provisions of the Real Property Limitation Act, 1833 [repealed] on which the squatter relies. The only rights extinguished for the benefit of the squatter under s. 34 of that Act [see now s. 16 of the Limitation Act, 1939] are those of persons who might have brought during the statutory period, but did not in fact bring, an action to recover possession of the land. But the person entitled to the benefit of a restrictive covenant like this never had any cause of action which he could have brought, because, unless and until there is a breach, or a threatened breach, of such a covenant, it is impossible for the person entitled to the benefit of it to bring any action.

It appears, therefore, so far as the squatter himself was concerned, both during the currency of the twelve years, and after the expiration of the twelve years, there would be no possible answer to the claim of anybody seeking to enforce the covenant. In fact there would, so far as he is concerned, be no difference between this, which was in the nature of an equitable easement, and a legal easement strictly and properly so-called. But, although the squatter took this property subject to this equitable burden, it may be, of course, in spite of that, that the present vendor, who purchased from or through the squatter, may be able to say that the burden does not affect the property in his hands. But what must he prove in order to claim this exemption? He must prove that he is a purchaser for value without notice. If he had simply pleaded in the old days, "I am a purchaser for value," such a plea would have been demurrable. He must go further and allege and prove that he was a purchaser for value without notice. Can the present vendor allege and prove that? I think not. It is not necessary, of course, to prove actual notice. That has not been contended. But if a purchaser chooses to take a title without making full inquiries, he cannot be allowed to say that he had no notice of that which a full abstract would have disclosed. On this point, the observations of NORTH, J., in *Re Cox and Neve's Contract* (2) are so much in point that I will read them. He says ([1891] 2 Ch. at pp. 117, 118):

> "I must say that I dissent entirely from the proposition that the purchaser would have taken the property free from the restrictive covenant, if he had made no inquiry. On the contrary, I think he would have been bound by it, and for this reason. He had agreed by the bargain contained in the conditions of sale to accept a title of less than forty years. That cannot relieve him from all knowledge of the prior title, or it would come to this—that, if a man was content to purchase property on the condition that he should not inquire into the title, he would acquire a title free from any existing restrictions, and would not have constructive notice of any incumbrance. Of course, the law will not allow of anything so absurd as that."

I should be sorry to think that there could be nowadays any real doubt on that.

In the case of a lessee the law has gone, possibly, one step further, because in *Patman* v. *Harland* (8) it has been held, and so far as I know it has never been questioned, that a lessee is affected with notice of any restrictive covenants, the existence of which he would have learned if he had investigated the lessor's title, even though, since the Vendor and Purchaser Act, 1874 [repealed], the lessee is not entitled under an open contract for a lease to require the production of the lessor's title. As SIR GEORGE JESSEL in that case said, that alteration of the law did not really prevent or interfere with the application of the doctrine of *Tulk* v. *Moxhay* (3). If the lessee wanted to escape from that obligation he, in agreeing to take the lease, should have required the production of the lessor's title. The doctrine, therefore, has been extended, and, I venture to think, properly extended, not merely to a case where a purchaser under an open contract would get notice of the document, but, at least in the case of a lease, to a case where a purchaser under an open contract would not be entitled to require production of the documents which alone could give him notice. I think that a squatter who has been in possession

for more than twelve years is certainly in no better position that any other person. He cannot make a good title without making and delivering a full abstract extending over the full period, and if the purchaser is willing to take a title depending upon the Statute of Limitations, and the effect of s. 34 of the Real Property Limitation Act, 1833, [repealed], he must take such title as the vendor has, which is a title subject to the equitable burden, as it is often called, by analogy to *Tulk* v. *Moxhay* (3), except in so far as it can be shown that the equitable burden has been got rid of by means of a purchase for value without notice. For these reasons I think the appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors: *Harris, Chetham & Cohen* : *Coleman, Betts & Howard.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

THE MINNETONKA

[Court of Appeal (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), April 5, 6, 1905]

[Reported [1905] P. 206; 74 L.J.P. 97; 93 L.T. 581; 53 W.R. 521; 21 T.L.R. 407; 10 Asp.M.L.C. 142]

Shipping—Collision—Damages—Measure—Payment by cargo-owners to owners of ship abandoning voyage by way of settlement—Recovery of this sum by cargo-owners against owners of other colliding ship.

A collision occurred between the ship *U.* and the ship *M.* The *U.* was carrying cargo for the Admiralty on the terms, inter alia, that the owners of *U.* should not be liable for damage caused by their negligence. As a result of the collision *U.* returned to port for repairs. The Admiralty and the owners of *U.* having taken into account the cost of carrying the cargo to its destination, the delay for repairs, transhipment and re-shipment, and possible deterioration of the cargo, came to the conclusion that the reasonable thing to do was to effect a compromise involving the abandonment of the voyage. By way of settlement the Admiralty agreed to pay the owners of *U.* a sum less than that which they would have had to contribute in general average. In an action between the owners of *U.* and *M.*, both ships were held equally to blame. On the assessment of damages in these proceedings the question of the Admiralty's cargo was not considered. An action brought by the Admiralty against the owners of *M.* for damage sustained to the cargo was settled on the terms that both the Admiralty and *M.* were to blame and the claim was referred to the registrar. Included in the Admiralty's claim was the sum they had agreed to pay to the owners of *U.* in respect of the settlement between them, and the registrar disallowed this sum.

Held: the only consideration was whether the compromise was reasonable, which it was, especially as far as the Admiralty were concerned, since the owners of *U.* were protected from liability for negligence; as the sum had not, and ought not to, come into the discussions between the shipowners it was not unreasonable to make a settlement without regard to subsequent litigation; and, accordingly, this sum could be recovered from the owners of *M.*

Notes. Considered: *Morrison Steamship Co.* v. *Steamship Greystoke Castle* (*Cargo Owners*), [1946] 2 All E.R. 696.

As to the measure of damages resulting from collisions, see 35 Halsbury's Laws (3rd Edn.) 708 et seq.; and for cases see 41 Digest 800 et seq.

Case referred to:

(1) *The Marpessa*, [1891] P. 403; 61 L.J.P. 9; 66 L.T. 356; 40 W.R. 239; 7 Asp. M.L.C. 155; 41 Digest 810, *6723*.

Also referred to in argument:

The Milan (1861), Lush. 388; 31 L.J.P.M. & A. 105; 5 L.T. 590; 1 Mar.L.C. 185; 167 E.R. 167; 41 Digest 692, *5221*.

The Thuringia (1872), 41 L.J.Adm. 44; 26 L.T. 446; 1 Asp.M.L.C. 283; 41 Digest 711, *5484*.

Jackson v. *Union Marine Insurance Co.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 41 Digest 330, *1859*.

Svendson v. *Wallace Brothers* (1885), 10 App. Cas. 404; 54 L.J.Q.B. 497; 52 L.T. 901; 34 W.R. 369; 1 T.L.R. 476; 5 Asp.M.L.C. 453, H.L.; 41 Digest 493, *3224*.

Notara v. *Henderson* (1872), L.R. 7 Q.B. 225; 41 L.J.Q.B. 158; 26 L.T. 442; 20 W.R. 443; 1 Asp.M.L.C. 278, Ex. Ch.; 41 Digest 495, *3237*.

Appeal from an order of BUCKNILL, J., in an action brought by the plaintiffs, the Admiralty Commissioners against the defendants, the owners of the S.S. *Minnetonka* for £276 18s. 4d.

Acland, K.C., and *Wills* for the Admiralty.

Aspinall, K.C., and *Arthur Pritchard* for the owners of the *Minnetonka*.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal from the decision of BUCKNILL, J., who had been invited to review the report of the registrar and merchants on a matter which had been referred to them.

The question arose in an Admiralty action between the Admiralty and a vessel called the *Minnetonka*, and the circumstances shortly are these: The Admiralty had chartered a vessel called the *Uskmoor* to carry a cargo of coal from the Tyne to South Africa, and when the *Uskmoor* was proceeding on her voyage down the English Channel near Beachy Head, she came into collision with the *Minnetonka*, with the result that she was seriously damaged and had to put back to London. Considerable time would have been spent in repairing the ship, but, as the ship was quite capable of being repaired, the shipowner had a right to insist on repairing it, that he might carry the cargo to its destination and earn the freight. One-third of the freight had been paid in advance. There was at the time an action pending between the owners of the *Uskmoor* and the *Minnetonka* with regard to the damage caused by the collision, and it had not then been decided who was to blame for the collision. Naturally the owners of the *Uskmoor* considered, and no doubt represented to the Admiralty, that their vessel was not to blame, and that the *Minnetonka* was alone to blame. So that at this time the rights as to the collision between the *Minnetonka* and the *Uskmoor* had not been ascertained, the *Uskmoor* had been disabled for the time being, but was capable of being repaired, and her owners were insisting on their right to repair her and carry her cargo on to its destination.

In those circumstances a compromise was arranged between the Admiralty and the owners of the *Uskmoor*. Reasonable steps were taken to ascertain what would be the relative cost of carrying on the cargo to its destination, with the necessary delay for repairs, involving the transhipment and re-shipment of the coal, and the possible deterioration of the cargo in the process, and a suggestion was made on the part of the owners of the *Uskmoor* that they should abandon the attempt to carry this cargo to its destination in consideration of a sum of about £276. That was an offer to compromise, and terms were discussed. Ultimately a calculation was made as to the length of time during which the repairs would probably last, and as to the cost of warehousing the cargo during that period and of shipping and unshipping. A calculation having been made upon that basis, the owners of the *Uskmoor* and the Admiralty arrived at the conclusion that the reasonable thing, instead of pursuing the voyage and incurring this expense, was that they should agree upon a compromise involving the abandonment of the voyage. Having ascertained, by calculation according to the best estimate they could make, what the contribution of the cargo would be, upon an average statement, in the event of the voyage being continued, and having arrived at the conjectural figure of £332 they arranged a

compromise by which the Admiralty agreed to pay the owners of the *Uskmoor* £276. By doing that they reduced the sum they would have had to pay on their calculation if the cargo was carried on to its destination, and they also avoided, as far as they were concerned, loss on account of the deterioration of the cargo. The arrangement was also advantageous to the shipowner, inasmuch as he was at liberty to get a cargo later on, as soon as the ship was repaired, and to get another cargo possibly at a better freight. At all events both sides saw the advantage of settling the matter at once upon the terms I have named, instead of each standing on his rights, with the possible consequence of no advantage to either party.

If that was a reasonable compromise to make it seems to me that the amount of that compromise fairly measures the damages obtainable by the Admiralty against the wrongdoers, the owners of the *Minnetonka*. There is a very important point in this case which did not come out in the court below, and which was elicited by a question put by Mathew, L.J., to counsel for the Admiralty—that is, that as between the Admiralty and the owners of the *Uskmoor*, the latter are protected by the exemptions in the charterparty from all liability for negligence, and that, therefore, in arranging the compromise between themselves and the owners of the *Uskmoor* the Admiralty had to regard the owners of the *Uskmoor* as persons who, as between the Admiralty and the owners of the *Uskmoor*, were free from blame, although the owners of the *Uskmoor*, as against the owners of the *Minnetonka*, were afterwards held partly to blame for the collision. That did not affect the rights of the owners of the *Uskmoor* as between themselves and the Admiralty, and therefore the Admiralty were not in a position to say, "You are not entitled to receive anything from us with regard to this collision, which was partly caused by your fault." The learned registrar's report was the basis of the argument addressed to the court below and confirmed by the learned judge, and, though the learned registrar had not allowed this sum to the Admiralty, we find as a fact that no part of the £276 has been recovered by the owners of the *Uskmoor* from the owners of the *Minnetonka*, and the owners of the *Minnetonka* have not paid any part of that sum.

That being the fact, it gets rid, in my judgment, of a very formidable argument, if not the main argument, for the owners of the *Minnetonka* in this case. They say it cannot be reasonable to have compromised upon such terms when the persons to whom you are going to pay £276 when they receive it will receive it in addition to a sum received by them on similar grounds in proceedings between them and the owners of the *Minnetonka*. For some time we were under the impression that if the owners of the *Minnetonka* were called upon to pay this sum they would be paying again to the Admiralty a sum already paid by them by virtue of proceedings taken by the owners of the *Uskmoor* against the owners of the *Minnetonka*. Now, however, we have carefully looked at the findings of the registrar on the matter of fact, and his findings distinctly negative any part of that sum of £276 18s. 4d. entering into any arrangement between the owners of the *Uskmoor* and the owners of the *Minnetonka*, or being paid by the owners of the *Minnetonka* to the owners of the *Uskmoor*. Therefore, the case comes back to this, does the arrangement made by the Admiralty represent a reasonable compromise between the parties at the time it was made? For reasons I have given I think it was a reasonable compromise.

The junior counsel for the owners of the *Minnetonka* in his very ingenious argument took another point. He says, however reasonable the Admiralty may have been when they made the arrangement they were bound to re-adjust it in view of possible litigation between the owners of the *Uskmoor* and the owners of the *Minnetonka*, the fact not having been ascertained whether both were to blame or which. He says that some provision should have been inserted in the agreement to allow of its being re-adjusted in accordance with the result of that litigation; but when one comes to look at the point in respect of which that contention is made it seems to me it does not arise, because when we have once disposed of the fact that this sum did not come, and ought not to come, into discussion between the owners of the *Minnetonka* and the owners of the *Uskmoor*, it entirely disposes of the suggestion that it was unreasonable to make a settlement without regard to the subsequent litigation. It could not be an element, and was not an element, in the adjustment of the rights between the owners of the *Uskmoor* and the owners of the *Minnetonka*. That being so, it seems to me clear—after disengaging this matter, which

was very complex in its statement, from all the confusion which surrounded it, and having ascertained the facts upon which the registrar's report was given, and the learned judge's judgment proceeded—that the Admiralty are entitled to recover from the owners of the *Minnetonka* the sum claimed. With respect to the learned judge's judgment, it seems to me that he really had not before him the facts as ascertained and explained to us. His judgment seems to have proceeded upon grounds quite outside the grounds which have been pressed upon us in the discussion in this court. As far as I can understand the grounds of his judgment, they seem to have been rather based upon the expression of law which he extracted from *The Marpessa* (1). I cannot pretend to say that I very clearly follow the train of reasoning based upon that case, but it seems to suggest that the wrongdoer, who is liable for some sum in respect of damage caused to the plaintiff, is relieved from all liability in respect of it if that sum of money has been arrived at by some compromise between the parties, whether reasonable or not, on the ground that the sum payable in respect of which the claim is made against the wrongdoer is a sum which became payable under the compromise, and therefore is not the direct consequence of the collision. It seems to me that the only consideration is whether the compromise is reasonable—whether it was a reasonable way of adjusting the sum for which the wrongdoer was liable—and that the simple process of assessment does not break the chain of causality. The points which have been carefully discussed before us—first, what were the real facts found by the registrar; and, secondly, was the compromise reasonable—do not seem to have been argued before the learned judge. They have been argued before us, and I do not think we are really differing from his view in holding that this sum is recoverable from the owners of the *Minnetonka*. The appeal must succeed.

MATHEW, L.J.—I am of the same opinion. The owners of the *Uskmoor* were, as between themselves and the Admiralty, not to blame, and therefore were entitled to have the average contribution ascertained in the usual way; and it seems to me to be perfectly clear that the arrangement come to between the Admiralty and the owners of the *Uskmoor* was reasonable, not only as regards those interests, but also as regards the interests of the owners of the *Minnetonka*. The owners of the *Minnetonka*, fortunately for them, are only condemned in one-half of the necessary expenditure. The necessary expenditure here, if the arrangement was reasonable as between the cargo-owners and the owners of the *Uskmoor*, was £276. It was arrived at upon the footing that averages of far larger amount would have to be paid if the voyage was proceeded with. It was a perfectly reasonable and businesslike arrangement, and one of which it appears to me that the owners of the *Minnetonka* have no right to complain. It is said, however, that it would be a great injustice to put this charge, reasonable though it be, upon the owners of the *Minnetonka*, because there has been a reference, and the result was to include this very sum in the damages, which must be paid by the owners of the *Minnetonka* to the owners of the *Uskmoor*. After discussion and examination, and with the assistance of the registrar, it is now made clear that the documents have been misinterpreted in that respect, and the sole question therefore is whether it was a reasonable arrangement. It seems to me that it was reasonable.

COZENS-HARDY, L.J.—I agree.

Solicitors: *The Treasury Solicitor*; *Pritchard & Sons.*

[*Reported by* L. F. C. Darby, Esq., *Barrister-at-Law.*]

WEINGARTEN BROTHERS *v.* BAYER & CO.

[HOUSE OF LORDS (Lord Macnaghten, Lord Robertson and Lord Lindley), Dec. 9, 12, 13, 1904, April 11, 1905]

[Reported 92 L.T. 511; 21 T.L.R. 418; 22 R.P.C. 341]

Passing Off—Trade name—Name of article sold printed in special script on scroll—Similar goods sold by defendant under same name printed on similar scroll with addition of defendant's initials—Right of plaintiff to injunction and account of defendant's profits.

No trader is justified in taking the peculiar symbol, device, or mark by which another trader distinguishes his goods on the market, and so attracting custom to himself from his rival.

The appellants sold their goods in boxes, with the name of the article printed in a particular manner on a "scroll." The respondents sold precisely similar goods under the same name, also printed on a similar scroll, with the addition of their initials "C.B." There was no evidence that any customers were in fact deceived, and after the commencement of the action the respondents discontinued the use of the scroll.

Held: (LORD ROBERTSON dissenting) the appellants were entitled to an injunction to restrain the respondents from using the scroll in connection with their goods, and to an account of profits derived by the respondents from the sale of goods in boxes distinguished by the scroll.

Notes. As to trade names of goods and as to passing off by get-up or mark, see 32 HALSBURY'S LAWS (2nd Edn.) 638 et seq.; and for cases see 43 DIGEST 296 et seq.

Case referred to:

(1) *Edelsten* v. *Edelsten* (1863), 1 De G.J. & Sm. 185; 7 L.T. 768; 9 Jur.N.S. 479; 11 W.R. 328; 46 E.R. 72, L.C.; 43 Digest 217, *614*.

Appeal from a decision of the Court of Appeal (VAUGHAN WILLIAMS and COZENS-HARDY, L.JJ., ROMER, L.J., dissenting), reported 89 L.T. 56, reversing a decision of JOYCE, J., reported 88 L.T. 168.

Neville, K.C., Sebastian and *Noad* for the appellants.

Fletcher Moulton, K.C., Astbury, K.C., Younger, K.C., and *Kerly* for the respondents.

Their Lordships took time for consideration.

April 11, 1905. The following opinions were read.

LORD MACNAGHTEN.—This case has divided equally the opinions of four learned judges in the courts below. It occupied your Lordships' time for three whole days. But, after all, I cannot think that there is very much difficulty about it. There are no facts in dispute. There can be no controversy as to the law. The only possible questions are—(i) What has the respondent done? and (ii) What relief are the appellants (the plaintiffs in the action) entitled to if their rights have really been invaded?

Mr. Charles Bayer, trading under the firm of Charles Bayer & Co., is the largest maker of corsets in this country. No other trader comes near him in that line. His wares are on sale in every town in England. His advertisements are flaunted on the walls of every railway station in the United Kingdom. Most women, it is said, if not all, who have come to years of discretion are familiar with his trade mark—the letters C.B., either standing alone or announced as "The celebrated" C.B. Much time was spent in demonstrating from the evidence of Mr. Charles Bayer's travellers and others the great position of his firm and the comparative insignificance of the appellants' sales in England. So far from contesting Mr. C. Bayer's claim to pre-eminence in the corset trade, the appellants admitted it to the full; but they urged, with some show of reason, that the commanding position which he occupied made it all the more incumbent upon him to be very careful not to trespass on the rights of smaller men, beginners in the same line of business.

The appellants, too, are corset manufacturers. They assert that they hold in America a position similar to that occupied by Mr. Charles Bayer here. Until lately they had no footing in England. Not very long ago, about a year or so before the events occurred which led to this dispute, they designed an improved corset. It was an improvement in a make of corsets known to the initiated as "straight-fronted corsets." They called their new make "Erect Form Corsets," and they had the name printed in their advertisements and on their show cards and boxes in a very peculiar and distinctive form of type, displaying the word "Corsets" in white letters on a curved band, broad and black, which was made to form a tail to the initial letter of the word "Erect." Their venture was successful in America. And then with this make of corset, and with the name thus applied to it, they essayed to try their fortune on the London market. They began in a very modest way, but their position improved very soon. Their design was quickly appreciated. Mr. Charles Bayer admitted at the trial that "it was practically a new thing," different from the corsets he had previously sold. In one of his advertisements after he had adopted and appropriated the results of the appellants' skill and ingenuity, he described the erect form corset as "a departure in corset making which has instantly met with practical recognition." The name, too, took the fancy of the public. It also was new. No one had known it applied to such a thing as a corset before. It was "a happy description," as one of Mr. Charles Bayer's witnesses had said—happy, perhaps, because it left it uncertain whether the allusion was to the cut of the garment or to the graceful and stately carriage which the wearer was enabled or compelled to assume. Then the peculiar and distinctive form of type which in these proceedings has been referred to as "the scroll" was a novelty when the appellants' goods were first introduced into this country. Up to that time, as far as the evidence goes, it had never been displayed in any advertisement of any goods of any sort or description in the English market. It certainly presented a most striking appearance, well adapted so long as its novelty lasted to catch the eye and arrest the attention of anybody who happened to see it.

By the summer of 1901 the appellants were making steady and substantial progress, when Mr. Charles Bayer learned from one of his travellers what the American firm was doing. He was, it is said, "alive to the occasion." He procured some of the appellants' corsets. He examined their construction "very carefully indeed." He had them imitated exactly in his own works. The copies made were, he says, in some instances, "absolute copies to the one hundredth part of an inch." He took the name, too, and called the copies, which may or may not have been better than the originals, "Erect Form Corsets," and in one advertisement at least "Genuine" erect form corsets. He was determined to crush the foreign invasion, and, if possible, oust and supplant his American rivals. By the end of September he had placed in the hands of his travellers a stock of erect form corsets sufficient to answer any demand. If he had done nothing more than this, if he had merely copied the article which the American firm had produced and called the copies by the name which they had been the first to use, he might have laughed at any threat of legal proceedings. This new departure in corset making was not protected by any patent. Everybody was free to copy it. The name "Erect Form Corsets" had not acquired any secondary meaning. The words were common English words and simply descriptive. No one could be prevented from using them. But the scroll is a different thing altogether. No trader is justified in taking the peculiar symbol, device, or mark, or any "accompaniment," to use an expression of Lord Langdale, M.R., by which another man distinguishes his goods on the market, and so attract to himself the custom which would otherwise flow to his rival. But Mr. Charles Bayer took the scroll just as it appeared on the appellants' boxes. Placing C.B. on the right and C.B. on the left he made it the central and most conspicuous object on his own show cards and boxes. He took it, he said, "from Weingarten's box and his advertisements." He took it, he added, "because it was an effective and suitable form of putting the words."

I agree with Romer, L.J., in thinking that there was no excuse or justification whatever for pirating this scroll. No excuse, indeed, was offered. In mitigation of the offence it was said at the Bar that it was a very stupid thing to do. But stupidity is about the last thing to be attributed to a shrewd and successful man of business like

Mr. Charles Bayer, who, as one of his most experienced travellers says, "knew more of the heart of things" than he did. I agree with ROMER, L.J., when he says (89 L.T. at p. 58):

> "I cannot myself resist the conclusion that the defendants adopted this form of putting their goods on the market in order to make those goods like the plaintiffs' goods. And, in my opinion, the adoption of this form at any rate cannot be justified as fair and legitimate competition, and I think its effect would be to deceive to a substantial extent, not indeed the trade, but the ultimate purchasers, and to allow the defendants' goods to be passed off as and for the plaintiffs' goods to many customers who knew of and wanted to buy the plaintiffs' goods."

That is really the whole case; and if it had not been for the view taken in the Court of Appeal, I should have thought that the action was in truth and reality an undefended action. I should like to know what would have been said if the position of the parties had been reversed—if Mr. Charles Bayer had invented this new departure in corset making—if he had hit upon the happy description and applied it with the scroll to his goods, and then the appellants coming new to this country had copied his work, taken the name, and pirated his scroll, adding, of course, their own initials, or some distinctive mark to attract purchasers to themselves, and indicate where the goods were to be obtained. Would any human being have believed them, however loudly they might have protested that what they had done was not calculated to deceive, and that they had never a thought of deception?

It only remains to say a few words about the arguments advanced on behalf of the respondent, especially those that found favour in the Court of Appeal. There was one extremely ingenious argument which, I think, deserves the foremost place. The learned counsel for the respondent contended that there were two distinct and separate grounds of action combined in the present case, one of the very highest importance, the other so insignificant as to be almost beneath contempt. These giants in the corset trade, it was said, knew what they were fighting for, and they were not fighting about trifles. Weingarten and his firm fought for a monopoly in the name "Erect Form Corsets." Mr. Charles Bayer, on public as well as on private grounds, was determined that no such monopoly should be gained. He was resolved to throw the trade in the erect form corsets open to all British subjects. That was an honourable and praiseworthy object, it was said. As for the scroll nobody cared about it. It was a minor point, a petty objection, a mere after-thought. Mr. Charles Bayer had vanquished his antagonist on the main question. He was entitled to the spoils. He had carried off the real bone of contention. It was not worth while to make a fuss over the scroll—mere trimming and frippery—a trumpery trick of the printer's art. Mr. Charles Bayer was stupid, ill-advised if you will, to carry off the scroll; but that was a venial error. The mistake, such as it was, should make no difference in the costs. At any rate, a very slight deduction would meet the justice of the case.

That argument seems to me to be founded on a complete misapprehension. It is quite true that when the contest was raging in the "Draper's Record" and the other papers that minister to the caprices of fashion, Weingarten's firm claimed an exclusive right in the name which they had invented. Probably few laymen would understand by the light of nature that it was permissible to take a name and wrong to take the garb in which it was presented to the public. But when the cause of action was formulated there was, I think, no claim to any exclusive right in the name except in connection with the scroll. The action was an ordinary action to prevent Mr. Charles Bayer selling his goods as and for the goods of the appellants. It was necessary to bring out all the circumstances of the case, but the scroll was the one thing on which the action was based. Certainly no claim was made at the Bar on the part of the appellants to exclusive property in common English words, which in so short a space of time could not possibly have acquired a secondary meaning. It was also urged that if the appellants really objected to Mr. Charles Bayer taking their scroll they ought to have written to complain and told him what they complained of before taking legal proceedings. I cannot think that there is any substance in that objection. Why should a person assailed and injured by unfair

competition teach his opponent how far he may safely go in undermining a rival business which he wishes to destroy? Why should he throw away the only chance of obtaining by process of law redress for injury already done? Then it was boldly asserted that all Mr. Charles Bayer wanted was to show the public that his goods, English made, were better than any foreign goods and cheaper. That was the view of VAUGHAN WILLIAMS, L.J., who said (89 L.T. at p. 57):

> "The real object of the defendants, was not to represent their corsets as being the plaintiffs' corsets, but, on the contrary, to invite a comparison between the manufacture of their own goods and those of the plaintiffs."

No doubt that is what Mr. Charles Bayer said in advertisements in the "Draper's Record." He was anxious to prove that, notwithstanding the silly prejudice in favour of foreign fashions, English goods could hold the field. But when we come to the show cards and advertisements intended to attract customers and not simply addressed to the trade, all this flourish disappears. There is not a single word in any show card or label to tell the public that Mr. Bayer's goods were English made, or to invite comparison between his goods and those of American origin. Anybody buying corsets which Mr. Charles Bayer described as erect form corsets with the accompaniment of the scroll and the letters C.B. upon them might, I think, well suppose that the goods were the same as those which had been put on the market by the plaintiffs, but with the guarantee of C.B., whoever C.B. was, for their excellence.

Lastly, a good deal was made of a statement by Mr. Charles Bayer in his defence to the effect that he had ceased to print the scroll, and that, except for the purposes of using up his existing stock, he did not intend to resume its use. I cannot understand why that statement is supposed to tell in his favour. It seems to me to tell very much against him. The writ was issued on Nov. 15, 1901, and then, at any rate, his attention was pointedly called to the improper use of the scroll. Still he went on using it; still he continued to print it. He did not cease to print it till Jan. 25, 1902. His defence was not delivered until Mar. 4, and then he declared that the scroll was of no importance to him. I think that was very likely. The novelty of such tricks in advertising passes off very quickly, and they soon cease to be "effective." No doubt long before the defence was put in Mr. Charles Bayer had gained all the advantage that could be derived from the improper use of the scroll. But even then he did not offer to pay the costs or to make any amends. He insisted on using the scroll so long as his existing stock might last. It has been held over and over again that if a person persists in using the device of a rival trader which he had no right to use after he knows that it is wrong to use it, that is fraud, even if he originally used it inadvertently and innocently, a suggestion which can hardly be put forward in the present case on behalf of Mr. C. Bayer.

As regards the form of the injunction, I think that the injunction granted by JOYCE, J., is open to objection. It seems to imply that the appellants had some special right in the words "erect form corsets." I think that the order should restrain the respondents, their servants, and agents from selling or offering for sale corsets in boxes bearing the scroll, or an imitation of the scroll, used by the appellants in connection with their corsets, or any corsets designated by show cards or labels bearing such scroll, or imitation, or otherwise distinguished by such scroll, or imitation, and should direct an account of the profits derived by the respondents from the sale of corsets in such boxes or so designated or distinguished. Ever since *Edelsten* v. *Edelsten* (1) in 1863, it has been the established rule that a plaintiff succeeding in a case of this sort may at his option take an inquiry as to damages or an inquiry as to profits. I do not see any ground for departing from that practice in the present case. I do not think that the variation which I have suggested ought to make any difference in costs; and I move your Lordships that the order appealed from be reversed, and that the order of JOYCE, J., should be restored with the variation I have mentioned, and that the respondents should pay the costs both here and below.

LORD ROBERTSON.—I agree with the judgment of the Court of Appeal. The grounds of my opinion may be stated in a few plain words. The case differs from most

passing off cases in several broad features. The party complaining is not in the position of one whose trade was established and well known in English repute when the respondents are said to have simulated it. Nor can it be suggested that the operations of the respondents were intentionally directed towards getting their goods mistaken for those of the appellants; the opposite is the case. Nor, again, is the relief which your Lordships propose to give that for which the appellants asked, nor even that which the judge of first instance gave. Finally, the ground upon which your Lordships are to proceed does not represent any grievance felt by the appellants or known to the respondents until the writ was prepared; it was at once removed by the statement of defence; and it is not in truth or substance the question between the parties. In the tentative operations which constituted the trading of the appellants in this country the one thing which they regarded as essential in the description of their corsets was the phrase "erect form." At first the full title was "W.B. erect form corset." Driven out of this by a rival whose initials were also "W.B." they adopted the title "America's leading corset. Erect form corset." But the gist of their case has all along been to claim the description "erect form" as their own. This claim is bad in law, for reasons which I do not elaborate, as they are common ground with your Lordships, but they have been borne in upon the appellants only in the course of this suit.

But, such as it is, this has been the sole ground of complaint against the respondents, as against the other traders whom they have sued, until the acumen of counsel fished up from the sea of advertisements this scroll which is now the sole surviving part of the case. In a passing off case it is, of course, not necessary to prove intention to deceive or actual deception; but the absence of both (as in the present case) is highly important. Still more important is the fact that until the writ, and in all the correspondence down to the issue of the writ, there is no hint that the scroll was in fact calculated to deceive. And this is the more important because, such as it is, the scroll was patent and palpable to the appellants. Nor, in the absence of facts, is the attempt to conjure up imaginary deceived customers very successful, when in point of fact every one of the respondents' corsets has C.B., and nothing else, staring the purchaser in the face when she first sees them and every time she puts them on. Indeed, the same obtrusive frankness in revealing the identity of C.B. is to be observed in the scroll itself, on which C.B. is again as prominent as anything else. As I have said, however, when once objection was taken the respondents promptly withdrew the scroll; and, for my part, I put the incident to their credit. What is proposed now is to make the scroll the ground of judgment against the respondents, with costs. In this I cannot concur. I do not think that it is the duty of courts of equity, and still less of this House, to be astute in discovering unfelt grievances and administering one remedy when another is sought and for a different wrong.

LORD LINDLEY.—If it were not for the scroll appellants would have had no cause of action. But the respondents cannot, in my opinion, justify their conduct in copying the scroll; and, although they ceased to use it, its use gave the appellants a cause of action, and this has not been put an end to. Its importance may have been magnified, but it cannot be ignored; and for the reasons given by ROMER, L.J., in the Court of Appeal and by LORD MACNAGHTEN, whose judgment I have read and am content to adopt, I am of opinion that this appeal should be allowed with costs.

Appeal allowed.

Solicitors: *C. Urquhart Fisher*; *Reed & Reed.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

CHESHIRE *v.* BAILEY

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Mathew, L.JJ.), December 15, 1904.]

[Reported [1905] 1 K.B. 237; 74 L.J.K.B. 176; 92 L.T. 142; 53 W.R. 322; 21 T.L.R. 130; 49 Sol. Jo. 134]

Master and Servant—Liability of master for act of servant—Criminal act of servant—Act outside scope of employment—Theft by coachman of plaintiff's goods in brougham hired by plaintiff from defendant.

The plaintiff, a wholesale silversmith, hired from the defendant, a jobmaster, a brougham, with a horse and coachman, for the purpose of driving the plaintiff's traveller round London to visit customers with samples of the plaintiff's silver goods. The defendant knew the purpose for which the brougham was required and that it would involve the traveller frequently having to leave the brougham in charge of the coachman while he visited customers or was having refreshment. One day when the traveller had thus left the brougham in charge of the coachman, the coachman drove off to a spot agreed on beforehand with his confederates, and the plaintiff's goods in the carriage were stolen. In an action to recover the value of the stolen goods from the defendant,

Held: in committing the crime of larceny the coachman was acting outside the scope of his employment and had thereby severed his connection with the defendant; the theft was not attributable to negligence on the part of the defendant; and, therefore, the defendant was not liable for the loss of the goods.

Abraham v. *Bullock* (1) (1902), 86 L.T. 796, distinguished.

Notes. Considered: *Malcolm, Brunker & Co.* v. *Waterhouse* (1908), 24 T.L.R. 854. Followed: *Mintz* v. *Silverton* (1920), 36 T.L.R. 399. Distinguished: *United Africa Co.* v. *Saka Owoade*, [1957] 3 All E.R. 216. Referred to: *Lloyd* v. *Grace, Smith & Co.*, [1911–13] All E.R.Rep. 51; *Williams* v. *Curzon Syndicate* (1919), 35 T.L.R. 475; *Penmount Estates, Ltd.* v. *National Provincial Bank, Ltd.* (1945), 173 L.T. 344.

As to a master's liability in tort for the criminal act of his servant, see 25 HALSBURY'S LAWS (3rd Edn.) 537; and for cases see 34 DIGEST 132.

Cases referred to:

(1) *Abraham* v. *Bullock* (1902), 86 L.T. 796; 50 W.R. 626; 18 T.L.R. 701, C.A.; 34 Digest 145, *1139*.

(2) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 1 Com. 133; Holt, K.B. 131; 3 Salk. 11; 92 E.R. 107; 3 Digest (Repl.) 64, *52*.

(3) *Sanderson* v. *Collins*, ante p. 561; [1904] 1 K.B. 628; 73 L.J.K.B. 358; 90 L.T. 243; 20 T.L.R. 249; sub. nom. *Saunderson* v. *Collins*, 52 W.R. 354; 48 Sol. Jo. 259, C.A.; 34 Digest 140, *1100*.

Also referred to in argument:

Jobson v. *Palmer*, [1893] 1 Ch. 71; 62 L.J.Ch. 180; 67 L.T. 797; 41 W.R. 264; 9 T.L.R. 106; 3 R. 173; 34 Digest 154, *1211*.

Dyer v. *Munday*, [1895] 1 Q.B. 742; 64 L.J.Q.B. 448; 72 L.T. 448; 59 J.P. 276; 43 W.R. 440; 11 T.L.R. 282; 14 R. 306, C.A.; 34 Digest 130, *996*.

Hamlyn v. *Houston & Co.*, [1903] 1 K.B. 81; 72 L.J.K.B. 72; 87 L.T. 500; 51 W.R. 99; 19 T.L.R. 66; 47 Sol. Jo. 90, C.A.; 34 Digest 171, *1335*.

Ellis v. *Turner* (1800), 8 Term Rep. 531; 101 E.R. 1529; 8 Digest (Repl.) 45, *273*.

Citizens' Life Assurance Co. v. *Brown*, [1904] A.C. 423; 73 L.J.P.C. 102; 90 L.T. 739; 53 W.R. 176; 20 T.L.R. 497, P.C.; 9 Digest (Repl.) 670, *4431*.

British Mutual Banking Co., Ltd. v. *Charnwood Forest Rail. Co.* (1887), 18 Q.B.D. 714; 56 L.J.Q.B. 449; 57 L.T. 833; 52 J.P. 150; 35 W.R. 590, C.A.; 34 Digest 137, *1059*.

Speight v. *Gaunt* (1883), 9 App. Cas. 1; 53 L.J.Ch. 419; 50 L.T. 330; 48 J.P. 84; 32 W.R. 435, H.L.; 43 Digest 884, *3273*.

Daniels v. *Harris* (1874), L.R. 10 C.P. 1; 44 L.J.C.P. 1; 31 L.T. 408; 23 W.R. 86; 2 Asp.M.L.C. 413; 29 Digest 191, *1499*.

Osborn v. *Gillett* (1873), L.R. 8 Exch. 88; 42 L.J.Ex. 53; 28 L.T. 197; 21 W.R. 409; 34 Digest 182, *1480*.

Finucane v. *Small* (1795), 1 Esp. 315; 3 Digest (Repl.) 76, *148*.

Raw v. *Cutten* (1832), 9 Bing. 96; 2 Moo. & S. 123; 1 L.J.C.P. 171; 131 E.R. 551; 34 Digest 132, *1013*.

Clarke v. *Earnshaw* (1818), Gow, 30, N.P.; 3 Digest (Repl.) 101, *276*.

Giblin v. *McMullen* (1868), L.R. 2 P.C. 317; 5 Moo.P.C.C.N.S. 434; 38 L.J.P.C. 25; 21 L.T. 214; 17 W.R. 445; 16 E.R. 578, P.C.; 3 Digest (Repl.) 64, *60*.

Coupé Co. v. *Maddick*, [1891] 2 Q.B. 413; 60 L.J.Q.B. 676; 65 L.T. 489; 56 J.P. 39, D.C.; 3 Digest (Repl.) 99, *265*.

Liver Alkali Co. v. *Johnson* (1874), L.R. 9 Exch. 338; 43 L.J.Ex. 216; 31 L.T. 95; 2 Asp.M.L.C. 332, Ex. Ch.; 8 Digest (Repl.) 10, *38*.

Kettle v. *Bromsall* (1738), Willes, 118; 125 E.R. 1087; 3 Digest (Repl.) 64, *58*.

Appeal by the defendant from a decision of WALTON, J., at the trial of the action without a jury.

The action was brought to recover damages for the loss of goods of the plaintiff which had been stolen by a servant of the defendant under the following circumstances.

The plaintiff was a wholesale silversmith carrying on business at Birmingham, and the defendant was a jobmaster in London. In 1902 a traveller employed by the plaintiff hired on his behalf from the defendant a "commercial brougham" with a horse and coachman at the rate of £3 5s. a week. The defendant did not know what the plaintiff's trade was, but WALTON, J., at the trial found that the brougham with the horse and coachman was supplied for the purpose of taking the plaintiff's commercial traveller and his samples round London to see customers and transact business, and that the defendant knew that samples of goods were to be carried about in the brougham. WALTON, J., also said that he thought that there was nothing extraordinary or unusual, having regard to the way in which broughams of this kind were used in London, in the nature or value of the plaintiff's goods carried. The traveller told the defendant that the carriage must be a lockfast one, and that a trustworthy coachman would be required. The defendant said that there would be no difficulty about that, and he supplied a coachman as to whom he had received a good character from previous employers, and whose conduct had been good while in the defendant's employment. The defendant knew that the traveller would frequently have to leave the brougham with samples in it in charge of the coachman for the purpose of seeing customers or having refreshment.

On Aug. 28, 1903, the traveller went into an hotel to get his luncheon, leaving the brougham with samples in it of the value of about £1,000 in charge of the coachman. The coachman, acting in concert with other persons, drove off to a spot previously agreed upon, and stole a great part of the contents of the brougham. The coachman was afterwards arrested and convicted of larceny.

The plaintiff brought the present action to recover the value of the stolen goods. At the trial of the action, WALTON, J., was of opinion that he was bound by the decision of the Court of Appeal in *Abraham* v. *Bullock* (1) to hold that the defendant was liable, and he gave judgment accordingly. The defendant appealed.

English Harrison, K.C., and *Clavell Salter, K.C.* (*G. Thorn Drury* with them), for the defendant.

C. A. Russell, K.C., and *Sims Williams* for the plaintiff.

Cur. adv. vult.

Dec. 15, 1904. The following judgments were read.

SIR RICHARD HENN COLLINS, M.R., stated the facts, and continued: The plaintiff brought this action claiming to recover from the defendant the value of the stolen goods. WALTON, J., being, as he conceived, bound by the decision of this court in *Abraham* v. *Bullock* (1), gave judgment for the plaintiff for £800.

Putting that case aside for a moment, I desire to consider whether on principle the decision of the learned judge can be supported. I have come to the conclusion that it

cannot. There was no special contract in this case altering the ordinary rights of the parties as implied by law upon a bailment of this class. Technically it seems to come under the class described as locatio operis faciendi. The defendant, though not a common carrier, has come under the ordinary obligations of a person who undertakes for consideration to do the work of carrying the plaintiff's traveller and his goods to such destination as he shall direct. He is bound therefore to bring reasonable care to the execution of every part of the duty accepted. He may perform that duty by servants or personally, and if he employs servants he is as much responsible for all acts done by them within the scope of their employment as he is for his own. But he is not an insurer, and is not answerable for acts done by his servants outside the scope of their employment. Hence he is not responsible for the consequences of the crime committed by the driver in this case, which was clearly outside the scope of his employment unless it can be shown that the happening of the crime was due to the defendant's negligence. It is a crime committed by a person who in committing it severed his connection with his master, and became a stranger, and as the circumstances under which it was committed are known it raises no presumption of negligence in the defendant. He took reasonable care to perform his duty in that he sent out a servant whom he reasonably supposed to be trustworthy to drive the brougham and watch its contents in the traveller's absence, and he was not bound to do more. That an ordinary contract of bailment of this class does not involve a warranty that the servant shall not turn thief, and so cease to adhibit reasonable care, where the master has devolved the duty of custody on the servant, is clear from the fact that no class of bailee except common carriers and innkeepers are now at common law deemed responsible for the theft of their servants unless such theft was attributable to the negligence of the master. This immunity rests on the combination of two well-established factors—(a) that such bailees are only bound to ordinary care; (b) that qua masters they are not responsible for acts done by their servants outside the scope of their employment. It is not necessary to refer to the authorities in detail which support these propositions. They will be found collected in *Coggs* v. *Bernard* (2) and the notes thereto, in SMITH'S LEADING CASES (11th Edn.), p. 173.

This being, in my view, the law clearly established as the result of many authorities, it remains to consider whether we are bound in this court to hold the contrary by reason of *Abraham* v. *Bullock* (1) on which WALTON, J., acted. I have carefully considered that case, and am quite satisfied that the decision is right, and that it does not support the decision under appeal. The short facts there were that the driver of a commercial brougham, hired under similar circumstances, negligently left the brougham unguarded while the traveller was at lunch, and thus gave opportunity to thieves to steal its contents. The negligence of the servant in that case was clearly committed within the scope of his employment, and was therefore negligence for which the master was responsible just as much as if he had elected to watch himself instead of doing it by his servant and had then neglected it in the same manner. I am reported to have said (86 L.T. at p. 798):

> "I think that the defendant was under an obligation to use ordinary care in looking after the carriage in Cohen's [the traveller's] absence, and that his servant failed in that respect."

This seems to be substantially accurate. The proposition I was combating was that of the judge below

> "that it was not in the scope of the driver's duty to protect the goods as the servant of the defendant, so that the latter was not liable for negligence in the performance of any duty owed by him,"

and I am reported to have said (86 L.T. at p. 797):

> "It is a reasonable and proper inference to draw from the contract and the circumstances under which it was made, that the defendant undertook to supply a driver who would take ordinary care of the carriage when Cohen was obliged to leave it."

Substitute for "who would" in the above sentence, "whose business it should be," and I think it would be verbally accurate. Later I say (ibid. at p. 798):

"The very thing contemplated by the obligation on the defendant to take care of the carriage in Cohen's absence was the guarding against the possibility of a thief taking the jewels."

I certainly did not intend to hold in that case that the defendant warranted that due care should be taken, though I did hold that he was responsible if his servant, acting in the scope of his employment, did not take it. I regret that any infelicity of language on my part should have misled Walton, J. I think that the appeal must be allowed.

STIRLING, L.J.—I agree. I think the implied obligation on the part of the jobmaster which was held by this court to exist in *Abraham* v. *Bullock* (1) ought, so far as regards the acts of the jobmaster's servants, to be restricted to acts done by them in the course of their employment. For the existence of such limitation *Sanderson* v. *Collins* (3) appears to me to be an authority. The headnote is ([1904] 1 K.B. at p. 628):

"The defendant sent his carriage to be repaired by the plaintiff, who was a coach-builder. The plaintiff lent a carriage of his own to the defendant for use while the repairs were going on. The coachman of the defendant, without his knowledge, took the plaintiff's carriage out for his own purposes, and while he was driving the carriage it was injured through his negligence. In an action to recover the cost of repairing it, **held,** that as the coachmar at the time when the injury was done to the carriage was not acting in the course of his employment, the defendant was not liable."

There are a few observations of Romer, L.J., which seem to me to apply to the present case. He says ([1904] 1 K.B. at p. 633)

"It is admitted that when the arrangement was made between the plaintiff and the defendant no special contract was made with regard to the obligations to be undertaken by the defendant. What, then, are the obligations that must be implied? Certainly the insurance of the safe return of the carriage is not one of them."

That applies, with slight verbal alterations, here also. Then he proceeds (ibid.):

"The case is one of an ordinary bailment for mutual benefit and the defendant as bailee is under an obligation, now well settled in law, by which he was bound to take reasonable care of the chattel intrusted to him, but was not liable for loss or injury which might happen to it during the bailment unless caused by his negligence or that of his servants acting in the course of their employment."

Here also the bailment, though of a slightly different nature, is one by which the defendant was bound to take only reasonable care of the chattel intrusted to him, and, in my opinion, was not liable for loss or injury except caused by his own negligence or that of his servant acting in the course of his employment. Here there was no evidence of any negligence on the part of the defendant, and as regards the acts of the coachman it seems to me that he ceased to be acting in the course of his employment when he drove away from the spot where the plaintiff's traveller had left the brougham and proceeded to meet his accomplices for the purpose of doing the wrong. I think, therefore, the appeal ought to be allowed.

MATHEW, L.J.—I see no reason to doubt that in a contract of this kind the jobmaster undertakes with the hirer that the coachman will take care to protect the goods in the brougham from damage or depredation. This was the decision of the court in *Abraham* v. *Bullock* (1). The object of the present action was to establish that the defendant had guaranteed the honesty of his servant, and was therefore responsible for the theft of which the coachman had been guilty. But I see no ground for the implication of any such undertaking on the part of the defendant. It was not shown that the plaintiff had informed the defendant that he insisted upon any such liability on the part of the defendant. If he had done so there seems little reason to doubt that the defendant would have declined to take upon himself without remuneration the obligation of an insurer. The coachman was not the class of person who would in the ordinary course of business have been intrusted for safe keeping with money or money's worth to the amount of many hundreds of pounds. The true inference from the facts would seem to

be that the plaintiff relied for the protection of his property, not upon any contract with the defendant, but upon the strong arm of the criminal law, and the dread which is felt of being brought within its grasp. The plaintiff had no reason to assume that the coachman, in committing a crime, would be acting within the scope of the authority given him by his master, which must be measured by reference to the ordinary duties of a coachman. In the absence of any evidence of a contract the law applicable to the case would seem to be clear. Any departure by the servant for his own purposes from the discharge of his ordinary duties would relieve his master from responsibility, and from the time that the coachman drove the brougham to the public-house with the intention of assisting in the theft of the contents the master ceased to be liable for any loss or damage that followed. The contract between the plaintiff and the defendant must be regarded as having been made on this footing of this well-known rule of the law of master and servant. The defendant is no more liable than he would have been if the brougham and its contents, without negligence on the part of the coachman, had been carried away by a stranger. The authority relied upon by WALTON, J., seems clearly distinguishable from the present case, and I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *G. F. Hudson, Matthews, & Co.; H. Clifford Turner & Co.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

SALVESEN & CO. *v.* REDERI AKTIEBOLAGET NORDSTJERNAN

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Davey and Lord Robertson), November 10, 11, 14, 15, 1904, April 14, 1905]

[Reported [1905] A.C. 302; 74 L.J.P.C. 96; 92 L.T. 575]

Agent—Principal—Misrepresentation by agent to principal—Liability—Measure of damages.

Where an agent opens negotiations on behalf of his principal and falsely informs him that a contract has been concluded he is liable in damages to his principal for breach of duty. But the measure of damages is the loss actually sustained by his principal in consequence of the misrepresentation and does not extend to profits which might have been made if the representation had been true.

The respondents were shipowners and employed the appellants who were shipbrokers to obtain freight at a certain rate per ton for one of their ships. The appellants opened negotiations with prospective charterers, but difficulties, which they had hoped to overcome, proved insurmountable and the bargain went off. The appellants, however, falsely reported to the shipowners that a charter had been concluded subject to instant confirmation, which the respondents gave. The charterers having repudiated the charter on the ground that they had not authorised it, the shipowners brought an action against the appellants for loss sustained by reason of their misrepresentation, claiming as damages the difference between the freight price in the alleged charter and the freight price actually earned which was much less on the substituted voyage.

Held: the appellants were liable in respect of the breach of their duty to the shipowners, their principals, by reason of their misrepresentation for any loss sustained but such damages were limited to the loss actually incurred and did not include any profits which the respondents might have made under the alleged charter.

Notes. Distinguished: *Johnson* v. *Braham and Campbell*, [1916–17] All E.R.Rep. 601. As to remedies for agent's default, see 1 HALSBURY'S LAWS (3rd Edn.) 188; and for cases see 1 DIGEST (Repl.) 554 et seq.

Cases referred to:

(1) *Collen* v. *Wright* (1857), 8 E. & B. 647; 27 L.J.Q.B. 215; 30 L.T.O.S. 209; 4 Jur. N.S. 357; 6 W.R. 123; 120 E.R. 241, Ex. Ch.; 1 Digest (Repl.) 758, *2957*.

(2) *Starkey* v. *Bank of England*, [1903] A.C. 114; 72 L.J.Ch. 402; 88 L.T. 244; 51 W.R. 513; 19 T.L.R. 312; 8 Com. Cas. 142, H.L.; 1 Digest (Repl.) 763, *2988*.

(3) *Cassaboglou* v. *Gibb* (1883), 11 Q.B.D. 797; 52 L.J.Q.B. 538; 48 L.T. 850; 32 W.R. 138, C.A.; 1 Digest (Repl.) 554, *1747*.

Also referred to in argument:

Dickson (*Dixon*) v. *Reuter's Telegram Co.* (1877), 3 C.P.D. 1; 47 L.J.Q.B. 1; 37 L.T. 370; 42 J.P. 308; 26 W.R. 92; 3 T.L.R. 49, C.A.; 1 Digest (Repl.) 758, *2959*.

Firbank's Executors v. *Humphreys* (1886), 18 Q.B.D. 54; 56 L.J.Q.B. 57; 56 L.T. 36; 35 W.R. 92; 3 T.L.R. 49, C.A.; 1 Digest (Repl.) 758, *2960*.

Eastwood v. *Bain* (1858), 3 H. & N. 738; 28 L.J.Ex. 74; 32 L.T.O.S. 109; 7 W.R. 90; 157 E.R. 665; 1 Digest (Repl.) 764, *2993*.

Re National Coffee Palace Co., Ex parte Panmure (1883), 24 Ch.D. 367; 53 L.J.Ch. 57; 50 L.T. 38; 32 W.R. 236, C.A.; 1 Digest (Repl.) 766, *3003*.

Meek v. *Wendt & Co.* (1888), 21 Q.B.D. 126; 59 L.T. 558; 4 T.L.R. 582; 6 Asp.M.L.C. 331; affirmed [1889] W.N. 14, C.A.; 1 Digest (Repl.) 766, *3005*.

Suart v. *Haigh* (1893), 9 T.L.R. 488, H.L.; 1 Digest (Repl.) 763, *2984*.

Simons v. *Patchett* (1857), 7 E. & B. 568; 26 L.J.Q.B. 195; 29 L.T.O.S. 88; 3 Jur.N.S. 742; 5 W.R. 500; 119 E.R. 1357; 1 Digest (Repl.) 767, *3013*.

Hughes v. *Graeme* (1864), 4 New Rep. 190; 33 L.J.Q.B. 335; 12 W.R. 857; 1 Digest (Repl.) 760, *2968*.

Spedding v. *Nevell* (1869), L.R. 4 C.P. 212; 38 L.J.C.P. 133; 1 Digest (Repl.) 767, *3008*.

Richardson v. *Williamson and Lawson* (1871), L.R. 6 Q.B. 276; 40 L.J.Q.B. 145; 35 J.P. 728; 1 Digest (Repl.) 764, *2995*.

Godwin v. *Francis* (1870), L.R. 5 C.P. 295; 39 L.J.C.P. 121; 22 L.T. 338; 1 Digest (Repl.) 767, *3015*.

Appeal from a decision of the Second Division of the Court of Session in Scotland, (the Lord Justice-Clerk LORD KINGSBURGH and LORD MONCREIFF) affirming a judgment of the Lord Ordinary (LORD PEARSON).

The action was brought to recover damages for loss sustained by the respondents, who were shipowners, through alleged wrongful actings and misrepresentation in the negotiation for a charter of their steamship *Oscar II*. The Lord Ordinary found that the respondents had sustained damage, for which the appellants were liable, and he awarded them £450.

The appellants, who were shipbrokers at Leith, acted as brokers between the respondents and Messrs. David Ireland & Son, coal merchants and exporters, Dundee, in negotiating the charter in question. The negotiations were carried on chiefly by telegram, and on Dec. 5, 1898, the appellants informed the respondents that they had concluded a charter for the *Oscar II* with Messrs. Ireland, subject to instant confirmation. This confirmation the respondents gave. Messrs. Ireland repudiated the alleged bargain on the ground that they had not authorised it. On the other hand, the appellants informed the respondents that they had acted within their authority. In these circumstances, the respondents raised an action against Messrs. Ireland, but before trial the action was stayed in order that the present action might be brought. According to the respondents, the bargain which the appellants were authorised to make on their behalf was to charter the ship to carry a cargo of coal from Methil to Stockholm at a freight of 7s. 6d. per ton, on condition that the cargo was to be loaded in 120 running hours after the ship's arrival. Messrs. Ireland, however, had not agreed to take the *Oscar II* on those conditions. On the contrary, they declined to do so, and only authorised the appellants to offer for the ship on condition that the cargo was to be loaded in ninety-six hours after the ship was berthed. It being evident that neither party would give way

in regard to the terms of loading, and that there was, accordingly, no possibility of any contract being conducted, the appellants in accordance with a known practice in the trade—and knowing that owing to the state of the turn at Methil there was no practical difference between 120 hours after arrival and ninety-six hours after berthing—resolved that they would themselves take the risk of the difference, and thus enable a charter to be effected. The respondents telegraphed to the appellants confirming and authorising them, if necessary, to agree to the charterers' terms for discharge. The appellants thereupon telegraphed and also wrote to Messrs. Ireland that their offer was accepted on their own terms—namely, ninety-six hours after berthing—and that a charter would be posted for signature on the following morning. On receipt of the telegram Messrs. Ireland wrote to the appellants refusing to proceed further with the charter, stating as their reason that their agents abroad had meantime telegraphed cancelling the ship, and that the owners had spoiled the business by hanging off too long. The appellants on the following morning telegraphed to Messrs. Ireland declining to accept the latter's refusal, and Messrs. Ireland persisted, stating that the owners had delayed so long that they found it impossible, in the face of the scarcity of waggons, to secure enough cargo to load the vessel.

The damages sought to be recovered were the difference in value between the freight of 7s. 6d. a ton under the alleged contract with Messrs. Ireland and the 5s. per ton actually earned by the vessel on the substituted voyage.

The Lord Advocate (*Scott-Dickson, K.C.*) (*Salvesen, K.C.*, with him) and *C. D. Murray* (all of the Scottish Bar) for the appellants.

Scrutton, K.C., and *J. G. Spens* (of the Scottish Bar) for the respondents.

Their Lordships took time for consideration.

April 14, 1905. The following opinions were read.

THE EARL OF HALSBURY, L.C.—The proposition of law laid down by the Exchequer Chamber in *Collen* v. *Wright* (1) must, I think, notwithstanding the protest made by COCKBURN, C.J., be held to be the law. But one must see what that proposition is, and how far it is applicable to the case before your Lordships. The proposition is this: That a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent is answerable to the person who so contracts for any damage which he may sustain by reason of the assertion of authority being untrue. This is the authority upon which the court below have given damages, but it really has no application to the facts in proof here. A firm applies to a shipbroker in Scotland to obtain freights for a vessel of theirs. The shipbroker, in consequence, opens a negotiation with Messrs. Ireland, who state certain terms which they will accept, one of which the appellants' principals will not agree to. The appellants, nevertheless, untruly report that the bargain is complete, whereas the bargain, in fact, went off altogether. I quite agree that, if in consequence of their mis-statement, the respondents changed their position and suffered damage, the appellants would be liable for any actual damage arising from the respondents acting on that erroneous statement, and it is no answer to say that the appellants bona fide expected to get over the one outstanding term on which the bargain went off, but it appears to me that there is an absolute failure to make out any such damages as are claimed, though I think that £30 has been justly suggested as enough to cover all actual damage sustained, and for that the respondents ought to sustain their judgment. But I think that in applying the doctrine of *Collen* v. *Wright* (1), and treating the appellants as having held themselves out as the agents of Messrs. Ireland, and clothed with their authority to make a contract, the respondents seek to get, and the court below have given them as damages the profits which they would have made if Messrs. Ireland had in fact authorised the appellants to act as their agents, and had in truth made the bargain. But, in fact, they did nothing of the sort; they were endeavouring to get a bargain from Messrs. Ireland, and, having failed to overcome Messrs. Ireland's objections, they are in the position of not having got the bargain which they represented that they had. There is no evidence of any loss sustained by reason of relying on the untrue statement, and I

think that the original judgment cannot be supported. I therefore move that the judgment be reduced to £33 1s. 3d., and the appellants ought to get the costs of this appeal.

LORD DAVEY.—It is not necessary for the purpose of this decision to have recourse to the doctrine of *Collen* v. *Wright* (1). The appellants, the shipbrokers, were undoubtedly agents of the respondents for the purpose of finding a charter for their ship. But I am not satisfied on the evidence that the appellants were employed by Messrs. Ireland & Son to find a ship for their requirements. It appears to me that the negotiations were carried on between the appellants as agents for the respondents with Messrs. Ireland & Son as principals acting on their own behalf. No doubt the appellants were intermediaries between the two firms, but that always is so where the agent of one party is negotiating with the other party. Wherever a person misrepresents a fact relative to a third party, he, in a sense, impliedly represents that he is authorised to make the statement. But I do not think that he is thereby asserting that he is clothed with an authority or fills a particular character within the meaning of the doctrine of *Collen* v. *Wright* (1), as explained in subsequent cases, including the recent case of *Starkey* v. *Bank of England* (2) in this House, or that the doctrine ought to be extended to such a case as that now before your Lordships. But the appellants were guilty of a breach of their duty to the respondents, their principals, in giving them incorrect information as to their business, and are liable in damages for such breach of duty. The measure of damages in such a case has recently been discussed in the Court of Appeal in England in *Cassaboglou* v. *Gibb* (3). It was there determined that the measure of damages was the loss actually sustained by the principal in consequence of the misrepresentation, and that it did not include the anticipated profit which he might have made if the representation had been true. I am of opinion that the proper measure of damages in the present case is the same as in the case to which I have referred. There is no evidence that the respondents lost any opportunity of profitably employing their ship owing to their belief that a charter had been arranged with Ireland & Son, and I am of opinion that they cannot, therefore, recover anything in respect of the profits which they might have derived if their belief had been well founded.

With regard to the expenses of the abortive action against Ireland & Son, the question is whether they were reasonably incurred. On this point the letters which passed between the respondents' solicitors and the appellants on Feb. 27 and 28 and Mar. 1 are important; and I think that the respondents are entitled to recover these expenses subject to taxation. The only other head of damage claimed is a general charge for telegrams and trouble and inconvenience. I think that a sum of £30 will be an ample compensation and solatium to the respondents on this head. I am, therefore, of opinion that the interlocutor of the Lord Ordinary should be varied by the substitution of the sum of £30 for the sum of £450, and quoad ultra that it should be affirmed. I understand that the appellants denied any liability in the Inner House as well as before the Lord Ordinary, and in fact their case in this appeal also contains a denial of any liability. I am, therefore, of opinion that no alteration should be made as regards the expenses in the courts below, and there should be no costs of this appeal.

LORD ROBERTSON.—In the view which I take of this case it is one of great simplicity both in fact and in law. A foreign shipowner (the respondents' firm) employs a Leith shipbroker (the appellants) on the usual terms of remuneration to find freight for a steamship. The appellants take the business in hand and report that they have concluded a bargain. In fact no bargain had been concluded; differences, which the appellants, too sanguine, had hoped to get rid of, existed and proved invincible; and, three days after the news of the bargain, the respondents learned that the thing was off. That the appellants, by making this mis-statement, acted in violation of their duty as agents for the respondents admits of no doubt; and the respondents have a good claim of damages for whatever loss has been caused to them. If, for example, acting on the faith of the alleged contract, the respondents had incurred expense; or if, misled into inaction, they had missed other chances for the ship, these, and the like, would be heads of damage. The facts in the present case are not of this kind. The respondents, in furtherance of their theory of their case, have been at pains to prove that at this particular time no other

advantageous freights were to be had, and, when informed that the bargain was off, they made no efforts to look for them. They found employment for the steamer in a quarter where it was easily to be had (under a current contract), although at a low rate, 5s. per ton. The claim of the respondents is for the difference between this rate and the rate in the bargain which was not concluded; and their theory is that they are entitled to take the appellants at their word, and demand from them fulfilment of the charter or damages. To this the short answer is that the appellants (who dealt with Ireland & Son at arm's length) did not in point of fact assume to act for the alleged charterers at all, and they purported to report the agreement of the charterers as matter of fact. The central and crucial fact in the case is that the appellants did not represent to the respondents that they acted for Ireland & Son. The case is, therefore, not within the scope of *Collen* v. *Wright* (1). The practical result is that, in my opinion, the main part of the claim of damages is untenable. But I think that the respondents are entitled to something for certain damage which they have proved—to wit, trouble, outlays on telegrams, and the like; and in the Court of Session this has been fixed at £33 1s. 3d. They have been also held entitled to the expenses incurred by them in the action against Ireland & Son down to the closing of the record, and I think that they are entitled to this; but this limitation of those expenses to the period before closing the record is not specified in the interlocutor of the Lord Ordinary, although it is in his judgment, and it should, perhaps, therefore be now declared. As regards costs, I am disposed to think that, as this action was misconceived in its most material part, there should be no costs either here or below.

Judgment appealed from affirmed with a variation.

Solicitors: *Botterell & Roche*, for *Beveridge, Sutherland & Smith*, Leith; *Hollams, Sons, Coward, & Hawksley*, for *J. & J. Ross*, Edinburgh; *Maclay, Murray, & Spens*, Glasgow.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

Re EASTGATE. Ex Parte WARD

[King's Bench Division (Bigham, J.), January 17, 1905]

[Reported [1905] 1 K.B. 465; 74 L.J.K.B. 324; 92 L.T. 207; 21 T.L.R. 198; 12 Mans. 11; 53 W.R. 432; 49 Sol. Jo. 205]

Bankruptcy—Property available for distribution—Goods obtained fraudulently—Act of bankruptcy—Discovery of the fraud—Right of vendor to disaffirm contract and seize the goods.

If goods are sold on credit to a person who has no intention of paying for them, the vendor, on discovering the circumstances, can within a reasonable time disaffirm the contract by re-taking possession of the goods, and this is so although the buyer has committed an act of bankruptcy, to which the title of the trustee relates back, before the contract has been so disaffirmed.

Notes. Considered: *Tilley* v. *Bowman, Ltd.*, [1908–10] All E.R.Rep. 952.

As to property available for distribution in bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 409 et seq.; and for cases see 5 Digest (Repl.) 679–688.

Cases referred to in argument:

Load v. *Green* (1846), 15 M. & W. 216; 15 L.J.Ex. 113; 7 L.T.O.S. 114; 10 Jur. 163; 153 E.R. 828; 5 Digest (Repl.) 851, *7156*.

Re Hull and County Bank, Burgess's Case (1880), 15 Ch.D. 507; 49 L.J.Ch. 541; 43 L.T. 54; 28 W.R. 792; 9 Digest (Repl.) 135, *767*.

Re Fletcher, Ex parte Suffolk (1891), 8 T.L.R. 80; 9 Morr. 8, D.C.; 5 Digest (Repl.) 930, *7639*.

Motion by the trustee in bankruptcy to recover from the respondent certain goods or their value, which were in the possession of the bankrupt at the date of the act of bankruptcy, and which had been subsequently seized by the respondent.

In February, 1904, the bankrupt took a house, and obtained a large quantity of goods on credit from tradesmen in its neighbourhood. The respondent had supplied goods to the value of £11. On April 20 the landlord put in a distress for rent which was paid out by the tradesmen, and on the same day the respondent commenced an action in the county court to recover the amount due to him. On April 22 the bankrupt committed an act of bankruptcy by departing from his dwelling-house with intent to defeat or delay his creditors. On April 27 the respondent and some of the other tradesmen, by permission of the landlord, broke into the house by removing a pane of glass from one of the windows, and carried off what remained of the goods which they had supplied. On May 4 a creditor's petition was presented founded on the act of bankruptcy of April 22, and on May 20 the receiving order was made, which was followed by adjudication in bankruptcy and the appointment of a trustee. The bankrupt was afterwards convicted of obtaining credit elsewhere by fraud, and sentenced to five years' penal servitude.

Clayton for the trustee in bankruptcy.
S. G. Lushington for the respondent.

BIGHAM, J.—The question I have to determine in this case is whether at the time the respondent Bowling took possession of those goods they formed part of the bankrupt's estate. In my opinion they did not. The bankrupt appears in February, 1904, to have taken a house in the neighbourhood in which Bowling carried on business. He immediately began to make purchases on credit from the tradespeople round about, and, in my opinion, he never had the least intention of paying for any of the goods he bought. In other words, he falsely pretended to the persons from whom he obtained the goods that he intended to pay for them, when in truth and in fact he did not intend to do anything of the kind—and it was in that way that the bankrupt got possession of these goods. What was the position of the vendors? In my opinion their position was this, that as soon as they discovered that the bankrupt had bought these goods without any intention at all of paying for them, they were entitled to treat the contract as a contract induced by fraud—induced, that is to say, by a representation which the purchaser knew to be untrue—that he was going to pay for the goods; and, being entitled to treat the contract as one induced by fraud, they were entitled within a reasonable time after they discovered the fact to disaffirm the contract. The sales in the particular case before me extended over a period from Mar. 9 to April 15, the house, as I have said, being taken in February. On April 20, as Bowling could not get his money, he appears to have taken proceedings in the county court to recover the price of the goods he had supplied. He did not at that time know the circumstances. Very soon afterwards, however, he did know the circumstances, because on April 22, two days afterwards, the bankrupt shut up his house and absconded, and committed an act of bankruptcy. It was then that Bowling discovered that he had been defrauded, disaffirmed the contract and took back his property. Now, did the property at the time he took it back form part of the estate of the bankrupt? I do not think it did, for when a trustee in bankruptcy acquires the interest of the bankrupt in the property which he finds in the bankrupt's possession, he takes that property subject to the rights of third parties, and one of those rights in this case was the right of the vendors of the goods to disaffirm contracts for sale and to re-take possession. I cannot say that I approve of the way in which the possession was re-taken in this case; but, in my opinion, Bowling was only taking, though in a wrong way, what was his own property, and, that being so, this application by the trustee must be dismissed. I think, however, that the way in which Bowling re-took possession of these goods quite justified the trustee in bringing this case before the court, and I shall only give the respondent his costs out of the bankrupt's estate.

Solicitors: *Spencer, Gibson & Sons*; *Parker, Garrett & Holman.*

[*Reported by* J. ANWYL THEOBALD, ESQ., *Barrister-at-Law.*]

Re SUMMERS. Ex Parte OFFICIAL RECEIVER

[KING'S BENCH DIVISION (Bigham, J.), April 22, 1907]

[Reported [1907] 2 K.B. 166; 76 L.J.K.B. 707; 96 L.T. 791; 23 T.L.R. 465; 51 Sol. Jo. 430; 14 Mans. 101]

Bankruptcy—Discharge—Conditional order—Wilful failure to fulfil its conditions—Jurisdiction to revoke order—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 104 (1) *—Bankruptcy Act*, 1890 (53 & 54 *Vict.*, *c.* 71), *s.* 8 (2) (*iv*).

A discharge was granted to a bankrupt on condition that he repaid his liabilities by monthly instalments. The debtor did not make his payments and application for a revocation of the order of discharge was made by the official receiver.

Held: a conditional order of discharge might be reviewed, rescinded, or varied, and if the court was satisfied that the debtor had been in receipt of earnings or after-acquired property and had not devoted it to satisfying the conditions imposed by the order of discharge, it might, in its discretion, revoke the order.

Notes. The Bankruptcy Act, 1883, s. 104 (1) and the Bankruptcy Act, 1890, s. 8, have been repealed. See now the Bankruptcy Act, 1914, ss. 26 (1) (2), 108 (1), 2 HALSBURY'S STATUTES (2nd Edn.), 354, 418, respectively.

As to the statutory limitations of the court's discretion concerning an order of discharge in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 519–533; and for cases see 4 DIGEST (Repl.) 627, 628.

Cases referred to in argument:

Re Tobias & Co., Ex parte Tobias, [1891] 1 Q.B. 463; 60 L.J.Q.B. 244; 64 L.T. 115; 39 W.R. 399; 7 T.L.R. 296; 8 Morr. 30, D.C.; 4 Digest (Repl.) 626, *5584*.

Re Wike, Ex parte Keighley (1874), 9 Ch. App. 667; 44 L.J.Bcy. 13, L.JJ.; 4 Digest (Repl.) 583, *5204*.

Reference by Mr. Registrar BROUGHAM for the opinion of the judge, as to the revocation of a conditional order of discharge in bankruptcy.

The debtor was adjudicated a bankrupt in February, 1905. His unsecured liabilities were £7,709, and his assets were not equal to 10s. in the pound thereon. In August, 1905, he applied for his discharge. The report of the official receiver showed that the debtor had contributed to his bankruptcy by hazardous speculations and personal extravagance. The discharge was granted on condition that the debtor consented to judgment being entered against him for the £7,709, which he was ordered to pay at the rate of £50 a year by equal monthly instalments. The debtor signed a consent to this judgment, which was entered up by the official receiver. The debtor did not make the monthly payments in accordance with the judgment, and in March, 1906, the official receiver applied to the court to revoke the order of discharge on the ground that the judgment had not been complied with. The debtor thereupon paid all the instalments due, and no order was made on the application. In December, 1906, no further payments having been made, in spite of frequent applications, the official receiver made the present application.

By the Bankruptcy Act, 1883, s. 104 (1):

"Every court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction."

The Bankruptcy Act, 1890, enacts (inter alia) as follows:

"Section 8 (1). A bankrupt may, at any time after being adjudged bankrupt, apply to the court for an order of discharge, and the court shall appoint a day for hearing the application, but the application shall not be heard until the public examination of the bankrupt is concluded. The application shall be heard in open court. (2) On the hearing of the application the court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs (including a report as to the bankrupt's conduct during the proceedings under his bankruptcy), and may either grant or refuse an absolute order of discharge, or suspend the operation of

the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property: Provided, that the court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869, or the principal Act, or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the court otherwise determines, and shall, on proof of any of the facts hereinafter mentioned, either—(i) refuse the discharge; or (ii) suspend the discharge for a period of not less than two years; or (iii) suspend the discharge until a dividend of not less than two shillings in the pound has been paid to the creditors; or (iv) require the bankrupt as a condition of his discharge to consent to judgment being entered against him by the official receiver or trustee for any balance or part of any balance of the debts provable under the bankruptcy which is not satisfied at the date of the discharge, such balance or part of any balance of debts to be paid out of the future earnings or after-acquired property of the bankrupt in such manner and subject to such conditions as the court may direct; but execution shall not be issued on the judgment without leave of the court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available towards payment of his debts. Provided, that if at any time after the expiration of two years from the date of any order made under this section the bankrupt shall satisfy the court that there is no reasonable probability of his being in a position to comply with the terms of such order, or of any substituted order, in such manner and upon such conditions as it may think fit."

Hansell for the official receiver.
Tindale Davis for the debtor.

BIGHAM, J.—The question I have to determine in this case is whether there is jurisdiction in the court under any circumstances to revoke an order of discharge which has been granted to a debtor under the fourth provision of sub-s. (2) of s. 8 of the Bankruptcy Act, 1890. I am clearly of opinion that there is. The Bankruptcy Act, 1883, by s. 104, provides that

> "Every court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction."

This order of discharge was made by Mr. Registrar Linklater, and comes clearly within the words of the section. It is, therefore, an order that may be reviewed, rescinded, or varied. Now, in what circumstances may it be reviewed, rescinded, or varied? Paragraph 4 of sub-s. (2) of s. 8 of the Bankruptcy Act, 1890, says that an order of discharge may require the bankrupt as a condition of his discharge to consent to judgment being entered against him for the balance of the debts provable under the bankruptcy. The bankrupt in this case has consented to such a judgment, and it is said that, having consented to the judgment—which is the condition upon which he obtained his order of discharge—there is an end of the matter, and that it is not possible to review, rescind, or vary it. I do not think, however, that that is the whole effect of para. 4. The condition is, in my opinion, greater than a mere consenting to a judgment. It is consenting to a judgment to be paid in a certain way. It is to be paid, or satisfied, out of the future earnings or after-acquired property of the bankrupt in such manner and subject to such conditions as the court may direct. The court in this case has imposed conditions as to how the judgment is to be satisfied. It is to be satisfied by the payment of certain monthly instalments of £4. The Act of Parliament says that the official receiver or trustee can only require these instalments to be paid out of the "future earnings or after-acquired property of the bankrupt." Therefore, in my opinion, the condition, instead of being a condition merely that he shall consent to judgment, is a condition that he shall not only consent to judgment and be bound by the conditions imposed on him by the court, but that he must devote his future earnings and after-acquired property to the satisfying of the conditions placed upon him. It is not the

mere consent to the judgment which is the condition, it is the performance of the judgment as well; and if the registrar be satisfied that this gentleman has been in receipt of earnings or after-acquired property within the meaning of the statute and has not devoted it to the purpose to which he ought to have devoted it, then, if he pleases, he can say that, as the condition of the discharge has not been performed, it shall be revoked. There is power to revoke the order of discharge, and it may very well be that in this case circumstances are present—I do not say they are, because I do not know the facts sufficiently—which will justify him in exercising his jurisdiction to revoke the order of discharge.

Solicitors: *Solicitor to the Board of Trade*; *Roberts & Wrightson.*

[*Reported by* J. Anwyl Theobald, Esq., *Barrister-at-Law.*]

Re CRIGGLESTONE COAL CO., LTD.

[Court of Appeal (Sir Richard Henn Collins, M.R., Romer and Cozens-Hardy, L.JJ.), May 31, 1906]

[Reported [1906] 2 Ch. 327; 75 L.J.Ch. 662; 95 L.T. 510; 22 T.L.R. 585]

Company—Winding-up—Petition—Unsecured creditors—Debenture-holders' action—Floating security—Discretion of court—Companies Act, 1862 (25 *& 26 Vict., c.* 89), *s.* 79—*Companies Act*, 1890 (53 *& 54 Vict., c.* 63).

A creditor's petition for a winding-up order was opposed by debenture-holders, who had a floating charge on all the property of the company and had obtained the appointment of a receiver in an action to enforce their security, and by the company, which was under the control of the debenture-holders, on the ground that there were no assets available for the unsecured creditors.

Held: the onus was on the debenture-holders to prove that there was no reasonable possibility of any benefit accruing to the unsecured creditors from the winding-up, and, unless that onus was discharged, if there was a reasonable probability, even a reasonable possibility, that the unsecured creditors would derive some advantage from a winding-up order, an order ought to be made so as to entitle them to be heard in the debenture-holders' action.

Notes. The Companies Act, 1862, s. 79, and the Companies Act, 1890, have been repealed. See now the Companies Act, 1948, s. 256 (1) and Part V, respectively, 3 Halsbury's Statutes (2nd Edn.) 662, and 631 et seq.

Considered: *Re East Kent Colliery Co.* (1914), 30 T.L.R. 659; *Re P. & J. Macrae, Ltd.*, [1961] 1 All E.R. 302. Referred to: *Re A Company* (1915), 31 T.L.R. 171.

As to the procedure on a petition for the winding-up of a company by the court, see 6 Halsbury's Laws (3rd Edn.) 543–557; and for cases see 10 Digest (Repl.) 877 et seq.

Case referred to:

(1) *Bowes* v. *Hope, etc. Society* (1865), 11 H.L.Cas. 389; 35 L.J.Ch. 574; 12 L.T. 680; 11 Jur.N.S. 643; 13 W.R. 790; 11 E.R. 1383, H.L.; 10 Digest (Repl.) 869, *5715.*

Also referred to in argument:

Re St. Thomas' Dock Co. (1876), 2 Ch.D. 116; 45 L.J.Ch. 304; 34 L.T. 228; 24 W.R. 544; 10 Digest (Repl.) 882, *5852.*

Re Chapel House Colliery Co. (1883), 24 Ch.D. 259; 52 L.J.Ch. 934; 49 L.T. 575; 31 W.R. 933, C.A.; 10 Digest (Repl.) 878, *5809.*

Re Edgbaston Brewery Co., Ltd. (1893), 68 L.T. 341; 10 Digest (Repl.) 882, *5852.*

Re Crigglestone Coal Co., Stewart v. *Crigglestone Coal Co.*, [1906] 1 Ch. 523; 75 L.J.Ch. 307; 94 L.T. 471; 54 W.R. 298; 50 Sol. Jo. 240; 13 Mans. 181; 10 Digest (Repl.) 836, *5481.*

Re Krasnapolsky Restaurant and Winter Garden Co., [1892] 3 Ch. 174; 61 L.J.Ch. 593; 67 L.T. 51; 42 W.R. 639; 36 Sol. Jo. 627; 10 Digest (Repl.) 881, *5841.*

Appeal by the debenture-holders of the above-named company from the decision of Buckley, J.

Buckmaster, K.C., and *H. M. Humphry* for the debenture-holders.

Younger, K.C. (with him *H. E. Gardner*), for the petitioning unsecured creditors.

SIR RICHARD HENN COLLINS, M.R.—This case appears to me to depend on the truth of the debenture-holders' assertion that in no possible event can the petitioners, the unsecured creditors, gain any benefit from a winding-up order. Is there any possibility of the unsecured creditors reaping any fruits out of it? The onus is clearly on the debenture-holders to negative that possibility. They are met, to start with, by the proposition affirmed by the House of Lords in *Bowes* v. *Hope*, etc. *Society* (1), that primâ facie the right of a creditor who cannot obtain payment of his debt to obtain a winding-up order is ex debito justitiae. Certain exceptions are engrafted on this rule. But, as was pointed out by Buckley, J., in the present case they are of a very special character, and are not really exceptions. They depend upon this consideration, that the court will not give the creditor the right to seize the company's assets by the hand of the liquidator where there are no assets to seize. If there is a reasonable probability, or even a reasonable possibility, that the unsecured creditors will derive some advantage from a winding-up order, the same ought to be made in order to entitle them to be heard in the debenture-holders' action, instead of leaving the control of the proceedings in the hands of other persons who are antagonistic to their interests. In my opinion, the judgment of Buckley, J., is perfectly right, and this appeal, therefore, fails.

ROMER, L.J.—I am of the same opinion. If it was proved that no possible benefit could accrue to the unsecured creditors, I should agree with the debenture-holders that a winding-up order ought not to be made, especially as the winding-up order might possibly give the landlords of the colliery rights which might be used prejudicially to the debenture-holders' interests. But it is for those who oppose the petition to satisfy the court that no possible good can accrue to the petitioners from a winding-up order. Buckley, J., came to the conclusion that some good might result; and, on looking into the evidence, I am not satisfied that, if someone is appointed to represent the unsecured creditors and look after their interests, there may not eventually be some surplus coming to the unsecured creditors. As Buckley, J., pointed out, they are interested in the accounts to be taken of what is due on the debentures. They are also interested in seeing whether any of the debentures can be attacked, although I do not suggest that any case has been made out for attacking them. But I rely particularly on the passage in Buckley, J.'s judgment where he speaks of the interests of the unsecured creditors in a debenture-holders' action. He says:

> "They are interested in the terms upon which, and the circumstances under which, the property shall be realised. If I make a winding-up order, the unsecured creditors, by the official receiver, will in fact control the defence of that action [i.e., the debenture-holders' action]. This is a real advantage, to which they are, I think, entitled."

As matters stand, for the reasons I have pointed out, it may well be, that, if this company is wound-up and the unsecured creditors are represented by the official receiver in the debenture-holders' action, some good may result to the petitioners. I cannot say that it is hopeless. I, therefore, think that this appeal fails.

COZENS-HARDY, L.J.—I am of the same opinion. I think that the court ought not to be astute in endeavouring to support the contention that there is no possibility of any surplus being got for the unsecured creditors. I say this partly for the credit of the directors, whose honesty I assume. In December last they acted in the belief that this

was a company which had a future before it. They had themselves put in evidence the reports of a skilled expert who said that if the sum of £30,000 was spent upon the property it would produce a profit of £25,000 a year, and he valued the property at £165,000. The directors themselves put forward these reports. They do not venture to say that they are inaccurate. They acted on the footing that they were true so late as December last, and for their credit I think it scarcely lies in their mouths to say that no winding-up order ought to be made because there can be no assets for the unsecured creditors. Speaking for myself, I attach great importance to a winding-up order in the case of a company which has issued debentures in the way in which this company has done. Anything more unsatisfactory than leaving the affairs of the company in the hands of the debenture-holders alone I cannot imagine.

Appeal dismissed.

Solicitors: *Gribble, Oddie, Sinclair & Johnson,* for *Stewart & Chalker,* Wakefield; *Rawle, Johnstone & Co.,* for *Hill, Dickinson, Dickinson, Hill & Roberts,* Liverpool.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

KAUFMAN *v.* GERSON

[Court of Appeal (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.), February 24, 25, 1904]

[Reported [1904] 1 K.B. 591; 73 L.J.K.B. 320; 90 L.T. 608; 52 W.R. 420; 20 T.L.R. 277; 48 Sol. Jo. 296]

Conflict of Laws—Contract—Foreign contract—Enforcement in England—Contract obtained by duress abroad, but not illegal where made.

The courts of this country will not enforce a contract made in a foreign country between persons domiciled in that country, if it has been obtained by coercion, whether moral or physical, even though the contract is valid and enforceable by the law of the country in which it was made.

Decision of Wright, J., [1903] 2 K.B. 114, reversed.

Notes. Applied: *Société des Hôtels Réunis* (*Société Anonyme*) v. *Hawker* (1913), 29 T.L.R. 578. Considered: *Dynamit Act.* v. *Rio Tinto Co.*, [1918] A.C. 292; *Aksionairnoye Obschestvo A. J. Luther* v. *Sagor*, [1921] All E.R.Rep. 138; *Mutual Finance, Ltd.* v. *Wetton & Sons, Ltd.*, [1937] 2 All E.R. 657. Referred to: *Moulis* v. *Owen*, [1907] 1 K.B. 746; *Saxby* v. *Fulton*, [1908–10] All E.R.Rep. 857; *Frankfurther* v. *Exner, Ltd.* (1947), 177 L.T. 257; *Anglo-Iranian Oil Co.* v. *Jaffrate*, [1953] 1 W.L.R. 246.

As to the legality of contracts made abroad, see 7 Halsbury's Laws (3rd Edn.) 78–81; and for cases see 11 Digest (Repl.) 440 et seq.

Cases referred to:

(1) *Hope* v. *Hope* (1857), 8 De G.M. & G. 731; 26 L.J.Ch. 417; 29 L.T.O.S. 4; 3 Jur. N.S. 454; 5 W.R. 387; 44 E.R. 572, L.JJ.; 11 Digest (Repl.) 443, *841.*

(2) *Rousillon* v. *Rousillon* (1880), 14 Ch.D. 351; 49 L.J.Ch. 338; 42 L.T. 679; 44 J.P. 663; 28 W.R. 623; 11 Digest (Repl.) 443, *842.*

Also referred to in argument:

Biggs v. *Lawrence* (1789), 3 Term Rep. 454; 100 E.R. 673; 11 Digest (Repl.) 441, *828.*

Re Missouri Steamship Co. (1889), 42 Ch.D. 321; 58 L.J.Ch. 721; 37 W.R. 696; sub nom. *Re Missouri Steamship Co., Monroe's Claim,* 61 L.T. 316; 5 T.L.R. 438; 6 Asp.M.L.C. 423; C.A.; 11 Digest (Repl.) 424, *728.*

Santos v. *Illidge* (1859), 6 C.B.N.S. 841; 28 L.J.C.P. 317; 5 Jur.N.S. 1358; on appeal (1860), 8 C.B.N.S. 861; 29 L.J.C.P. 348; 3 L.T. 155; 6 Jur.N.S. 1348; 8 W.R. 705; 141 E.R. 1404, Ex. Ch.; 11 Digest (Repl.) 444, *846*.

Grell v. *Levy* (1864), 16 C.B.N.S. 73; 9 L.T. 721; 10 Jur.N.S. 210; 12 W.R. 378; 143 E.R. 1052; 11 Digest (Repl.) 442, *835*.

Quarrier v. *Colston* (1842), 1 Ph. 147; 12 L.J.Ch. 57; 6 Jur. 959; 41 E.R. 587, L.C.; 11 Digest (Repl.) 445, *852*.

Robinson v. *Bland* (1760), 2 Burr. 1077; 1 Wm. Bl. 234, 256; Bull.N.P. 275; 97 E.R. 717; 25 Digest 420, *239*.

Jones v. *Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173; 61 L.J.Ch. 138; 65 L.T. 685; 40 W.R. 273; 8 T.L.R. 133; 36 Sol. Jo. 108; 17 Cox, C.C. 389, C.A.; 12 Digest (Repl.) 332, *2567*.

Williams v. *Bayley* (1866), L.R. 1 H.L. 200; 35 L.J.Ch. 717; 14 L.T. 802; 30 J.P. 500; 12 Jur.N.S. 875, H.L.; 12 Digest (Repl.) 331, *2566*.

Ormes v. *Beadel* (1860), 2 De G.F. & J. 333; 30 L.J.Ch. 1; 3 L.T. 344; 6 Jur.N.S. 1103; 9 W.R. 25; 45 E.R. 649, L.C.; 12 Digest (Repl.) 110, *656*.

Appeal by the defendant from a decision of Wright, J., at the trial of the action without a jury.

The plaintiff had intrusted a sum of money to the defendant's husband, in France, to be used for a particular purpose in France. All the parties were then domiciled in France. The defendant's husband appropriated the money to his own use instead of applying it to the purpose for which it had been handed to him. His conduct was criminal according to the law of France, and the plaintiff threatened a prosecution. Under the influence of threats made by the plaintiff, and in order to prevent the prosecution of her husband and to protect the good name of her children, the defendant, who had property of her own, signed an agreement in Paris, on the terms that there should be no prosecution of her husband, by which she agreed that she would by instalments spread over three years pay the plaintiff the amount which her husband had misappropriated. An expert in French law, whose evidence was not contradicted, gave evidence that such an agreement was not invalid by the law of France either on the ground that it was made in order to stifle a criminal prosecution or on the ground that it was obtained by duress or undue influence. The defendant by various instalments paid to the plaintiff £801, leaving a balance of £134 due under the agreement. The defendant having come to reside in England, the plaintiff brought this action to recover the balance of £134. The defendant set up a counter-claim claiming repayment of the money which she had paid under the agreement. Wright, J., gave judgment for the plaintiff on the claim and on the counter-claim.

Montague Shearman, K.C., and *Eustace G. Hills* for the defendant.
Lush, K.C., and *Israel Davis* for the plaintiff.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal by the defendant from the judgment of Wright, J., and it undoubtedly raises a very important question. The defendant, who is the wife of E. Gerson, was induced, as the learned judge has found, by threats of a criminal prosecution in France against her husband to give an undertaking to the plaintiff to pay to him the money which her husband had misappropriated. During the series of years which followed the making of the agreement, the defendant paid various sums to the plaintiff amounting to £801, leaving a balance unpaid to the amount of £134. The plaintiff and the defendant both being in England, the plaintiff has sued the defendant here to recover that balance.

Two points have been taken on behalf of the defendant. The first, that the agreement was bad because it was an agreement to stifle a criminal prosecution; and the second, that the agreement cannot be enforced in this country because it was obtained by duress or undue influence. The learned judge, after hearing the evidence of a witness who was an expert in French law, came to the conclusion on the first point that, according to the law of France, there is nothing wrong about an agreement for valuable consideration to stifle a criminal prosecution; and that, as the contract was made in France between

parties resident in France, and was intended to be performed in France, the defence that the contract was bad because it was an agreement to stifle a prosecution was not a ground on which the courts in England ought to refuse to enforce the agreement.

The other point is that the circumstances under which this agreement was made were such that the courts in England ought not to enforce it, because the defendant had been coerced by threats into making it. That point raises first the question of fact, whether the defendant has established that the agreement was obtained by coercion. It seems to me that the learned judge has found that it was so obtained. He says ([1903] 2 K.B. at p. 115):

> "Gerson appropriated part of the money to his own use instead of applying it in buying skins. His conduct was criminal in France, and a prosecution was threatened. In order to avoid a prosecution, and to protect the good name of Gerson's children, his wife, the present defendant, under the influence of Kaufman's threat and at his instance, agreed in writing to make good by instalments out of her own property the amount of the defalcation, on the express terms that there should be no prosecution on the part of Kaufman."

When we look at the evidence given by the defendant at the trial, it appears to be perfectly clear that it was under threats of a criminal prosecution that she agreed to sign the undertaking to pay.

It is said that there are two answers to the suggestion that this contract cannot be enforced in an English court. The first answer is that the defendant and her husband were domiciled in France and were married without a settlement and under the French law as to community of goods of husband and wife, and that, therefore, the wife was civilly liable with her husband for his debts. However that may be, it is obvious that the plaintiff was not content with that remedy and sought to obtain more from her, and that, by exercising the strongest possible moral pressure, he sought to get more security from her, and that she, yielding to that pressure, was constrained into giving the guarantee which it is now sought to enforce, and paid money under it. It is quite obvious from the correspondence that, under continued threats of a prosecution of her husband, she made the payments which she did make, until she was finally driven by the proceedings in this action to set up the defence which she has now set up.

I think that the real point in this case is whether an agreement obtained under such circumstances can be enforced in an English court. I will not deal with the first point raised on behalf of the defendant, that any contract to interfere with the course of justice cannot be enforced in the courts of this country. The law of France appears to be different from English law on that question, and I am not prepared to say that, if such a contract is a good contract in France, it might not be enforced in the courts of this country. I am not prepared to say now that it cannot be enforced, but it is not necessary to give a final opinion on that point in the present case.

I come then to the real point in this case on which I propose to decide this appeal. It is said that, by the law of France, an agreement obtained by moral pressure can be enforced in that country. WRIGHT, J., deals with that question, and, although he clearly thought that some pressure had been exercised, yet he came to the conclusion that the agreement could be enforced in France, and that it could, therefore, also be enforced in the courts of this country. He said ([1903] 1 K.B. at pp. 119, 120):

> "The second ground on which the contract in the present case is impeached is that it was obtained by the undue influence or duress of a threat to prosecute the husband for crime. If this objection is to be regarded as based on considerations of public policy, the same answer applies as in the case of the first objection. It seems, however, to be more in the nature of an objection to the proof of consent of the defendant to the contract, a consent induced by duress or undue influence being by English law treated as no consent. If this be the correct view, it would seem that the law of the country in which the contract is made and is to be performed, and in which the parties are domiciled, ought to prevail unless there is such duress as must be considered to avoid the contract under any but unreasonable and uncivilised institutions of law—a description which would be applicable to such a case as that of consent

obtained, e.g., by physical torture, or by the use of drugs, but which cannot properly be applied to this case."

The whole point of the learned judge's judgment on that part of the case is contained in the last few lines of that passage. The learned judge admits that, if the contract was obtained by physical violence, it could not be enforced in the courts of this country, whatever the view of the courts of the other country might be. What can it matter what may be the form of coercion used? It is coercion just the same whether it is physical or moral. Why was it not coercion to threaten to dishonour her and her children by prosecuting her husband?

But it is contended that unless the principle is one which is universally applied and recognised by the law of all civilised countries, under which the courts of those countries would refuse to enforce such a contract, we are not entitled to apply it in an English court to a contract enforceable in a foreign court, and that, therefore, when it is shown that another civilised country does not accept that principle, an English court is debarred from applying it to a foreign contract. The authorities do not bear out that proposition. In Story on Conflict of Laws (7th Edn.), s. 258, the rule is stated as follows:

"The second class of excepted contracts comprehends those against good morals, or religion, or public rights. Such are contracts made in a foreign country for future illicit cohabitation and prostitution . . . and, in short, all contracts which in their own nature are founded in moral turpitude and are inconsistent with the good order and solid interests of society. All such contracts, even though they might be held valid in the country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or of even natural justice, are allowed to have their due force and influence in the administration of international jurisprudence."

In the English courts, the principle is that a party who seeks a remedy must come with clean hands; and, if a suitor has to aver something which, on grounds of public morality, ought to debar him from obtaining the assistance of the court, he is not entitled to obtain relief on the ground that the courts of the other country would allow him to sue in such a case. The passage in Westlake on Private International Law (3rd Edn.), s. 215, which was referred to by Romer, L.J., states:

"Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here, notwithstanding that it may have been valid by its proper law. The plaintiff in such a case encounters that reservation in favour of any stringent domestic policy, with which alone any maxims for giving effect to foreign laws can be received. . . The difficulty in every particular instance cannot be with regard to the principle, but merely whether the public or moral interests are essential enough to call it into operation; and where a breach of English law is not contemplated, this is necessarily a question on which there is room for much difference of opinion among judges."

In the present case, the point is whether a contract obtained by such moral pressure as was brought to bear on the defendant is one which an English court will enforce. In my opinion, it is a universal principle of the courts of this country that they will not enforce any contract which has been brought about by coercion. That rule is not inconsistent with any authority which has been cited. It is clearly consistent with many of the cases and with what has been said by the judges in some of the cases, especially by Turner, L.J., and I think also by Knight-Bruce, L.J., in *Hope* v. *Hope* (1). In *Rousillon* v. *Rousillon* (2), Fry, J., acted upon a similar principle. On the broad principle which I have stated, I am of opinion that the law in this country is such that the defendant is entitled to the protection of an English court in refusing to enforce a contract obtained in the way in which this contract was obtained. This appeal must, therefore, be allowed and judgment be entered for the defendant.

ROMER, L.J.—I am of the same opinion. In my opinion, the principle of law which is applicable to this kind of case is succinctly and accurately stated by Westlake in his Private International Law in the passage which has been read by the Master of the

Rolls. The only question, then, is as to the application of that principle to the facts of the present case. Shortly stated, the facts are that the plaintiff extorted this contract from the defendant by threats of a criminal prosecution against her husband, the threatened proceedings being of such a kind that, if taken, they would ruin the husband and also socially disgrace the wife and children. The plaintiff seeks in this action to enforce the contract which was so obtained. To enforce such a contract would be to do something conflicting with the essential moral interests of the community. This court cannot properly be asked by the plaintiff to assist him in enforcing an agreement so arrived at. It has been suggested that the defendant affirmed the contract after the improper pressure and its effects had been removed. As to that, I will only say that it was neither pleaded nor proved. I agree, therefore, that this appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. The policy of the English courts in such a case as this is that a litigant is not permitted by unfair or unjust means to arm himself with a right which the law does not allow to be enforced in these courts. What were the means employed by the plaintiff to obtain this agreement? The facts show that moral torture, and nothing less, was applied to the defendant in order to obtain it. It seems to me, therefore, that it would be a violation of the principles applied in the English courts if we were to allow such a contract as this to be enforced. Then it was suggested that this contract was made long ago and has been since acted on; but the case is just the same now as if this defence had been raised before anything was paid under it. There is no evidence at all of any ratification by the defendant. The pressure was steadily maintained by the plaintiff down to the year 1902. There is no evidence that the defendant affirmed the contract, and it was not attempted in the court below to show that she had done so. I agree that the appeal must succeed.

Appeal allowed.

Solicitors: *Dixon, Weld & Dixons*; *Leggatt, Rubinstein & Co.*

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

ASHTON *v.* LANCASHIRE AND YORKSHIRE RAIL. CO.

[KING'S BENCH DIVISION (Lord Alverstone, C.J., and Kennedy, J.), May 2, 1904]

[Reported [1904] 2 K.B. 313; 73 L.J.K.B. 701; 91 L.T. 349; 52 W.R. 655; 20 T.L.R. 482; 48 Sol. Jo. 459]

Carriage of Passengers—Railway—Passenger's right to break journey.

A passenger who takes a railway ticket, either single or return, for a certain journey is not, in the absence of special terms enabling him to do so, entitled to alight from the train at an intermediate station, break the journey, and later claim to go on to his destination on the original ticket.

Notes. As to breaking a journey, see 4 HALSBURY'S LAWS (3rd Edn.) 189; and for cases on the subject, see 8 DIGEST (Repl.) 107.

Cases referred to in argument:

Richardson, Spence & Co. and Lord Gough Steamship Co. v. *Rowntree*, [1894] A.C. 217; 63 L.J.Q.B. 283; 70 L.T. 817; 58 J.P. 493; 10 T.L.R. 335; 7 Asp.M.L.C. 482; 6 R. 95, H.L.; 8 Digest (Repl.) 114, *737*.

Stephen v. *International Sleeping Car Co., Ltd.* (1903), 19 T.L.R. 621; 47 Sol. Jo. 692, D.C.; 8 Digest (Repl.) 114, *739*.

Appeal by the defendants from the decision of the registrar of the county court of Lancashire, held at Chorley, in favour of the plaintiff in respect of a claim to recover the sum of 11½d., alleged to have been paid by the plaintiff under protest in respect of a railway fare.

On Sept. 15, 1903, the plaintiff took a second class return ticket from Chorley to Manchester for which she paid 3s. 10d. The return ticket was available for seven days, and on the return half of the ticket were printed the following words:

"Issued subject to the regulations and conditions in the company's time tables, books, bills, and notices. Available on the day of issue or on one of the seven following days."

There were no special conditions printed on the ticket. On the morning of that day the plaintiff travelled on that ticket from Chorley to Manchester, and on the afternoon of the same day she started from Manchester to return to Chorley, travelling in a Blackburn train from Manchester to Bolton, Bolton being an intermediate station between Manchester and Chorley, where the Blackburn and Chorley lines diverges. Her ticket was examined at Manchester, and, although there were trains running directly between Manchester and Chorley, no question was raised as to her right to travel in the Blackburn train as far as Bolton. As that train did not go to Chorley, the plaintiff in the ordinary course would have had to alight at Bolton and there wait for the next train to Chorley. She alighted at Bolton, but she did not proceed from Bolton to Chorley by the first available train, which left Bolton about half an hour after her arrival there, but, having a friend living in Bolton, she proceeded to leave the station in order to go into the town to visit her friend. She walked to the exit and was told by the ticket collector that she could not leave the station without giving up her ticket, as there was a train for Chorley in half an hour; she gave up her ticket and went into Bolton, paid her visit, and came back to the station later in the day: she was then required to take another ticket from Bolton to Chorley, which cost 11½d., which sum she paid under protest and claimed to recover it from the defendants. The registrar gave judgment for the plaintiff, and the defendants (by leave) appealed.

The regulations in the defendants' time-table, under the heading "availability of tickets," contained the two following regulations:

"A passenger with either a single journey or a return ticket is not permitted to leave any train at an intermediate station (unless it is advertised that the journey may be broken at that station) without giving it up, in which case he will forfeit all further right to it. Return tickets cannot be used to proceed by a later train beyond

the station at which the passenger may first alight; in all cases, therefore, fresh tickets must be taken to proceed by any subsequent train."

C. A. Russell, K.C. (*J. Openshaw* with him), for the defendants.
Arthur Powell, K.C. (*Woodfin* with him), for the plaintiff.

LORD ALVERSTONE, C.J.—I have been impressed with what counsel for the plaintiff has said on the point about the conditions being incorporated on the ticket, and I express no opinion as to what is the effect of the incorporation of the conditions on the front of a ticket such as this. No doubt the point will come up at some time for consideration, but it is not material for our decision in this case, and I, therefore, think that counsel for the defendants was wisely advised in keeping it apart, at any rate for the purpose of to-day. It seems to me that the point is not that the plaintiff was prevented from leaving the station if she had chosen to do so, as the argument of counsel for the plaintiff assumes, and as the learned registrar in his judgment assumes. The point is that she seeks to put a duty on the defendants to carry her back by two different transits.

There are a number of cases which draw a distinction between the beginning and end of a journey for this purpose; and if we are to decide that the plaintiff has a right to do what she claims to do, it means that she had a right to leave the defendant's premises, determine the contractual relations with them for the time being and recommence the contractual relations at her will by coming back again and saying to the defendants, "Now carry me for the rest of my journey." We cannot decide in favour of this view without shutting our eyes to the common-sense incidents of railway travelling, as known to the travelling public now for more than half a century. Breaking the journey is a matter which is perfectly well understood. It means that the passenger leaves the care of the railway company, and that, by quitting the premises, he releases the railway company from any duties and obligations to him generally; but, of course, there might be other ways by which he might break the journey, as by agreement with the railway company, and then he may come back again and be allowed to resume the journey under an arrangement made with the railway company. Counsel for the plaintiff says—and this is the argument which he has most strenuously put forward—that the contract made by the return ticket means that the railway company will carry the passenger from Chorley to Manchester, and will carry that passenger back from Manchester to Chorley. Then he contends—and there is no reason why, if he is right, the same principle should not apply both to the outward and homeward journey alike—that, if the train happens to stop at some important station, which it probably will, and the passenger is minded to leave the premises for a time, he may do so and come back, and claim to be carried by a series of journeys to the destination to which the railway company were originally to take him. So he has a right to go back by making a succession of journeys, and not merely to be brought back by the railway company according to the custom of travelling in the ordinary way in which they profess to carry passengers. I see no vestige of authority for the suggestion that the contract undertaken by the railway company by a return ticket is that kind of contract, and I do not think that we, or the county court judge, or anybody ought to shut their eyes to the common incident of termination of the contractual relations for the time being by what has been known, and properly known, as breaking the journey and commencing it again. That is something which is not involved in the contract.

I, therefore, come to the conclusion that this was a contract to carry the plaintiff to Manchester and back again, and to carry her in the sense that the journey, both outward and homeward, was to be continuous in the sense that the one journey was to be performed as one contractual operation, and the other journey was to be performed as one contractual operation, and not that there was to be a right in the plaintiff to say to the defendants that she would force them to enter into a series of contracts from hour to hour, and from day to day during seven days, to take her out from Chorley to Manchester or back from Manchester to Chorley in journeys by pieces, so to speak. Under the circumstances, it seems to me that that is not a reasonable construction of the contract. There is nothing in the contract to bind the defendants to do it, and I think that both

common sense and law are remote from such a conclusion as that arrived at by the learned registrar.

I think, therefore, that this appeal must be allowed.

KENNEDY, J.—I agree. The attempt of the plaintiff no doubt in perfect good faith and for the purpose of testing the right, in substance is to make a contract to carry from A to Z, and back from Z to A, giving the passenger a right to separate voyages or carriages—if we may so call it—from every letter of the alphabet.

Appeal allowed.

Solicitors: *Woodcock Ryland & Parker*, for *Christopher Moorhouse*, Manchester; *W. Buttle*, for *J. Whitfield*, Chorley.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

R. *v.* LANCASHIRE JUSTICES

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Ridley and Darling, JJ.), January 12, 1906]

[Reported 75 L.J.K.B. 198; 94 L.T. 481; 70 J.P. 337]

Licensing—Justices—Appeal—Licensing justices sitting at quarter sessions on hearing of appeal against refusal by them to renew licence—Competency to sit at quarter sessions.

On an appeal to quarter sessions from an order of licensing justices refusing to renew a licence, two of the licensing justices who were present at the licensing meeting and were parties to the making of the order appealed against, sat on the Bench with the chairman and justices of quarter sessions during the hearing of the appeal. They retired with the other justices, and returned into court and sat on the Bench when the decision was given and an order made dismissing the appeal, but they took no part whatever in court, or when the justices retired, in the discussion of the case or in the decision of the appeal.

Held: justices who were not competent must not sit when an appeal was being heard in which they were interested even though they took no part in the proceedings on appeal; accordingly, the appeal must be re-heard.

Notes. Considered: *R.* v. *Byles, Ex parte Hollidge* (1912), 108 L.T. 270.

As to appeals from licensing justices, see 22 HALSBURY'S LAWS (3rd Edn.) 606 et seq.; and for cases see 30 DIGEST (Repl.) 64 et seq.

Case referred to:

(1) *R.* v. *Meyer* (1875), 1 Q.B.D. 173; 34 L.T. 247; 40 J.P. 645; sub nom. *R.* v. *Harrison*, 24 W.R. 392; 33 Digest 294, *100*.

Also referred to in argument:

R. v. *L.C.C., Ex parte Akkersdyk, Ex parte Fermenia*, [1892] 1 Q.B. 190; 61 L.J.M.C. 75; 66 L.T. 168; 56 J.P. 8; 40 W.R. 285; 8 T.L.R. 175, D.C.; 33 Digest 103, *698*.

Rule Nisi calling on the justices of the county of Lancaster to show cause why a writ of certiorari should not issue to remove, for the purpose of quashing the same, an order made by the general Court of Quarter Sessions for the county of Lancaster, on April 12, 1905, dismissing the appeal of one Arthur Heathcote against an order of the licensing justices of Manchester, on Mar. 6, 1905, refusing to grant him a renewed licence, on the ground that two of the justices, whose order was the subject of the appeal, were members of the Court of Quarter Sessions which dismissed the appeal. A rule nisi had also been

obtained for a mandamus to the same justices to hear and determine the appeal, the rules being obtained on the application of Arthur Heathcote.

The following facts appeared from the affidavits of the chairman of the quarter sessions and the two justices. On April 12, 1905, the general court of Quarter Sessions for the county sat for the purpose of hearing licensing appeals. Mr. Yates, K.C., the chairman, presided, and among the other justices present were Mr. Armitage and Mr. Moss, both of whom had been members of the licensing meeting, and had taken part in refusing to renew the applicant's licence for the Angel Inn, Gorton. These two justices sat one at each side of the chairman, and, when the appeal was called on, they told the chairman that they had taken part in the previous proceedings and asked if they should leave the bench. The chairman agreed that they should take no part in the hearing of the appeal or in the decision, but said that he did not see any objection to their remaining on the bench. They accordingly remained on the bench while the appeal was being heard, but they addressed no remarks to the chairman, except as above mentioned, or to the other justices, and neither of them took any part in the discussion or hearing of the appeal. They retired with the other justices when they retired to consider their decision, but they took no part whatever in the discussion which then took place, or in influencing or arriving at the decision which the other justices arrived at. They returned into court with the other justices, and had resumed their seats next the chairman when the decision was announced. No objection was made to their presence on the bench until after the decision of the court was given.

No counsel appeared to show cause.

E. Sutton (*G. Jordan* with him) in support of the rules.

LORD ALVERSTONE, C.J.—In this case two justices who were obviously not competent to take part in the proceedings appear to have sat on the Bench on either side of the chairman, and to have retired and returned into court with him and the other justices. It was said that they took no part in the decision, but, in my opinion, it is extremely important that persons should not even appear to form part of a court, or be in a position in which they could be supposed to have any influence, where they are interested in a case. That seems to me to be the principle which BLACKBURN, J., enunciated in *R.* v. *Meyer* (1), in which he had the concurrence of two other judges, and his judgment has been approved in this court. BLACKBURN, J., in that case expressly declined to go into the question whether the person acted or not, and he thought it better to maintain the rule that justices who were not competent to act should not sit on the Bench when the appeal was heard. Both rules, therefore, will be made absolute, and the appeal must be re-heard by the quarter sessions.

RIDLEY and **DARLING, JJ.**, concurred.

Rules absolute.

Solicitors: *Pritchard, Englefield & Co.*, for *P. Holker Jordan & Bowden*, Manchester.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

LUMBY *v.* FAUPEL

[Court of Appeal (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.), February 9, 1904]

[Reported 90 L.T. 140; 20 T.L.R. 237; 2 L.G.R. 605]

Landlord and Tenant—Covenant—Covenant to pay all assessments "which now are, or during the said term shall be imposed or assessed" on the premises—Paving expenses under Public Health Act, 1875*—Works completed before lease—Apportionment after lease—Liability of lessee.*

A covenant by a lessee to pay "all rates, taxes, and assessments whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or on the landlord or tenant in respect thereof by authority of Parliament or otherwise" does not apply to paving expenses incurred in respect of the premises under the Public Health Act, 1875, s. 150, before the date of the lease, although the amount payable is not assessed until after the date of the lease.

Surtees v. *Woodhouse* (1), [1903] 1 K.B. 396, applied.

Notes. Section 150 of the Public Health Act, 1875, has been repealed. See now ss. 189 and 190 of the Highways Act, 1959 (39 Halsbury's Statutes (2nd Edn.) 612–615).

As to covenants in leases for payment of rates, taxes and outgoings, see 23 Halsbury's Laws (3rd Edn.) 610 et seq.; and for cases see 31 Digest (Repl.) 328 et seq.

Case referred to:

(1) *Surtees* v. *Woodhouse*, [1903] 1 K.B. 396; 72 L.J.K.B. 302; 88 L.T. 407; 67 J.P. 232; 51 W.R. 275; 19 T.L.R. 221; 47 Sol. Jo. 276; 1 L.G.R. 227, C.A.; 31 Digest (Repl.) 333, *4669*.

Also referred to in argument:

Stock v. *Meakin*, [1900] 1 Ch. 683; 69 L.J.Ch. 401; 82 L.T. 248; 48 W.R. 420; 16 T.L.R. 284, C.A.; 40 Digest (Repl.) 137, *1054*.

Appeal by the plaintiff from a decision of the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.), reversing the decision of the judge of the Kingston-on-Thames County Court.

On Oct. 7, 1879, the plaintiff demised premises situate on Broadway, Wimbledon, to one Gordon. On May 4, 1893, Gordon assigned to the defendant. On Nov. 2, 1899, the defendant surrendered the lease to the plaintiff, the deed of surrender containing an absolute release and discharge of the defendant by the plaintiff from all rents and covenants and conditions reserved by and contained in the indenture of lease of Oct. 7, 1879, and from all actions, proceedings, claims, and demands in respect thereof. On the same day, viz., Nov. 2, 1899, the plaintiff granted to the defendant a new lease of the same premises for a term which was to commence on the preceding Sept. 29. The new lease contained the following covenant:

"that the lessee will pay the rent hereby reserved at the time and in manner aforesaid, and will pay all rates, taxes, and assessments whatsoever, which now are, or during the said term shall be imposed or assessed upon the said premises, or on the landlord or tenant in respect thereof by authority of Parliament or otherwise."

In January, 1898, the Wimbledon Urban District Council had finally completed certain improvements under s. 150 of the Public Health Act, 1875, but the expenses of the works were not apportioned under that section among the frontagers till December, 1900.

The plaintiff sought to recover £25 18s. 11d., from the defendant, being the proportionate amount of the improvement works under s. 150 of the Act of 1875, apportioned in respect of the premises. The county court judge held that under the covenant in the lease of Nov. 2, 1899, the defendant was bound to repay to the plaintiff the amount which the plaintiff had been compelled to pay to the Wimbledon Urban District Council.

The Divisional Court reversed the decision of the county court judge on the ground that the words in the covenant, "rates, taxes, and assessments," were not wide enough to cover the apportioned expenses of paving a street under s. 150 of the Public Health Act, 1875, and gave judgment for the defendant. The plaintiff appealed.

W. O. Hodges for the lessor.
Danckwerts, K.C., and *S. Green* for the tenant.

SIR RICHARD HENN COLLINS, M.R.—I am of opinion that this appeal fails, and I decide the case, not on the point that has been mainly argued, but on the last point, which is a very short one and on which it appears to me that the authorities are conclusive. The headnote to *Surtees* v. *Woodhouse* (1) is this ([1903] 1 K.B. at p. 396):

> "Where by a covenant in a lease the lessee covenanted that he would during the term pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the demised premises, or the owner or occupier in respect thereof: HELD, that the covenant did not apply to expenses of private street works which, under the Private Street Works Act, 1892, had become a charge upon the premises on the completion of the works before the date of the commencement of the term granted by the lease, though not payable until after that date."

In the present case, paving expenses had been incurred in respect of these premises before the date of lease to the defendant, and, though the amount payable in respect of them had not been assessed at the date of the lease, still the charge, according to this authority, had become a charge on the premises—i.e., the liability had been incurred. The defendant had surrendered the lease, which he had held at the time when these expenses became a charge on the premises, and he had received a complete release from all his obligations towards the lessor in respect of these premises. After that, he took the existing lease. The covenant here is this: [HIS LORDSHIP read the covenant, and continued:] It seems to me that that covenant is identical for all purposes of this discussion with the covenant in *Surtees* v. *Woodhouse* (1) and, just as there it was held that the fact that the expenses had ripened into a charge before the commencement of the new lease was a complete answer to any claim made on the new lease, so, it seems to me, it is a complete answer here.

I have listened to the argument of counsel for the tenant, and I am really unable to follow the distinctions which he seeks to make between the obligations arising on the two covenants, and, therefore, I do not propose to attempt to go through them. It appears to me that the grounds of the decision of *Surtees* v. *Woodhouse* (1) apply just as much whether the words are "outgoings," or whether, as they are here, "assessments," because the basis of that decision was that the charge had accrued before the assessment was made, and the fact that the charge subsisted was not affected, nor was any fresh liability imposed, by virtue of the fact that assessment came after. The charge was for an amount which was afterwards assessed and, although the assessment did not take place until after the currency of the new lease, nevertheless it gave no new right at all in respect of a right which had accrued, and which in this case was satisfied before the new lease arose. In *Surtees* v. *Woodhouse* (1), VAUGHAN WILLIAMS, L.J., after reading from the words of the covenant in question, said ([1903] 1 K.B. at p. 400):

> "In my judgment those words would not cover a rate or charge which had become effective before the date of the lease by reason merely of the completion of the works."

and then he said (ibid. at p. 401):

> "Apart from the words 'present and future,' the covenant is to my mind perfectly plain, and does not impose upon the tenant the obligation to pay charges to which the property had been assessed for private street works, but which had not become payable. For these reasons I am of opinion that the judgment of WALTON, J., must be reversed."

And STIRLING, L.J., said in a written judgment, after referring to s. 257 of the Public Health Act, 1875 (ibid. at p. 402):

"It appears to me that, by the combined effect of this last section and s. 12 of the Private Street Works Act, 1892, the apportioned amount became charged on the owner at the time of completion of the works as from that date."

That is to say, although the apportionment did not take place till afterwards, nevertheless, the apportioned amount had become charged. My brother Mathew gave judgment to the same effect. For these reasons, I think that, on this point, this appeal must be dismissed.

Romer, L.J.—I agree.

Mathew, L.J.—I am of the same opinion, and for the same reasons as those given by my Lord.

Appeal dismissed.

Solicitors: *Ashley, Lumby & Cooper*; *Gregson, Wareham, Waugh & Gregson.*

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

WILLIAMS AND OTHERS *v.* NORTH'S NAVIGATION COLLIERIES (1889) LTD.

[House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord Davey, Lord Robertson and Lord Atkinson), March 1, 2, 20, 1906]

[Reported [1906] A.C. 136; 75 L.J.K.B. 334; 94 L.T. 447; 70 J.P. 217; 54 W.R. 485; 22 T.L.R. 372; 50 Sol. Jo. 343]

Master and Servant—Wages—Deduction—Truck Acts—Fine ordered to be paid by workmen to master by court of summary jurisdiction—Truck Act, 1831 (1 *& 2 Will.* 4, *c.* 37), *s.* 3.

By the Truck Act, 1831, s. 3, an employer, when paying wages to a workman, is not allowed to make any deductions except those expressly permitted by s. 23 and s. 24 of the Act; accordingly, he is not allowed to deduct a fine which a court of summary jurisdiction has ordered the workman to pay to him.

Decision of the Court of Appeal, [1904] 1 K.B. 44, reversed.

Notes. By s. 1 of the Payment of Wages Act, 1960 (40 Halsbury's Statutes (2nd Edn.) 290), payment of wages otherwise than in cash may be lawfully made notwithstanding s. 3 of the Truck Act, 1831.

Applied: *Jones* v. *Harris* (1926), 43 T.L.R. 1. Considered: *Hart* v. *Riversdale Mill Co.*, [1928] 1 K.B. 176. Explained and Distinguished: *Sagar* v. *Ridehalgh & Son, Ltd.*, [1931] 1 Ch. 310. Considered: *Penman* v. *Fife Coal Co., Ltd.*, [1935] All E.R.Rep. 46; *Kenyon* v. *Darwen Cotton Manufacturing Co.*, [1936] 1 All E.R. 310. Referred to: *Parkin* v. *South Hetton Coal Co.* (1907), 98 L.T. 162; *Keates* v. *Lewis Merthyr Consolidated Collieries*, [1910] 2 K.B. 445; *Pratt* v. *Cook Son & Co. (St. Paul's), Ltd.*, [1940] 1 All E.R. 410.

As to deductions from wages, see 17 Halsbury's Laws (3rd Edn.) 144–147; and for cases see 24 Digest (Repl.) 1101 et seq. For the Truck Act, 1831, s. 3, see 9 Halsbury's Statutes (2nd Edn.) 12.

Cases referred to:

(1) *Hewlett* v. *Allen*, [1892] 2 Q.B. 662; 62 L.J.Q.B. 9; 67 L.T. 457; 57 J.P. 260; 41 W.R. 197; 8 T.L.R. 793, C.A.; affirmed [1894] A.C. 383; 63 L.J.Q.B. 608; 71 L.T. 94; 58 J.P. 700; 42 W.R. 670; 10 T.L.R. 464; 38 Sol. Jo. 455; 6 R. 175, H.L.; 24 Digest (Repl.) 1100, *475*.

(2) *Chawner* v. *Cummings* (1846), 8 Q.B. 311; 15 L.J.Q.B. 161; 6 L.T.O.S. 364; 10 J.P. 229; 10 Jur. 454; 115 E.R. 893; 24 Digest (Repl.) 1104, *497*.
(3) *Archer* v. *James* (1862), 2 B. & S. 67; 31 L.J.Q.B. 153; 6 L.T. 167; 8 Jur.N.S. 166; 10 W.R. 489; 121 E.R. 998, Ex. Ch.; 24 Digest (Repl.) 1104, *498*.
(4) *Pillar* v. *Llynvi Coal and Iron Co., Ltd.* (1869), L.R. 4 C.P. 752; 38 L.J.C.P. 294; 20 L.T. 923; 17 W.R. 1123; 24 Digest (Repl.) 1102, *482*.
(5) *Smith* v. *Walton* (1877), 3 C.P.D. 109; 47 L.J.M.C. 45; 37 L.T. 437; 42 J.P. 280; 24 Digest (Repl.) 1100, *472*.
(6) *Re Morris, Ex parte Cooper* (1884), 26 Ch.D. 693, C.A.; 24 Digest (Repl.) 1102, *484*.
(7) *Lamb* v. *Great Northern Rail. Co.* [1891] 2 Q.B. 281; 60 L.J.Q.B. 489; 65 L.T. 225; 56 J.P. 22; 39 W.R. 475; 7 T.L.R. 415, D.C.; 24 Digest (Repl.) 1102, *486*.

Also referred to in argument:

Willis v. *Thorp* (1875), L.R. 10 Q.B. 383; 33 L.T. 11; 23 W.R. 730; sub nom. *Wallis* v. *Thorp*, 44 L.J.Q.B. 137; 40 J.P. 6; 24 Digest (Repl.) 1104, *500*.
Redgrave v. *Kelly* (1889), 54 J.P. 70; 37 W.R. 543; 5 T.L.R. 477; 24 Digest (Repl.) 1102, *490*.
Beetham v. *Crewdson* (1890), 55 J.P. 55; 6 T.L.R. 379, D.C.; 24 Digest (Repl.) 1102, *491*.

Appeal from a judgment of the Court of Appeal (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.), reported [1904] 2 K.B. 44, reversing a decision of Bucknill, J., at chambers, granting an interim injunction until the trial of the action. It was agreed that the hearing of the appeal should be treated as the trial of the action, and that the appellants (the plaintiffs below) should withdraw their claim for an injunction, and only ask for a declaration that certain deductions from their wages were illegal as being contrary to the Truck Act, 1831. The facts are set out in the opinion of Lord Loreburn .L.C.

S. T. Evans, K.C., Bailhache and *J. Sankey* for the appellants.
Eldon Bankes, K.C., M. Lush, K.C., and *A. J. Ashton* for the respondents.

The House took time for consideration.

Mar. 20, 1906. The following opinions were read.

LORD LOREBURN, L.C.—I do not propose to enter on a consideration of the authorities that were cited to us in the course of argument or dealt with in the Court of Appeal, as I understand that Lord Davey intends to refer to them. But I have come to the conclusion that the judgment appealed from ought to be reversed, and a declaration given in the sense asked for by the appellants. The facts lie in narrowest compass. Certain workmen in the service of the respondent company were entitled to wages payable on Jan. 30, 1904. A fortnight earlier, each of them had been ordered by magistrates in petty sessions to pay a fine to the respondents, of which 10s. was due on Jan. 30. On that date, the respondents made out an account with each of them, in which, apart from other items which were not complained of, the sum of 10s. for fines was deducted from the wages, and the balance alone was paid. In the case of the appellant Jacob Williams, whose case is typical of the rest, he had earned £3 13s. 2d., and received £3 2s., the difference consisting of an agreed deduction of 1s. 2d. for doctor and the 10s. fine, which was not agreed. On this the appellants commenced an action for damages and an injunction and a declaration that the deduction of 10s. was illegal. It was agreed in the Court of Appeal that the relief sought should be limited to a declaration, and on that footing the case came here. The question is whether the respondents, when they paid the wages on Jan. 30, were in law bound to pay in coin the total sum due for wages, or were entitled in law to deduct 10s. due from the appellants to them, and pay merely the balance in coin. This turns on the true construction of s. 3 of the Truck Act, 1831. I find in that section an explicit enactment that "the entire amount of the wages earned by or payable to a workman" shall be "actually paid" to him in the current coin of this realm, "and not otherwise." The section does not say when it is to be paid, for the common law will settle that as soon as the agreement of service is ascertained. The

section does say that, when paid, it shall be paid in coin of the realm, and not otherwise. I cannot think that this means that it shall be paid as to part in coin and as to the remainder in account.

Our attention was directed in argument to the word "payable"; we were invited to hold that the obligation to pay in coin applied only to the entire amount of wages payable after deducting cross-claims. In this case, it was argued that only £3 2s. was payable, because, on striking an account, that was the balance due. A reference to s. 23 of the Act shows, to my mind, that this would be a wrong interpretation even if the language of the Act admitted of it. Section 23 provides, with elaborate care and under strict safeguards, the cases in which debts due from the workman may be deducted from the wages due to the workman when the employer is paying the wages. These provisions would be wholly unnecessary if an employer were already authorised by s. 3 to deduct anything that the workman owed him and to pay in coin merely the balance. The word "payable" may have been inserted because otherwise the law could have been evaded by making wages payable in advance, before they had been earned. Or it may have been inserted because there might be deductions authorised by s. 23 which would not diminish the wages earned but would diminish the sum payable for wages. However, that may be, it appears to me that an obligation rests on the employer under the Truck Act, 1831, s. 3, to pay in coin (for we are not concerned with bank notes in this case) all the money payable as wages, and that, in ascertaining how much is payable as wages, he can subtract nothing except the deductions expressly sanctioned by s. 23. The deduction of 10s. for fines was, therefore, in the present case illegal.

Counsel for the respondents argued that this construction would be very anomalous. He urged that, if the employer did not pay the wages at all and were sued, he would be entitled then to set-off in the action anything due to him except such sums as fall within the prohibition of s. 4. It would be strange, said counsel, if an employer could, by breaking his contract and forcing litigation, obtain an advantage denied to him if he fulfilled his contract. No doubt this would be an anomaly, as are the Truck Acts themselves, and some other Acts which interfere in a limited degree with freedom of contract. It is necessary to distinguish between the clauses of the Act relating to set-off in an action and those relating to stoppage or deduction when the wages are paid. Possibly the legislature thought that a court might be trusted to strike a balance in the rare cases where the dispute came into court, but that the vast multitude of weekly or other payments which never come near a court ought to be regulated by a simple and wholesome rule, namely, that they should be paid wholly in coin save for certain carefully specified exceptions. This is, however, a mere conjecture. It is enough to say that, assuming that the Act of Parliament has so provided, the fact that the provision is anomalous does not permit us to disregard the plain meaning of the words used.

Accordingly, I move your Lordships to reverse the judgment of the Court of Appeal, and to enter judgment for the appellants, with a declaration in the sense prayed.

LORD MACNAGHTEN.—I have had an opportunity of reading the opinion which has just been delivered by the Lord Chancellor, and I entirely agree with it.

LORD DAVEY.—I agree with the opinion of the Lord Chancellor, and with the reasons which he has given for his judgment. The learned judges in the Court of Appeal rested their decision mainly on the ground that it was neither an offence nor a violation of the Truck Act, 1831, to give effect to a legal right of set-off. Set-off in an action I understand. It is a right given by statute to a man who is sued for a sum of money to defend himself by claiming a debt due to himself from the plaintiff in satisfaction or reduction of the debt for which he is sued. But set-off outside the court means nothing more than a claim of deduction and retention, and the question comes to be whether the deduction of a cross-debt which might be the subject of a set-off in an action is a legitimate deduction, or whether the express enactment that the entire amount of the wages shall be actually paid in current coin can be so qualified. I agree with my noble and learned friend that there can be but one answer to that question. By s. 23 certain deductions are permitted to be made, or, to use the language of the marginal note,

"particular exceptions to the generality of the law" are made under strictly defined conditions, and no other deductions or particular exceptions are, in my opinion, authorised.

The learned counsel for the respondents argued that the employer was not bound by the Act to pay in full, and nonpayment was not an offence under the Act. Be it so; but this was not a case of nonpayment or repudiation by the master of his debt, but of retention of a part of the workman's admitted wages in payment of a debt to himself, and was intended to be payment or satisfaction pro tanto of the workman's wages. BOWEN, L.J., stated the exact point in *Hewlett* v. *Allen* (1) ([1892] 2 Q.B. at p. 666), when, commenting on s. 3, he said that payment in account will not do, and that the employer cannot for the purpose of compliance with the statute be both payer and payee, while, on the other hand, he held (ibid. at pp. 667, 668) that set-off in an action was only prohibited in the cases mentioned in s. 5. It is sufficient to look at the account, which was handed to one of the appellants, to see that this is nothing more than payment in account, which I agree with the lord justice will not do. I will only add that I can see very good reasons why the legislature should not allow a deduction to be made by the employer himself, although it might be the subject of set-off in an action where the amount and propriety of it could be impartially investigated.

Counsel for the respondents boldly said that there was a clear and consistent course of authority in favour of the respondents, and that it was too late for this House to revert to the views of the appellants. The exact contrary of this statement appears to me to be nearer the truth. Not a single one of the numerous cases which were cited in my opinion supports the argument of the respondents, and a good deal is to be found in the judgments of the learned judges which is against them. In *Chawner* v. *Cummings* (2), the plaintiff was presumed to have contracted on the usual and well-known terms in the trade, and certain customary deductions which had been made from his nominal wages were held not to be in the nature of payment at all, but the mode of calculating and ascertaining the actual amount of his wages. *Archer* v. *James* (3) was a similar case, and was decided, in the first instance, on the authority of *Chawner* v. *Cummings* (2). In the Exchequer Chamber three judges held that *Chawner* v. *Cummings* (2) was wrongly decided, and three other judges, on the other hand, approved the decision, and held that the deductions in question on the case before them were in the same category, and were an element only in calculating the true amount of the workman's wages. But there is not a word in any of the judgments which supports the contention that, where the amount of the wages is ascertained, the employer can discharge himself by set-off or payment in account. In *Pillar* v. *Llynvi Coal and Iron Co.* (4) it was only decided that deductions of the character authorised by s. 23 could not be made unless there was a contract in writing as required by the section. In *Smith* v. *Walton* (5), the workman having damaged a piece of cloth through negligent workmanship, the employer delivered to him the damaged cloth, and deducted from his wages the value placed by the employer on the cloth. The question was raised on an information against the employer for making an illegal payment. The court reversed the decision of the magistrates, who refused to convict, LINDLEY, J., saying (3 C.P.D. at p. 115) that, whether there was a payment in goods, or a set-off, the respondent had infringed the Act. The decision in *Ex parte Cooper* (6) has no bearing on the case before the House. *Lamb* v. *Great Northern Rail. Co.* (7) was a decision on the Truck Amendment Act, 1887, but the judgment of SMITH, J., contains dicta on the construction of s. 2, s. 3, s. 4, and s. 23 of the Act of 1831 which are in the appellants' favour. The judgment of BOWEN, L.J., in *Hewlett* v. *Allen* (1) has already been referred to. That case, however, was decided on the ground that the plaintiff had authorised and directed certain payments to be made by the employer on her behalf, and was confirmed in this House on the same ground.

The writ in this action claimed payment to each of the appellants of the sum of 10s. deducted by the respondents. In the Court of Appeal, by some arrangement between the parties, the appellants confined their claim to a declaration that such deduction was illegal. SIR RICHARD HENN COLLINS, M.R., expressed some doubt whether the court ought to entertain a suit for a declaration not ancillary to the putting in suit of any legal right. I share that doubt; but, as the case has been fully argued and both parties appear

to desire the decision of the House on it, I am not disposed to say more. I am of opinion that the order appealed from should be reversed, and, the appellants and respondents having consented to the hearing in the Court of Appeal being taken as the trial of the action, that it be declared that the deduction by the respondents on Jan. 30, 1904, of the sum of 10s. from the wages due to the appellants respectively from the respondents at that date was unauthorised and illegal, and that it be ordered that the respondents pay to the appellants their costs of this suit, including the costs of the appeal to the Court of Appeal, and also the costs of this appeal.

LORD ROBERTSON.—I have had an opportunity of reading the opinion which LORD ATKINSON is about to deliver, and I concur in it.

LORD ATKINSON, stated the facts, and continued: Section 3 of the Truck Act, 1831, runs as follows:

> "The entire amount of the wages earned by or payable to any artificer . . ., in respect of any labour by him done . . ., shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void."

Some comment was made on the use in this section of the words "or payable to any artificer." I think that these words are introduced for the purpose of meeting a case where some deduction or stoppage authorised by s. 23 and s. 24 of the statute has, in fact, been made, and the workman is only entitled to receive the balance of his wages remaining due after such deduction.

It has been urged on behalf of the respondents that such a deduction as this does not come within the mischief aimed at by the Truck Acts; that those statutes were merely designed to prevent the payment of workmen's wages in equivalents for cash, as distinguished from cash itself. It may well be that this was the main purpose and object of this legislation, and that, in this section, the legislature has used language which extends beyond the mischief aimed at, and reaches harmless transactions or practices not within the spirit of the Act. Still, there is no ambiguity in the words used in the section. They are precise and clear, and require that the entire amount of the wages earned shall be "actually paid to such artificer in the current coin of this realm, and not otherwise." It cannot, I think, be contended that the withholding by the master from the workman of a portion of the wages earned by the latter against his consent is, or could be held to be, a payment by the master to the workman of that very same portion. It is, in fact, the very opposite of payment. It is a refusal to pay, for the not unnatural reason that an equivalent sum is due to the master from the workman. The requirements of the statutes have, therefore, not been observed in this case. The wages earned have not been paid.

The drawback, or stoppage, or deduction, or whatever it may be termed, is not one of those authorised by s. 23 or s. 24, yet it is sought to justify the course taken on this ground, that, inasmuch as in any action brought by the workman to recover his wages the master would be entitled to set-off the debt due to him in reduction of the workman's claim, it is absurd and anomalous to hold that the master cannot, before action brought, make a deduction in respect of the claim which, after action brought, he can successfully rely on by way of set-off. No doubt, at first sight, there would seem to be much force in this argument, but a little reflection will show that there may be good reason even for this anomaly. The whole principle on which this legislation is based is that the workman requires protection, that if not protected he may be over-reached; and it is quite consistent with that principle to hold that, in any such action brought by him to recover his wages, he may be liable to have the sum found on investigation before the legal tribunal to be due to him by his master diminished by the sum found by the same tribunal on the same occasion to be due by him to his master, and yet at the same time prohibit the master from, as it were, substituting himself for the legal tribunal, investigating his own claim against his workman in his own office, and deciding in his own favour. In this

particular case, no doubt the sum which it is sought to deduct is the amount of a judgment debt, and the danger referred to could not arise; but the argument as to the anomaly which I have mentioned dealt with the general scheme and machinery of the statute, and it is in respect of its general application that I consider it open to criticism.

The several authorities cited appear to me to support rather than refute the contention of the appellants. They may, I think, be roughly divided into two classes—namely, those cases like *Chawner* v. *Cummings* (2), in which charges were made by the employer for the use of the instruments by which the workman did his work and earned his wage; and those like *Hewlett* v. *Allen* (1), in which payments were in effect made by the master out of the wages by the authority of the workman for certain purposes not prohibited by the Truck Acts. In none of those cases was it contended that the master had the right to deduct which is relied on here. On the contrary, the effort of the master in each of these cases was to justify the drawback on grounds entirely different from, and inconsistent with, those relied on in this case. In the first class of cases it was successfully contended that the charges made by the master were not deductions properly so called from sums due for wages earned, but were sums to be taken into account in ascertaining the amount of wages actually earned; and in the second class of cases the so-called drawbacks or deductions were justified on the ground that these sums in truth and in fact represented portions of the wages earned, paid in current coin of the realm, at the request of the workman, to his duly appointed agent. All the reasoning on which the several tribunals in the cases cited based their respective decisions would have been unnecessary, and, indeed, beside the point, if the Truck Act had conferred on the master the right here contended for, namely, the right to deduct from the workman's wages whatever the master could set-off in a suit brought by the workman against him to recover those wages. It may well be that the appellants have no merits; that a decision in their favour will enable them to violate their duty with impunity, and evade the payment of their just and legally established liabilities; but if that be so, the fault must lie on that "tutelary shelter," to use the words of BOWEN, L.J., which the legislature has thrown around the workman, without, possibly, taking sufficient care so to mould and fashion it that it could not be open to abuse. I think that this appeal must be allowed with the declaration in the sense prayed for.

Appeal allowed.

Solicitors: *Smith, Rundell & Dods*, for *Walter Morgan, Bruce & Nicholas*, Pontypridd; *Bell, Brodrick & Gray*, for *C. & W. Kenshole*, Aberdare.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

DAWSON *v.* GREAT NORTHERN AND CITY RAIL. CO.

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Mathew, L.JJ.), November 16, December 9, 1904]

[Reported] [1905] 1 K.B. 260; 74 L.J.K.B. 190; 92 L.T. 137; 69 J.P. 29; 21 T.L.R. 114]

Compulsory Purchase—Creation by vendor after service of notice to treat of greater burden on undertakers—Sale of land subject to notice—Compensation—Assignment of right to compensation—Amount to which assignee entitled.

A landowner who has received a notice to treat is precluded from dealing with the property sought to be acquired in such a way as to subject the undertakers who have given the notice to a greater burden in respect of damage occasioned by their works, but so long as he does not infringe this rule he may sell and convey his land to a purchaser. He may also assign to the purchaser his right to be paid compensation under the notice to treat, which is not simply a right to claim damages for a wrongful act, but is a right to a payment under the terms of a statute and to be ascertained in the way prescribed by the legislature, which is to be regarded as the price payable for the exercise by the undertakers of their statutory powers, and as such is property. Compensation is to be assessed on the value of the land taken at the time of the service of the notice to treat, and the assignee cannot recover a greater amount of compensation than the assignor would have received.

Decision of WRIGHT, J., [1904] 1 K.B. 27, reversed.

Notes. Considered: *Turner* v. *Midland Rail. Co.* (1911), 104 L.T. 347. Referred to: *Dufries* v. *Milne*, [1913] 1 Ch. 98; *County Hotel and Wine Co.* v. *London and North Western Rail. Co.*, [1918] 2 K.B. 251; *Ellis* v. *Torrington*, [1918–19] All E.R.Rep. 1132; *Sir Grey Skipwith* v. *Homewoods Sawmills, Ltd.*, [1938] 2 All E.R. 733.

As to the effect of the service of a notice to treat, see 10 HALSBURY'S LAWS (3rd Edn.) 63–65, and as to compensation generally, see ibid. 91 et seq. For cases see 8 DIGEST (Repl.) 557–559; 11 DIGEST (Repl.) 124 et seq., 189 et seq.

Cases referred to:

(1) *Mercer* v. *Liverpool, St. Helens and South Lancashire Rail. Co.*, [1903] 1 K.B. 652; 72 L.J.K.B. 128; 88 L.T. 374; 67 J.P. 77; 51 W.R. 308; 19 T.L.R. 210, C.A.; affirmed [1904] A.C. 461; 73 L.J.K.B. 960; 91 L.T. 605; 68 J.P. 533; 53 W.R. 241; 20 T.L.R. 673, H.L.; 11 Digest (Repl.) 289, *1951*.

(2) *May* v. *Lane* (1894), 64 L.J.Q.B. 236; 71 L.T. 869; 43 W.R. 193; 39 Sol. Jo. 132; 14 R. 149, C.A.; 8 Digest (Repl.) 556, *97*.

(3) *Tolhurst* v. *Associated Portland Cement Manufacturers (1900), Ltd.*, *Tolhurst* v. *Associated Portland Cement Manufacturers (1900), Ltd. and Imperial Portland Cement Co.*, [1903] A.C. 414; 72 L.J.K.B. 834; 89 L.T. 196; 52 W.R. 143; 19 T.L.R. 677, H.L.; 12 Digest (Repl.) 660, *5123*.

(4) *Prosser* v. *Edmonds* (1835), 1 Y. & C. Ex. 481, 160 E.R. 196; 8 Digest (Repl.) 552, *71*.

(5) *Dickinson* v. *Burrell*, *Stourton* v. *Burrell* (1866), L.R. 1 Eq. 337; 35 Beav. 257; 35 L.J.Ch. 371; 13 L.T. 660; 12 Jur.N.S. 199; 14 W.R. 412; 55 E.R. 894; 40 Digest (Repl.) 574, *787*.

(6) *Williams* v. *Protheroe* (1829), 5 Bing. 309; 3 Y. & J. 129; 2 Moo. & P. 779; 130 E.R. 1080, Ex. Ch.; 1 Digest (Repl.) 93, *690*.

(7) *Hammersmith and City Rail. Co.* v. *Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 11 Digest (Repl.) 106, *29*.

Also referred to in argument:

Colonial Bank v. *Whinney* (1886), 11 App. Cas. 426; 56 L.J.Ch. 43; 55 L.T. 362; 34 W.R. 705; 2 T.L.R. 747; 3 Morr. 207, H.L.; 8 Digest (Repl.) 543, *1*.

Re Marylebone (Stingo Lane) Improvement Act, Ex parte Edwards (1871), L.R. 12 Eq. 389; 40 L.J.Ch. 697; 25 L.T. 149; 19 W.R. 1047; 11 Digest (Repl.) 289, *1950*.

Tyson v. *London Corpn.* (1871), L.R. 7 C.P. 18; 41 L.J.C.P. 6; 25 L.T. 640; 20 W.R. 112; 11 Digest (Repl.) 294, *2000.*

Wilkins v. *Birmingham Corpn.* (1883), 25 Ch.D. 78; 53 L.J.Ch. 93; 49 L.T. 468; 48 J.P. 231; 32 W.R. 118; 11 Digest (Repl.) 293, *1989.*

Torkington v. *Magee*, [1902] 2 K.B. 427; 71 L.J.K.B. 712; 87 L.T. 304; 18 T.L.R. 703, D.C.; reversed [1903] 1 K.B. 644; 72 L.J.K.B. 336; 88 L.T. 443; 19 T.L.R. 331, C.A.; 8 Digest (Repl.) 556, *98.*

Re Penny (1857), 7 E. & B. 660; 26 L.J.Q.B. 225; 3 Jur.N.S. 957; 5 W.R. 612; 119 E.R. 1390; sub nom. *R.* v. *South-Eastern Rail. Co.*, 29 L.T.O.S. 124; 11 Digest (Repl.) 156, *310.*

Caledonian Rail. Co. v. *Ogilvy* (1855), 25 L.T.O.S. 106; 2 Macq. 229, H.L.; 11 Digest (Repl.) 149, *276.*

London, Brighton and South Coast Rail. Co. v. *Truman* (1885), 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 34 W.R. 657, H.L.; 11 Digest (Repl.) 121, *134.*

Appeal by the plaintiff and cross-appeal by the defendants from a decision of WRIGHT, J., at the trial of the action without a jury: see [1904] 1 K.B. 27.

Sir Edward Clarke, K.C., Cripps, K.C., and *Harry Dobb* for the plaintiff.
McCall, K.C., Cave, K.C., and *C. C. Hutchinson* for the defendants.

Cur. adv. vult.

Dec. 9, 1904. The judgment of the court was read by

STIRLING, L.J.—This case comes before this court upon an appeal and cross-appeal from the judgment of WRIGHT, J., in an action brought to recover a sum of £4,150 awarded to the plaintiff upon an inquiry held before RIDLEY, J., and a jury under the provisions of the Regulation of Railways Act, 1868, s. 41, as to the compensation to be paid by the defendants to the plaintiff for subsoil taken and in respect of "structural damage" and "damage to trade stock" occasioned to the plaintiff in respect of certain houses and buildings in and near the City Road, London, as the result of subsidence caused by the construction by the defendants of a tunnel for an underground railway under the authority of an Act of Parliament. These houses and buildings comprised, first, certain freehold houses, Nos. 119 to 125 (odd numbers), City Road, and Nos. 1 to 5 (odd numbers), East Street, hereafter referred to as the freeholds; secondly, certain leasehold houses, Nos. 127 to 133 (odd numbers), City Road, and Nos. 7 to 13 (odd numbers), East Street, hereafter referred to as the Hewitt leaseholds; and, thirdly, certain other leasehold houses, Nos. 135 to 139 (odd numbers), East Road, hereafter referred to as the Berry and Vickery leaseholds. On these premises the plaintiff has for some time past carried on the business of a general draper. The defendants' works were executed between the beginning of April, 1901, and the end of October, 1901. The structural damage, which is admitted to have resulted from the execution of the defendants' works, occurred between the beginning of April, 1901, and Dec. 31, 1901. Upon the inquiry which I have mentioned the jury found that the value of the subsoil taken was £50, and that of "damage to trade stock" was £2,100, and of "structural damage" £2,000. It was agreed between the parties that one-third of each of these last-mentioned sums was to be treated as attributable to the freeholds, one-third to the Hewitt leaseholds, and one-third to the Berry and Vickery leaseholds. At the trial before WRIGHT, J., the plaintiff's claim to the £50 in respect of subsoil taken was abandoned, and the defendants contended that the plaintiff ought not to recover any part of the £2,100 or the £2,000. WRIGHT, J., held that the plaintiff was not entitled to recover any portion of these sums so far as they were attributable to the freeholds or the Berry and Vickery leaseholds, but was entitled to recover one-third of each of these sums in respect of the Hewitt leaseholds. The plaintiff has appealed from this judgment, and insists that the decision as to the freeholds ought to be reversed and the claim allowed to the full extent; and that the decision as to the Berry and Vickery leaseholds ought also to be reversed,

but only so far as relates to the claim for "structural damage," nothing being now claimed in respect of "damage to trade stock." There is a cross-appeal by the defendants, who insist that the decision as to the Hewitt leaseholds ought to be reversed.

Somewhat different considerations apply to these three different properties, and it is proposed to deal with them separately in the following order—first, the freeholds; secondly, the Berry and Vickery leaseholds; and, thirdly, the Hewitt leaseholds. First, as to the freeholds. These were in March, 1899, vested in one Arthur Maurice Blake in fee simple, subject to a lease vested in the plaintiff for a term of years to expire at Christmas, 1899. In Mar. 24, 1899, the defendants served upon Blake a notice to treat for an easement or right of using the subsoil or under-surface of the premises and as to the compensation to be made for damage (if any) sustained by the execution of the company's works. On July 3, 1899, they served on the plaintiff a like notice to treat, but without prejudice to the question whether the plaintiff had any interest in the subsoil. In October, 1899, Blake agreed to grant to the plaintiff a new lease for twenty-one years, from Christmas, 1899. On Feb. 6, 1900, an agreement was come to between Blake and the defendants whereby Blake agreed to grant and the defendants to purchase for £850—to include satisfaction and compensation for all damage (whether permanent, temporary, or recurring), loss, or inconvenience occasioned in respect of the lands and premises the subject of the agreement, except for structural damage through drainage or subsidence caused by the works of the company—full right and liberty to maintain and use a tunnel in and through the portion of the grantor's property thereby defined, including the freeholds. On Mar. 26, 1901, Blake entered into an agreement for the sale of the freeholds to the plaintiff, and by an indenture dated Aug. 17, 1901, the freeholds were in pursuance of this agreement conveyed by Blake to the plaintiff. The plaintiff's claim in respect of the freeholds is as owner thereof in fee. WRIGHT, J., held that, by virtue of the decisions collected in *Mercer* v. *Liverpool, St. Helens and South Lancashire Rail. Co.* (1), the plaintiff, whether the case depended on the notice to treat which was served on her in July, 1899, or her notice of claim under s. 68 of the Lands Clauses Consolidation Act, 1845, was not entitled to compensation for damage except in respect of her interest in the residue of the old lease, which still subsisted at the date of the notice to treat, and in respect of that interest she suffered no damage.

It was argued before us that the plaintiff claiming under s. 68 was in no way bound either by the notice to treat given to Blake or by that given to herself; and it was said she might have maintained a claim for compensation merely as occupier of the property. The actual claim of the plaintiff was made by her, however, not as occupier, but (as already remarked) as owner in fee, and that under a title derived from Blake subsequently to the notice to treat served on him. Although the property in respect of which the claim to compensation was made was not proposed to be taken by the company, but merely adjoining property of the same landowner, it was held by the Court of Appeal and the House of Lords, in *Mercer* v. *Liverpool, St. Helens and South Lancashire Rail. Co.* (1), that the proprietor could not disregard the obligations imposed upon him by the notice to treat in respect of land which might be injuriously affected any more than in respect of land required to be taken. LORD LINDLEY, in advising the House of Lords, says ([1904] A.C. at p. 465):

> "The broad principle appears to me to be that it is not competent for an owner of land who has received notice to treat to deal with any of his land either taken or injuriously affected by the company so as to increase the burdens of the company as regards the compensation to be made in respect of such land or any of it."

This principle, in our opinion, applies to the present case. The landowner, however, is only precluded from dealing with his property in such a way as to subject the company which has given the notice to a greater burden in respect of compensation for damage occasioned by their works. So long as he does not infringe this rule he may, as it seems to us, sell and convey his land to a purchaser; and the company cannot take advantage of such a conveyance to escape from any obligation on their part subsisting at the time of the conveyance in respect of the lands conveyed.

The conveyance to the plaintiff of Aug. 17, 1901, contains a recital of the agreement of Feb. 6, 1900, made between Blake and the defendants, and also a recital as follows:

> "And whereas no conveyance has yet been made to the Great Northern and City Railway Co. of the easement agreed to be granted by the hereinbefore recited agreement of the 6th day of February, 1900 . . . and it has been agreed that the said A. M. Blake should receive the said purchase money provided by the said agreement, but that the said E. W. Dawson should have the benefit of all other rights, benefits, and advantages in respect of the premises hereinafter described and expressed to be hereby conveyed conferred on the said A. M. Blake by the said agreement."

By the first witnessing part Blake conveys to the plaintiff the property in question, subject to the easement agreed to be granted to the defendants by the agreement of Feb. 6, 1900; and by a second witnessing part he purports as beneficial owner to assign to the plaintiff

> "all the rights, benefits, and advantages of him, the said A. M. Blake, conferred by or to be derived from the hereinbefore recited agreement of the 6th day of February, 1900, so far as the same relates to the hereditaments and premises hereinbefore described and intended to be hereby conveyed, or any part thereof,"

save and except the purchase money of £850 which Blake was to be entitled to receive. This clause is followed by an irrevocable appointment by Blake of the plaintiff as his attorney:

> "In his name or otherwise to commence and prosecute any action or other proceedings which may hereafter become necessary to enforce the said rights, benefits, or advantages, or any or either of them."

It appears to us that the intention of this deed was to place the plaintiff precisely in the same position as regards the defendants with respect to the lands conveyed as was previously occupied by Blake, and in particular to transfer to the plaintiff the compensation for structural damage to the conveyed property through drainage or subsidence caused by the works of the defendants excepted from the compensation which, by the agreement of Feb. 6, 1900, was to be included in the sum of £850 received by Blake. It was said that this compensation was "a right, benefit, or advantage conferred by or to be derived from" the notice to treat and not from the agreement in question. It may be that the expressions "conferred by" and "to be derived from" are not very happily chosen; but if they do not include this compensation they are entirely meaningless. The words are wide enough to cover a right, benefit, or advantage preserved to or kept alive in favour of Blake by the agreement of Feb. 6, 1900, and, in our opinion, they ought to be construed as including this right to compensation.

It was, however, contended that this assignment was invalid, and much reliance was placed on the decision of this court in *May* v. *Lane* (2), and particularly on a passage in the judgment of RIGBY, L.J., who, in discussing the meaning of the Supreme Court of Judicature Act, 1873, s. 25 (6), says (64 L.J.Q.B. at p. 238):

> "A legal chose in action is something which is not in possession, but which must be sued for in order to recover possession of it. It does not include a right of action such as, for instance, a right to recover damages for breach of a contract or a legal right to recover damages arising out of an assault; for if the argument on behalf of the plaintiffs be correct such a right would be assignable, and this subsection of the Judicature Act, would materially affect the law of champerty and maintenance."

Although, as is laid down by LORD MACNAGHTEN in advising the House of Lords in *Tolhurst* v. *Associated Portland Cement Manufacturers (1900), Ltd.* (3) ([1903] A.C. at p. 420):

> "It is well settled that as a general rule the benefit of a contract is assignable in equity and may be enforced by the assignee,"

yet a court of equity is as much bound as a court of common law by the law relating to champerty and maintenance, and if an assignment of a chose in action is obnoxious to

that law it is bad in equity no less than at law. An assignment of a mere right of litigation is bad (*Prosser* v. *Edmonds* (4)); but an assignment of property is valid, even although that property may be incapable of being recovered without litigation: see *Dickinson* v. *Burrell* (5). It was said in argument that the right which Blake purported to assign was simply a claim to damages for a wrongful act, and, therefore, incapable of assignment. With this contention we do not agree. It was, in our opinion, a right, arising directly under the notice to treat served by the defendants, to compensation for damage which might be done in the lawful exercise of powers conferred on them by the legislature. The compensation was a sum to be ascertained in the way prescribed by the legislature, and payment thereof by the defendants was imposed on them as one of the terms of the exercise of those powers. The payment may be regarded as the price payable for the exercise of the powers, and, in our judgment, was property. Even if the assignment be regarded apart from the conveyance of the lands and buildings comprised in the deed of Aug. 17, 1901, it appears to us that it is good; but we think that great weight must be given to the circumstance that this assignment is incidental and subsidiary to that conveyance, and is part of a bona fide transaction the object of which was to transfer to the plaintiff the property of Blake with all the incidents which attached to it in his hands. Such a transaction seems to be very far removed from being a transfer of a mere right of litigation. This conclusion appears to be in accordance with the decision in *Williams* v. *Protheroe* (6), where it was held in the Exchequer Chamber that there was no champerty in an agreement containing provisions for the purpose of enabling the bona fide purchaser of an estate to recover for rent due or injuries done to it previously to the purchase.

It was next objected that, even if the assignment were valid, the plaintiff had throughout proceeded in her own name and not in that of Blake. So far as the present action is concerned this is pure matter of form, for the conveyance confers on the plaintiff an irrevocable power to sue in the name of Blake, and any defect in the constitution of this action might be cured by adding him as a co-plaintiff. Further, the power is such as, in our opinion, to entitle the plaintiff to give receipts in the name of Blake for anything that may be recovered in the action, and in this way the defendants would be protected against any claim by him hereafter. But, as to the proceedings before RIDLEY, J., the case is different, and it was strongly contended that the plaintiff, by carrying them on in her own name, has obtained an advantage to which she is not entitled, and has been able to impose on the defendants a burden greater than they would have borne if the proceedings had been conducted in the name of Blake. If this contention be well founded a result would be arrived at entirely at variance with the principle established by the decision in *Mercer* v. *Liverpool, St. Helens and South Lancashire Rail. Co.* (1). It is sought to be made out in this way. It is said that the compensation ought to be assessed in the same way as if Blake, on the expiry of the lease under which the property was held at the date of the notice to treat, had entered into possession, and remained in such possession down to the time when the compensation is assessed. The amount of compensation awarded in respect of this portion of the property consists of two sums—namely, £666 13s. 4d., in respect of what is termed "structural damage," and £700 in respect of "damage to trade stock." The former sum we understand to be the amount which would have to be spent on the property in order to reinstate it in the condition in which it was before the defendants' works were executed; and we are unable to see that there ought to be any difference in this amount whether the property was in the occupation of Blake, or of the plaintiff, or whether the proceedings were taken in Blake's name or the plaintiff's. Further, it appears to us that every word of RIDLEY, J.'s summing up, so far as it deals with this part of the case, would have been just as applicable if Blake had been the plaintiff before him instead of Mrs. Dawson. We think, therefore, that so far as this item is concerned the defendants have not had any greater burden imposed on them than they would have had to bear if the proceedings had actually been taken in Blake's name.

The second sum was awarded in respect of "damage to trade stock," and is the sum which it was estimated would be sufficient to recoup to the plaintiff loss occasioned to her by disturbance of her drapery business carried on upon the property, and by damage

caused, or likely to be caused, to stock during the period occupied in the reinstatement of the buildings. The amount has been arrived at on the assumption that the plaintiff was the person in occupation of the property, and it is contended that it ought to have been ascertained on the basis that Blake was the occupier. In our opinion, the plaintiff cannot, consistently with the principle of *Mercer* v. *Liverpool, St. Helens and South Lancashire Railway Co.* (1), recover a greater amount of compensation than Blake could have got. At the time when the notice to treat was given Blake was reversioner in fee expectant on the determination of the plaintiff's lease at Christmas, 1899. If the inquiry as to compensation had taken place immediately after the service of the notice to treat, and before the execution of the works, Blake would have been entitled to compensation (i) for probable structural damage, and (ii) for probable loss arising from his being unable to let the property on advantageous terms while the works remained unexecuted and the actual structural damage remained unascertained. But this course was not adopted. Blake and the defendants came to terms as to everything except the compensation for structural damage through drainage or subsidence caused by the defendants' works. The reason for this exception was obviously that both parties considered it for their advantage to postpone the inquiry as to compensation until the works were completed and their effect on the property ascertained, and thus avoid a difficult and highly speculative inquiry. It was implied in this agreement between them that upon this inquiry regard should be had to the facts which actually occurred. This being so, we have to consider the position of Blake when the plaintiff's lease expired. He did not proceed to enter into possession himself or to carry on a drapery business there, but granted a new lease to the plaintiff. There is nothing to show that the terms of the new lease were disadvantageous to him, or that he suffered any loss by his being unable to obtain better terms; and, even if there were, the compensation actually awarded by the jury has not been ascertained on this basis, but with reference to the loss occasioned to the plaintiff by disturbance of her business. It seems to us that, in these circumstances, Blake could not recover any damage under the head of "Damage to trade stock," and, for the reasons already given, neither can the plaintiff. For these reasons we think that the appeal ought to be allowed so far as relates to the freeholds to the extent of £666 13s. 4d. awarded in respect of structural damage. We do not consider that on this part of the case we are differing from WRIGHT, J., on any question of law, for, as we read his judgment, he would have allowed this claim if he had understood (as he apparently did not) that the conveyance of Aug. 17, 1901, had contained an assignment to the plaintiff of Blake's right to compensation.

Secondly, as to the Berry and Vickery leaseholds. These were acquired by the plaintiff by purchasing from Berry and Vickery terms of eighty years, commencing on Mar. 21, 1879, and consequently having in 1901 about forty-eight years to run. In each case the assignment of the term was accompanied by a document of even date, expressed to be made in pursuance of the contract for sale, whereby the assignor of the leasehold interest assigned to the plaintiff all rights of compensation in respect of structural damage caused by reason of the execution of the defendants' works. No notice to treat was served on anyone in relation to the premises so assigned, and the plaintiff's claim was founded on the assignments to her by Berry and Vickery of their rights to compensation. Notices of these assignments were served on the defendants by the plaintiff. WRIGHT, J., held that, inasmuch as the claim of the plaintiff was founded on s. 68 of the Lands Clauses Consolidation Act, 1845, and not on any notice to treat, it was in the nature of a claim for damages for a wrong, and not a legal chose in action within the meaning of s. 25 of the Supreme Court of Judicature Act, 1873. Upon this appeal the plaintiff contends that this decision ought to be reversed, so far as relates to the sum of £666 13s. 4d. awarded by the jury as the compensation for structural damage, no claim now being put forward by her to the sum awarded in respect of "damage to trade stock." With the greatest respect we are unable to adopt the view taken by WRIGHT, J., of this part of the case. In the first place, we think that the claim of the plaintiff is not in the nature of damages for a wrong. No action could be brought against the defendants in respect of any act done by them in exercise of their statutory powers: see *Hammersmith and City Railway Co.* v. *Brand* (7). For the reasons already stated, we think that the claim was in sub-

stance for the price payable by the defendants for the exercise of the legal right conferred on them by statute. To this price Berry and Vickery were legally entitled, and, in our judgment, no objection can be taken to the assignments of their rights as on the ground of maintenance or champerty for the reasons already stated with reference to the assignment by Blake of a similar right. Therefore these assignments would have been valid in equity if made prior to the Supreme Court of Judicature Act, 1873; and the compensation assigned is, in our opinion, a legal chose in action within the meaning of s. 25 (6), of that Act. We think, therefore, that, as to this part of the claim, the appeal ought to be allowed.

Thirdly, as to the Hewitt leaseholds. [HIS LORDSHIP dealt with the facts and the proceedings below and said that, as the point on which the defendants relied had not been taken in the court below it was not now open to the defendants].

Appeal allowed; cross-appeal dismissed.

Solicitors: *White & De Buriatte*; *Le Brasseur & Oakley.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

PUBLIC WORKS COMMISSIONER *v.* HILLS

[PRIVY COUNCIL (Lord Loreburn, L.C., Lord Davey, Lord Dunedin, Lord Atkinson and Sir Arthur Wilson), April 9, 10, May 24, 1906]

[Reported [1906] A.C. 368; 75 L.J.P.C. 69; 94 L.T. 833]

Contract—Breach—Damages—Liquidated damages or penalty—Construction of railway line—Non-completion of line—Forfeiture by contractor of percentage of sums retained out of moneys paid as guarantee fund and security moneys "as liquidated damages . . . for non-completion of . . . line"—Contractor to be paid "actual cost"—Interest.

The criterion whether a sum stipulated for on the breach of a contract is "liquidated damages" with which the court will not interfere, or a "penalty" which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation.

Under contracts for the construction of railways to be handed over to a colonial government a percentage of the sums payable for the construction of each railway was to be retained by the government to form a guarantee fund to be applied primarily to making good any defects of construction. It was provided that this money, and also certain security money lodged by the contractor, was to be forfeited by the contractor to the government "as and for liquidated damages sustained by the said government for the non-completion of the said line," and that the government would then take possession of the incomplete line and pay to the contractor the amount found due in respect of the "actual cost" of the incomplete line. One line was not completed within the specified period.

Held: (i) the government were not entitled to the sums forfeited as liquidated damages because they were not definite, but were liable to great fluctuation in amount dependent on events not connected with the contract; but the government was entitled to obtain judgment for such damages as it might actually have suffered through the contractor's breach of contract; (ii) the contractor was not entitled to interest on the sum paid for the "actual cost," since those words were limited to the amount of money expended on the work.

Notes. Considered: *Widnes Foundry (1925), Ltd.* v. *Cellulose Acetate Silk Co.* (1931). 47 T.L.R. 373; *Pearl Assurance Co.* v. *South Africa Union Government*, [1934] A.C. 570; *Stockloser* v. *Johnson*, [1954] 1 All E.R. 630. Referred to: *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, [1914–15] All E.R.Rep. 739.

As to liquidated damages or penalty, see 11 HALSBURY'S LAWS (3rd Edn.) 298–302; and for cases see 17 DIGEST (Repl.) 148 et seq.

Case referred to:

(1) *Clydebank Engineering and Shipbuilding Co.* v. *Castaneda*, ante p. 251; [1905] A.C. 6; 74 L.J.P.C. 1; 91 L.T. 666; 21 T.L.R. 58, H.L.; 17 Digest (Repl.) 149, *489*.

Also referred to in argument:

Wallis v. *Smith* (1882), 21 Ch.D. 243; 52 L.J.Ch. 145; 47 L.T. 389; 31 W.R. 214, C.A.; 17 Digest (Repl.) 77, *14*.

Law v. *Redditch Local Board*, [1892] 1 Q.B. 127; 61 L.J.Q.B. 172; 66 L.T. 76; 56 J.P. 292; 8 T.L.R. 90; 36 Sol. Jo. 90, C.A.; 17 Digest (Repl.) 151, *496*.

Willson v. *Love*, [1896] 1 Q.B. 626; 65 L.J.Q.B. 474; 74 L.T. 580; 44 W.R. 450, C.A.; 17 Digest (Repl.) 148, *488*.

Peach & Co. v. *Johannesburg Jewish Congregation* (1894), 1 O.R. 345; 7 Digest (Repl.) 410, **686*.

Appeal and cross-appeal from a judgment of the Supreme Court of the Cape Colony (DE VILLIERS, C.J., and BUCHANAN, J.), 20 Sup. Ct. Rep. 147 and 21 Sup. Ct. Rep. 59.

The facts are set out in the judgment of the Board.

Neville, K.C., and Mackarness for the appellant the Public Works Commissioner, respondent in the cross-appeal.

Upjohn, K.C., C. E. Jenkins, K.C., and *W. H. Cozens-Hardy* for the respondent Hills, the appellant in the cross-appeal.

May 24, 1906. **LORD DUNEDIN.**—The present appeals come out of three contracts which were made between the government of the Cape of Good Hope and the Thames Ironworks and Shipbuilding Co., Ltd. Arnold Frank Hills, the respondent in the principal appeal and appellant in the cross-appeal, has had assigned to him the rights of the company. These three contracts were all made on the same day, July 4, 1900, and were subsequently confirmed by Act of Parliament of the Cape of Good Hope, where they appeared as Scheds. G, H, and I, of Act 19 of 1900. They had to do with the construction of three railways—viz., No. 1, Oudstshoorn-Klipplaat; No. 2, Somerset East-King William's Town; and No. 3, Mossel Bay-Oudsthoorn. The first two were contracts for the construction of the lines by the company and the handing over of them to the government. They were constructed and handed over, and no question, in one sense, is raised on them. But moneys payable under them are partly the subject of this litigation for the following reason. In each of them there was a clause providing that ten per cent. should be retained by the government from the payments falling due as the lines were constructed, and each of them also contained clauses dealing with the ultimate fate of the ten per cent. so retained. By these clauses, the ten per cent. retained from each instalment was to form a guarantee fund, which fund was to be primarily applied to making good any defects of construction, and then

> "the guarantee fund or the balance thereof shall be dealt with in terms of the agreement entered into for the construction of the Mossel Bay-Oudtshoorn line"

Under these clauses sums amounting in cumulo to £61,233 16s. 2d. have been retained. The third contract, which related to the Mossel Bay line, was rather different. This line was to remain the property of the contractors, but, in respect of their engaging to construct the line, the government was to pay them a subsidy at the rate of £2,000 per mile of completed railway, not to exceed £150,000 in all. Provision was made for the payment of this subsidy as the work went on, but subject to the retention of ten per cent. of it by the government.

A sum of £50,000 had been lodged as security by the company in the hands of the Cape Agent-General, and s. 15 of Sched. I provides that this sum and the sums retained by

way of ten per cent. of the instalments out of the payments on lines (1) and (2) should be handed over to the company as follows—viz., one-third when the Mossel Bay line had been completed to a certain geographical point, one-third when to a certain further point, and one-third on final completion. Then comes s. 17 on which the controversies in these appeals directly turn. It is in the following terms:

> "The concessionary undertakes to push forward the construction of the line with all possible speed and to complete the same within two years of the date of the approval of this agreement by Parliament. In the event of the non-completion of the line within the time hereinbefore mentioned, unless the delay is proved to the satisfaction of the Commissioner of Public Works to have been caused by the act of God, war, insurrection, rebellion, strikes, lockouts, or combination of workmen, or other extraordinary or unforeseen circumstances beyond the control of the concessionary, or from or on the part of the railway department, the security referred to in this agreement to wit: The ten per cent. (10%) retention money under this agreement, together with the ten per cent. retention money under the agreements for the construction of the Oudtshoorn-Klipplaat and the Somerset East-King William's Town lines, dated July 4, 1900, and the security lodged with the Cape Agent-General shall be forfeited to the colonial government as and for liquidated damages sustained by the said government for the noncompletion of the said line, and thereupon the agreement between the government and the said concessionary shall cease and determine, and it shall be lawful for the government to enter upon and take possession of such incomplete line of railway as has been constructed by the said concessionary, and the government shall thereafter as soon as the amount of the actual cost of such incomplete line shall have been ascertained pay to the said concessionary the amount so ascertained, less such amount as shall have been paid on account of subsidy and less the amount of retention money and security hereinbefore referred to."

The company failed to complete the line within the two years, or within a period to which the two years had been by mutual consent extended. They did not even advance with it so far as to be able to claim any of the partial payments under s. 15. Accordingly, on June 15, 1903, the government applied to the court to get a declaration of the failure of the company to complete the line, and for leave to enter on and take possession of the line in terms of s. 17. The court gave judgment accordingly. Against that judgment an appeal was brought, but subsequently abandoned, and the judgment now stands as final between the parties.

The company, who by this time were represented by the present appellant Hills, then brought the present action against the government, asking for payment of the value of their line, and the handing over of the sums retained and of the sum of £50,000 abovementioned, as also of a sum of £4,913 2s. 5d., being ten per cent. of the instalments of the subsidy retained on railway No. 3. The court gave judgment in favour of the respondent for a sum of £73,500 12s. 7d., being the actual cost of the works as found by referees to whom it had remitted the question (but with no allowance for interest on capital), under deduction of the said sum of £4,913 2s. 5d., and also gave judgment for the respondent for the sums of £66,146 18s. 7d. (made up of the said sums of £4,913 2s. 5d. and £61,233 16s. 2d.) and £50,000. The parties in the principal appeal do not raise any question as to the sum of £73,500 12s. 7d. but in the cross-appeal the appellant Hills prays for a further addition in name of interest on capital. On this point their Lordships entirely agree with the remarks of the learned Chief Justice. To add interest would seem to them to disregard the plain meaning of the word "actual" as applied to costs. The referees have here, as practical men, found the cost of works—in other words, they have said that so much money was expended in order to make them. To add something more in the name of interest would be to add something which never could be actual cost, for it would either be a sum calculated on an assumed general rate of interest, or it would be a sum which varied according to the financial position of the particular contractor. That "actual cost" in this contract is used in no such fanciful sense is clearly shown by the use of the words in s. 7 of Sched. I, where provision is made for its ascertainment as

regards each instalment by the certificate of an engineer. This disposes of the cross-appeal.

In the principal appeal, the government has complained of the judgment in so far as it gives the respondent Hills the sums of £66,146 18s. 7d. and £50,000, and claims these in terms of s. 17 as being theirs in name of liquidated damages for non-completion of the line within the specified time. Their Lordships have no doubt that the case of the non-completion of a railway would be a natural and proper case in which to make such a stipulation. But the question comes up in each particular case whether such a stipulation has been made, and it is well settled law that the mere form of expression "penalty" or "liquidated damages" does not conclude the matter. Indeed, the form of expression here "forfeited as and for liquidated damages," if literally taken, may be said to be self-contradictory, the word "forfeited" being particularly appropriate to penalty and not to liquidated damages. The House of Lords had occasion to review the law in the matter in *Clydebank Engineering and Shipbuilding Co.* v. *Castaneda* (1). It is, perhaps, worthy of remark, in view of certain observations of the learned Chief Justice in the court below, that that was a Scottish case—that is to say, decided according to the rules of a system of law where contract law is based directly on the civil law, and where no complications in the matter of pleading had ever been introduced by the separation of common law and equity. The general principle to be deduced from that judgment seems to be this, that the criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. The indicia of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made.

Applying this principle to the present case, their Lordships are unable to come to the conclusion that the sum here can be taken as a genuine pre-estimate of loss. The determining factor is that the sum is not a definite sum, but is liable to great fluctuation in amount dependent on events not connected with the fulfilment of this contract. It is obvious that the amount of retained money under contracts 1 and 2 depended entirely on the progress of those contracts, and that, further, as those moneys are primarily liable to make good deficiencies in these contract works, the eventual sum available to be dealt with under the provisions of s. 17 of this contract could not in any way be estimated as a fixed sum. Their Lordships, therefore, hold that the sums are not liquidated damages under s. 17.

So far as a claim is made under s. 16 for £10,000, there seems no ground for argument that the sum is liquidated damages, as the expression used points to forfeiture pure and simple. Their Lordships are not, however, satisfied that the government has been given a proper opportunity of proving such damages, not exceeding the sums in the penalties, as they can make out. In the court below, the whole contention seems to have turned on the question of liquidated damages. The judgment of the learned Chief Justice which decides—as their Lordships think, rightly—that the damages are not liquidated, does not directly deal with the question of damages, unless certain remarks are held to lay down the proposition that in such a contract, the government, as a government, could suffer no damage. Their Lordships do not take that view. That the government had a true and valuable interest in getting a line constructed, even although when constructed it was not to be their property, seems to be sufficiently established by the fact that they were content to pay a subsidy of £2,000 a mile. They have not got that line completed, but, on the contrary, have got on their hands an incomplete line, incapable of yielding profit in its present state, for which they have been obliged to pay a considerable sum of money. It seems to their Lordships that there are obvious elements of damage in such a position, and that the government should be given the opportunity of proving such damage and evaluating it in money.

Their Lordships will, therefore, humbly advise His Majesty to declare that before the respondent in the principal appeal obtains judgment for the sums of £66,146 18s. 7d. and £50,000 awarded to him by the judgment of the Supreme Court dated Feb. 29, 1904, the principal appellant is entitled to prove such damage as he may have actually suffered through the respondent's breach of contract, and to obtain judgment in reconvention for such amount to be deducted from the sums awarded to him by the judgment of the Supreme Court, and that, subject to such declaration, the appellant's appeal ought to be dismissed, and, further, that the respondent's cross-appeal ought to be dismissed. The parties will pay their own costs of the appeal and cross-appeal respectively.

Appeal dismissed; cross-appeal dismissed.

Solicitors: *Wilson, Bristows & Carpmael*; *Cox & Lafone.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

R. *v.* DE MARNY

[Court for Consideration of Crown Cases Reserved (Lord Alverstone, C.J., Grantham, Bigham, Lawrance and Kennedy, JJ.), December 19, 1906]

[Reported [1907] 1 K.B. 388; 76 L.J.K.B. 210; 96 L.T. 159; 71 J.P. 14; 23 T.L.R. 221; 51 Sol. Jo. 146; 21 Cox, C.C. 371]

Criminal Law—Obscene publications—Procuring sale—Advertisements in newspaper—Publications sent through post—Liability of editor.

The defendant, who was the editor of a newspaper, inserted advertisements in the newspaper relating, as he knew, to the sale of obscene books, catalogues, and photographs at addresses in England and abroad. A police officer wrote to the addresses given in the advertisements and received in return from the advertisers obscene books, catalogues and photographs.

Held: the defendant had been rightly convicted of causing and procuring obscene books, papers and photographs to be sold and published, and to be sent by post contrary to s. 4 of the Post Office (Protection) Act, 1884.

Notes. The Post Office (Protection) Act, 1884, has been repealed. For s. 4 of that Act see now the Post Office Act, 1953, s. 11, as amended by the Post Office Act, 1961, s. 28 and Schedule.

Referred to: *Cook* v. *Stockwell* (1915), 84 L.J.K.B. 2187; *H. Gould & Co., Ltd.* v. *Houghton*, [1920] All E.R.Rep. 679.

As to aiding and abetting in misdemeanours, see 10 Halsbury's Laws (3rd Edn.) 306; and for cases see 14 Digest (Repl.) 99 et seq. For the Post Office Act, 1953, s. 11, as amended, see 33 Halsbury's Statutes (2nd Edn.) 488 and 41 Halsbury's Statutes (2nd Edn.) 829.

Cases referred to:

(1) *Du Cros* v. *Lambourne*, [1907] 1 K.B. 40; 76 L.J.K.B. 50; 95 L.T. 782; 70 J.P. 525; 23 T.L.R. 3; 21 Cox, C.C. 311; 5 L.G.R. 120, D.C.; 14 Digest (Repl.) 99, *633.*

(2) *R.* v. *Oliphant*, [1905] 2 K.B. 67; 74 L.J.K.B. 591; 94 L.T. 824; 69 J.P. 230; 53 W.R. 556; 21 T.L.R. 416; 49 Sol. Jo. 460; 21 Cox, C.C. 192, C.C.R.; 14 Digest (Repl.) 148, *1115.*

(3) *R.* v. *Burdett* (1820), 4 B. & Ald. 95; 1 State Tr.N.S. 1; 106 E.R. 873; 14 Digest (Repl.) 156, *1188.*

(4) *R.* v. *Cooper* (1833), 5 C. & P. 535; 1 Nev. & M.M.C. 371; 14 Digest (Repl.) 108, *724.*

Case Stated by the Common Serjeant for the city of London.

The defendant was tried before the Common Serjeant at the Central Criminal Court on an indictment charging him in several counts with selling and publishing, and causing and procuring to be sold and published, divers obscene books, papers and photographs. The indictment also contained a series of counts charging him with sending, and causing and procuring to be sent, by post postal packets containing obscene books, papers and photographs, contrary to the Post Office (Protection) Act, 1884, s. 4. It was proved that the defendant was the editor of a newspaper called "Judy," and that he inserted and published in that newspaper advertisements of several persons in England and abroad, being the persons mentioned in the indictment, offering for sale books, catalogues and photographs. The chief inspector of police wrote to the addresses given in the advertisements and received in return from the persons or firms mentioned in the indictment postal packets containing books, catalogues and photographs of the most obscene character. The defendant had been warned several times by the police authorities that the books, photographs and other things advertised in his paper in the same terms and by the same persons and firms were of an obscene character, and that one of the persons so advertising in his newspaper had been convicted for selling and publishing obscene libels.

Counsel for the defendant submitted that there was no evidence to go to the jury that the defendant took part in or aided and abetted the selling and publishing of obscene libels as charged in the indictment. The Common Serjeant held that there was evidence, and directed the jury that, if they were satisfied that the books and photographs sent to the police inspector in pursuance of the advertisements were obscene, and that the defendant knew at the time he inserted and published the advertisements that they were advertisements for the sale of obscene literature and photographs, and that, by the publication of these advertisements he brought about the sale and transmission to the inspector of the books and photographs above mentioned, they ought to convict the defendant, although he did not know the actual contents of the books or the details of the photographs sent, and that, in judging of the defendant's knowledge, they might consider not only the evidence of the express warnings given to the defendant and the wording of each advertisement taken alone, but also the other advertisements appearing in the same issue of the newpaper. The jury found the defendant guilty on all counts.

Avory, K.C., and *J. P. Grain* for the defendant.
R. D. Muir (*Kershaw* with him) for the Crown.

LORD ALVERSTONE, C.J.—The very able arguments which have been addressed to us on both sides have enabled me to come to a clear conclusion, without any doubt, that this conviction must be affirmed. The point which arose in *Du Cros* v. *Lambourne* (1) does not arise here, for this is a case of an indictable misdemeanour. The defendant has inserted in his paper advertisements telling people where certain publications can be obtained, and the evidence was that he knew that these publications were obscene. The Common Serjeant left it to the jury in this way: [His Lordship read the direction to the jury, and continued:] The learned Common Serjeant has stated the law as favourably to the defendant as it could be stated. He told the jury that, in judging of the defendant's knowledge, they might consider not only the evidence of the express warnings given to the defendant and the wording of these advertisements, but also the other advertisements appearing in the same issue of the defendant's paper. The offence for which the defendant was indicted amounts, in common language, to bringing about the publication in England of obscene books in English, and of the sending through England of matter prohibited by the Post Office (Protection) Act, 1884. It would be lamentable if the law was not strong enough to deal with a man who has committed these acts. Here was a publication to people who might never have known of these things, or where they might be obtained. And we have it proved that the defendant knew of the character of these matters by the repeated warnings that had been given to him. In my opinion, the

direction of the Common Serjeant was right. *R.* v. *Oliphant* (2), *R.* v. *Burdett* (3), and *R.* v. *Cooper* (4) are authorities that persons who aid and abet persons abroad in the commission of offences in this country are liable as principals here.

GRANTHAM, BIGHAM, LAWRANCE and **KENNEDY, JJ.,** concurred.

Conviction affirmed

Solicitors: *Edward M. Lazarus*; *Wontner & Sons.*

[*Reported by* A. A. Bethune, Esq., *Barrister-at-Law.*]

CITIZENS' LIFE ASSURANCE CO. *v.* BROWN

[Privy Council (Lord Macnaghten, Lord Davey, Lord Lindley and Sir Arthur Wilson), April 20, May 6, 1904]

[Reported [1904] A.C. 423; 73 L.J.P.C. 102; 90 L.T. 739; 53 W.R. 176; 20 T.L.R. 497]

Libel—Corporation—Company—Libel by officer—Publication in course of employment—Liability of company.

A corporation is liable, on the ordinary principles of agency, for the publication of a libel by one of its officers in the course of his employment although he had no authority, express or implied, to write the libel.

Notes. Considered: *Triplex Safety Glass Co.* v. *Lancegaye Safety Glass (1934), Ltd.*, [1939] 2 All E.R. 613. Referred to: *Mousell Brothers* v. *London and North Western Rail. Co.*, [1916–17] All E.R.Rep. 1101; *Pratt* v. *British Medical Association*, [1918–19] All E.R.Rep. 104.

As to the liability in tort of a corporation, see 9 Halsbury's Laws (3rd Edn.) 87–90; and for cases see 13 Digest (Repl.) 317 et seq.

Cases referred to:

(1) *Abrath* v. *North Eastern Rail. Co.* (1886), 11 App. Cas. 247; 55 L.J.Q.B. 457; 55 L.T. 63; 50 J.P. 659; 2 T.L.R. 416, H.L.; 13 Digest (Repl.) 322, *1292.*

(2) *Western Bank of Scotland* v. *Addie, Addie* v. *Western Bank of Scotland* (1867), L.R. 1 Sc. & Div. 145, H.L.; 9 Digest (Repl.) 119, *617.*

(3) *Mackay* v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; 43 L.J.P.C. 31; 30 L.T. 180; 38 J.P. 296; 22 W.R. 473, P.C.; 1 Digest (Repl.) 682, *2428.*

(4) *Swire* v. *Francis* (1877), 3 App. Cas. 106; 47 L.J.P.C. 18; 37 L.T. 554, P.C.; 1 Digest (Repl.) 692, *2474.*

(5) *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 1 Digest (Repl.) 681, *2425.*

(6) *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317; 42 L.T. 194; 28 W.R. 677, H.L.; 13 Digest (Repl.) 324, *1314.*

Also referred to in argument:

Nevill v. *Fine Art and General Insurance Co.*, [1895] 2 Q.B. 156; 64 L.J.Q.B. 681; 72 L.T. 525; 59 J.P. 371; 11 T.L.R. 332; 39 Sol. Jo. 316; 14 R. 587; affirmed, [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 13 T.L.R. 97, H.L.; 13 Digest (Repl.) 324, *1309.*

Edwards v. *Midland Rail. Co.* (1880), 6 Q.B.D. 287; 50 L.J.Q.B. 281; 43 L.T. 694; 45 J.P. 374; 29 W.R. 609; 13 Digest (Repl.) 317, *1261.*

Cornford v. *Carlton Bank*, [1899] 1 Q.B. 392; 68 L.J.Q.B. 196; 80 L.T. 121; 15 T.L.R. 156; affirmed, [1900] 1 Q.B. 22; 68 L.J.Q.B. 1020; 81 L.T. 415, C.A.; 13 Digest (Repl.) 324, *1311.*

Appeal from a decision of the Supreme Court of New South Wales (STEPHEN, Acting C.J., G. B. SIMPSON and PRING, JJ.), refusing a rule nisi to set aside a verdict found for the respondent, and to enter a nonsuit, or a verdict for the appellant company, or for a new trial.

The action was brought by the respondent against the appellant company to recover damages for a libel published by one Fitzpatrick, an agent of the appellant company, under circumstances which appear in the judgment of the Board. The case was first tried in April, 1901, before OWEN, J., and a jury, when the jury returned a verdict for the respondent with damages. This verdict was set aside and the case was tried again in October, 1901, before COHEN, J., and a jury, when the respondent again obtained a verdict with damages. This verdict was also set aside, and, in October, 1902, the case was tried for the third time before SIMPSON, J., and a jury, when the respondent again obtained a verdict with £650 damages.

Asquith, K.C., and *F. Russell* for the appellant company.
H. Drysdale Woodcock for the respondent.

LORD LINDLEY.—The question raised by this appeal is whether a limited company is responsible for a libel published by one of its officers. The action has been tried three times. The respondent obtained a verdict and judgment every time, with damages which have been every time increased. Counsel for the appellant company feel that it would be useless to send the case back for another trial, and they therefore ask that the last verdict and judgment should be set aside and judgment entered for the company.

The facts are shortly as follows. The appellants are an assurance company incorporated with limited liability and carrying on business in New South Wales. From January, 1900, until June, 1900, the respondent (the plaintiff in the action) was in the service of the appellant company as an insurance agent at Tamworth. The respondent was introduced to the appellant company by Fitzpatrick, who was employed by the appellant company as a superintendent of agencies under the terms of an agreement dated June 12, 1899. His duties will be referred to presently. Shortly after leaving the employment of the appellant company, namely, in the month of July, the respondent entered the service of a rival company called the Standard Life Association, and, while in the service of such company, he visited divers of the policy-holders in the appellant company and endeavoured to induce such policy-holders to leave the appellant company and to insure in the Standard Life Association, and, for the purpose of bringing about such a result, made statements derogatory to the appellant company. Fitzpatrick learned that such statements had been and were being made, and he published the libel complained of. It was a circular letter sent to several persons insured in the appellant company in answer to inquiries made by them. It was plainly defamatory. Some statements contained in it were not true, and Fitzpatrick knew that they were not true. There was evidence of express malice on the part of Fitzpatrick. There is no note of the learned judge's summing-up, but the jury found a verdict for the respondent, gave him £650 damages, and found that

> "Fitzpatrick was acting in publishing the libel within the scope of his employment and in the course of his employment."

Judgment was accordingly entered for the respondent for this sum and costs; and the Supreme Court refused to set aside the verdict and enter judgment for the appellant company and refused to grant a new trial. Hence the present appeal.

Counsel for the appellant company contended, first, that the verdict was wrong in finding that Fitzpatrick acted in publishing the libel within the scope and in the course of his employment; and, secondly, that even if he did, yet the malice with which he wrote it cannot be imputed to the appellant company. In support of this proposition, reliance was placed on the well-known judgment of LORD BRAMWELL in *Abrath* v. *North Eastern Rail. Co.* (1). It will be convenient to dispose of the second question first. There is no doubt that LORD BRAMWELL held strongly to his opinion that a corporation was incapable of malice or motive, and that an action for malicious prosecution could not be maintained against a company. LORD CRANWORTH, in *Western Bank of Scotland*

v. *Addie* (2) had expressed a similar opinion as to the liability of corporations for frauds. But these opinions have not prevailed, and their Lordships are not prepared to give effect to them. If it is once granted that corporations are for civil purposes to be regarded as persons, i.e., as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency, and of master and servant, are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases, in questions arising out of contract, and in questions arising out of torts and frauds; and to apply them to one class of libels and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their Lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious. Their Lordships concur with the view of the Acting Chief Justice in this case that, if Fitzpatrick published the libel complained of in the course of his employment, the appellant company are liable for it on ordinary principles of agency. Fitzpatrick's letter, although published on a privileged occasion, was not itself privileged; and, not being privileged, the letter must be treated as any other libel written and published by an officer of the appellant company.

There remains, however, the important question whether there was evidence on which the jury could properly find that the publication of the letter was within the scope of Fitzpatrick's authority or, what is the same thing, within the scope of his employment. He was engaged by a written agreement; he was a superintendent; he was to act under instructions given to him by properly authorised officers and in accordance with the rules and regulations of the appellant company. He was to devote his whole time to furthering the appellant company's business. He was to receive and pay money, keep proper accounts, and to supervise various agencies under him. He was to be paid a salary of £5 a week and a commission on policies procured by him. The written agreement did not state more precisely what his duties were. Witnesses were called to throw further light on the subject. Mr. Eedy, the general secretary of the appellant company, said that if policy-holders wanted to know why the appellant company did not prosecute the respondent for his statements about the appellant company, Fitzpatrick should have communicated that matter to the head office before taking action. "It would have been his duty." Another witness said that his duty was to appoint and look after agents, and

> "to stand as an intermediate between the assured and the office. His authority is to secure business and save business and to visit policy-holders whose policies have lapsed or are likely to lapse. In the district itself there is no one above him."

It is clear that the scope of Fitzpatrick's authority and employment was wide and by no means clearly defined. In considering the scope of his authority and employment, their Lordships agree with the Acting Chief Justice in thinking that the jury were entitled to act on their own knowledge of colonial business and habits. They were entitled to consider the necessities of the case arising from the size and nature of the district placed under Fitzpatrick's supervision, and what would naturally be done in the colony by a person in his position. He had no actual authority, express or implied, to write libels nor to do anything legally wrong; but it is not necessary that he should have had any such authority in order to render the appellant company liable for his acts. The law on this subject cannot be better expressed than it was by the Acting Chief Justice in this case. He said:

> "Although the particular act which gives the cause of action may not be authorised, still if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant."

This doctrine has been approved and acted on by this Board in *Mackay* v. *Commercial Bank of New Brunswick* (3) and *Swire* v. *Francis* (4), and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick* v. *English Joint Stock Bank* (5), which is the leading case on the subject. It was distinctly approved by Lord

SELBORNE in the House of Lords in *Houldsworth* v. *City of Glasgow Bank* (6), and has been followed in numerous other cases.

Such being the evidence, their Lordships cannot judicially hold that there was no evidence to warrant the jury in finding that it was within the scope of Fitzpatrick's authority and employment to write to policy-holders in order to counteract the mischief which the respondent was doing to the business of the appellant company; and, although Fitzpatrick went too far and made charges against the respondent which he knew were not true, their Lordships are of opinion that the appellant company are legally responsible for what he wrote. As regards the verdict being against the weight of evidence, it must be borne in mind that SIMPSON, J., who tried the last action, was satisfied with the verdict, and he reports that the judges who tried the two previous actions were also satisfied with the verdicts given in them. Their Lordships see no reason for thinking the verdict wrong on the evidence adduced. Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal, and the appellant company must pay the costs.

Appeal dismissed.

Solicitors: *Charles Russell & Co.*; *J. H. Galbraith.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

MORGAN *v.* FEAR AND ANOTHER

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Robertson, Lord Atkinson and Lord Collins), July 29, 30, 1907]

[Reported [1907] A.C. 425; 76 L.J.Ch. 660; 51 Sol. Jo. 702]

Easement—Light—Acquirement by termor over land held by other termor under same reversioner—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

By virtue of s. 3 of the Prescription Act, 1832, a termor can acquire a right to light over land held by another termor under the same reversion.

Frewen v. *Phillips* (1) (1861), 11 C.B.N.S. 449, followed.

Decision of the Court of Appeal [1906] 2 Ch. 406, affirmed.

Notes. Followed: *Richardson* v. *Graham*, [1908] 1 K.B. 39. Referred to: *Willoughby* v. *Eckstein* (*No. 2*), [1937] 1 All E.R. 257.

As to right to light, see 12 HALSBURY'S LAWS (3rd Edn.) 582 et seq.; and for cases see 19 DIGEST (Repl.) 134 et seq. For the Prescription Act, 1832, s. 3, see 6 HALSBURY'S STATUTES (2nd Edn.) 672.

Cases referred to:

(1) *Frewen* v. *Philips* (1861), 11 C.B.N.S. 449; 30 L.J.C.P. 356; 25 J.P. 676; 7 Jur. N.S. 1246; 9 W.R. 786; 142 E.R. 871, Ex. Ch.; 19 Digest (Repl.) 140, *902*.

(2) *Mitchell* v. *Cantrill* (1887), 37 Ch.D. 56; 57 L.J.Ch. 72; 58 L.T. 29; 36 W.R. 229, C.A.; 19 Digest (Repl.) 140, *903*.

(3) *Wheaton* v. *Maple & Co.*, [1893] 3 Ch. 48; 62 L.J.Ch. 963; 69 L.T. 208; 41 W.R. 677; 9 T.L.R. 559; 37 Sol. Jo. 615; 2 R. 549; C.A.; 19 Digest (Repl.) 60, *336*.

(4) *Colls* v. *Home and Colonial Stores, Ltd.*, ante p. 5; [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 19 Digest (Repl.) 135, *872*.

Also referred to in argument:

Daniel v. *North* (1809), 11 East, 372; 103 E.R. 1047; 19 Digest (Repl.) 72, *405*.

Barker v. *Richardson* (1821), 4 B. & Ald. 579; 106 E.R. 1048; 19 Digest (Repl.) 67, *373*.

Kelk v. *Pearson* (1871), 6 Ch. App. 809; 24 L.T. 890; 36 J.P. 196; 19 W.R. 665, L.JJ.; 19 Digest (Repl.) 138, *887.*

City of London Brewery Co. v. *Tennant* (1873), 9 Ch. App. 212; 43 L.J.Ch. 457; 29 L.T. 755; 38 J.P. 468; 22 W.R. 172, L.C. & L.JJ.; 19 Digest (Repl.) 85, *502.*

Bright v. *Walker* (1834), 1 Cr.M. & R. 211; 4 Tyr. 502; 3 L.J.Ex. 250; 149 E.R. 1057; 19 Digest (Repl.) 59, *327.*

Harbridge v. *Warwick* (1849), 3 Ex. Ch. 552; 18 L.J.Ex. 245; 154 E.R. 964; 19 Digest (Repl.) 143, *930.*

Truscott v. *Merchant Tailors' Co.* (1856), 11 Exch. 855; 26 L.T.O.S. 283; 20 J.P. 132; 2 Jur.N.S. 356; 4 W.R. 295; 156 E.R. 1079; sub nom. *Merchant Taylors Co.* v. *Truscott*, 25 L.J.Ex. 173, Ex. Ch.; 19 Digest (Repl.) 137, *883.*

Simper v. *Foley* (1862), 2 John. & H. 555; 5 L.T. 669; 70 E.R. 1179; 19 Digest (Repl.) 98, *581.*

Ladyman v. *Grave* (1871), 6 Ch. App. 763; 25 L.T.O.S. 52; 36 J.P. 228; 19 W.R. 863, L.C.; 19 Digest (Repl.) 17, *52.*

Daniel v. *Anderson* (1862), 31 L.J.Ch. 610; 7 L.T. 183; 8 Jur.N.S. 328; 10 W.R. 366; 19 Digest (Repl.) 55, *299.*

Robson v. *Edwards*, [1893] 2 Ch. 146; 62 L.J.Ch. 378; 68 L.T. 195; 41 W.R. 569; 37 Sol. Jo. 285; 3 R. 336; 19 Digest (Repl.) 140, *904.*

Kilgour v. *Gaddes*, ante p. 679; [1904] 1 K.B. 457; 73 L.J.K.B. 233; 90 L.T. 604; 52 W.R. 438; 20 T.L.R. 240, C.A.; 19 Digest (Repl.) 59, *328.*

Aynsley v. *Glover* (1875), 10 Ch. App. 283; 44 L.J.Ch. 523; 32 L.T. 345; 39 J.P. 484; 23 W.R. 457, L.JJ.; 19 Digest (Repl.) 73, *409.*

Birmingham, Dudley and District Banking Co. v. *Ross* (1888), 38 Ch.D. 295; 57 L.J.Ch. 601, 59 L.T. 609; 36 W.R. 914; 4 T.L.R. 437, C.A.; 19 Digest (Repl.) 50, *277.*

London and South Western Rail. Co. v. *Gomm* (1881), 20 Ch.D. 562; 51 L.J.Ch. 193; 45 L.T. 505; 30 W.R. 321; on appeal (1882), 20 Ch.D. 576; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620, C.A.; 37 Digest 89, *259.*

Appeal from a decision of the Court of Appeal (VAUGHAN WILLIAMS, ROMER and FLETCHER MOULTON, L.JJ.), reported [1906] 2 Ch. 406, affirming a decision of KEKEWICH, J.

The respondents, Mr. and Mrs. Fear, were the sub-lessees of No. 16, North Parade, Aberystwyth, for twenty-one years from June, 1900. The appellant was lessee of the adjoining house, No. 18, North Parade, Aberystwyth, for seventy-five years from February, 1904. The reversion of both leases was vested in the corporation of Aberystwyth. The corporation proposed to make improvements in their house property, and in May, 1903, the appellant, in accordance with an agreement made in March, 1903, under which the lease of February, 1904, was granted to her, began to raise a wall at the back of her house. The raising of this wall was a part of the general building scheme of the corporation. The respondents complained that the raising of the wall interfered with the access of light to windows in their house which had been continuously enjoyed for more than twenty years, and brought this action claiming an injunction to restrain the appellant from building, and that the wall might be reduced to its former height, and damages. It was contended by the appellant that the lease of 1900 was granted with the intention and understanding that the easement of light would be destroyed by the building operations which the corporation had in view.

KEKEWICH, J., gave judgment for the respondents, and his judgment was affirmed by the Court of Appeal, who held that *Frewen* v. *Phillips* (1) and *Mitchell* v. *Cantrill* (2), which were recognised as good law by the Court of Appeal in *Wheaton* v. *Maple & Co.* (3), were not impliedly overruled by the House of Lords in *Colls* v. *Home and Colonial Stores, Ltd.* (4).

Warmington, K.C., and *L. F. Potts* for the appellant.

P. O. Lawrence, K.C., and *Dunham* for the respondents.

LORD LOREBURN, L.C.—In this case there are two questions, one of law and the other of fact. The question of law is whether a right can be acquired by a termor over

land held by another termor under the same reversioner, by virtue of s. 3 of the Prescription Act, 1832. That was decided in the affirmative as long ago as 1861, in *Frewen* v. *Phillips* (1), and it was again expressly indicated in 1887 in *Mitchell* v. *Cantrill* (2). I think it is accurate to say that that rule of law has been acted on for forty-six years, and I cannot advise your Lordships to disturb so well settled a rule. The question of fact is whether the lease of 1900 was granted with the common intention or common anticipation that the easement, or the inchoate easement, created under s. 3 of the Prescription Act would be suppressed or destroyed. On that point, I think that the findings of KEKEWICH, J., negatived the conclusion of fact which is urged on your Lordships by the appellant. The Court of Appeal took the same view, and, in my view, there is no ground for disturbing those findings. In these circumstances, it is not necessary to say anything as to the question about perpetuities, which was raised by the counsel for the appellant. It was not argued in the court below, and judiciously in my opinion. I, therefore, move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN.—I am of the same opinion. The case has been very ably argued by counsel for the appellant. The only fault in his argument is that it comes too late. *Frewen* v. *Phillips* (1), decided in 1861, has, I believe, been accepted as law ever since, and, in my opinion, there was nothing said in *Colls* v. *Home and Colonial Stores, Ltd.* (4) to throw any doubt on it. I think that it is too late to disturb it now.

LORD JAMES OF HEREFORD.—I concur.

LORD ROBERTSON.—I also concur, solely and absolutely on the ground that the law has been so long settled that it is too late to review it. The same reason which induces me to concur in the decision induces me to abstain from any criticism on the merits of that question, supposing it were now open, because, if the law is to be upheld, it is also to be respected. Accordingly, I abstain from any criticism which would diminish the respect in which that decision is held.

LORD ATKINSON and **LORD COLLINS** concurred.

Appeal dismissed.

Solicitors: *Philpot & Morrell*, for *A. J. Hughes*, Aberystwyth; *Watkins & Pulleyn*, for *Hugh Hughes*, Aberystwyth.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

BEALE AND OTHERS *v.* KYTE

[CHANCERY DIVISION (Neville, J.), February 18, 20, 21, 1907]

[Reported [1907] 1 Ch. 564; 76 L.J.Ch. 294; 96 L.T. 390]

Limitation of Action—Rectification—Defence—Laches—Time to run from date when plaintiff first aware of error.

In 1900 B. and V. sold and conveyed three plots of land to K. Due to a common mistake, the parcels in the conveyance included more land than that in the written contract in pursuance of which the conveyance was executed. In 1905 B. and V. sold the adjoining plot to S. who began building on it. K., relying on his conveyance, complained that S. was encroaching on his land. On B. and V. becoming aware of the discrepancy between the contract and the conveyance, they commenced an action claiming rectification of the conveyance. K. contended that B. and V. were guilty of laches.

Held: in cases of mistake, time only ran on the question of laches from the time when the party seeking rectification discovered the mistake, and, therefore, B. and V. were not guilty of laches and were entitled to rectification.

Bloomer v. *Spittle* (1) (1872), L.R. 13 Eq. 427, questioned.

Notes. As to rectification, see 26 HALSBURY'S LAWS (3rd Edn.) 914 et seq.; and for cases see 35 DIGEST 127 et seq.

Case referred to:

(1) *Bloomer* v. *Spittle* (1872), L.R. 17 Eq. 427; 41 L.J.Ch. 369; 26 L.T. 272; 20 W.R. 435; 35 Digest 111, *165*.

Witness Action. By an agreement in writing, dated Oct. 4, 1900, and made between the plaintiffs Arthur John Beale and Henry Vickars as vendors and the defendant as purchaser, the plaintiffs agreed to sell and the defendant agreed to purchase "three freehold plots, numbered 101, 102, and 103 on plan annexed, having a frontage in Matlock Road of 96 ft." The three plots represented a piece of land situated in a corner formed by the junction of Matlock Road with Maldon Road. According to the plan annexed to the agreement, the frontage to Matlock Road was to be measured from a point situated in the junction of the two roads at some 7 ft. beyond the boundary of the property to be conveyed to the defendant. The plan annexed to the agreement had been taken from a plan known as Parson's plan, which was the plan of the estate of which these plots formed a part; and, as the plots had not been pegged out, they could only have been ascertained previous to the plan annexed to the agreement by a reference to Parson's plan. This plan was hung up in the office of the plaintiffs, and evidence was produced at the trial of the action that the defendant consulted this plan at or about the date of the agreement. On Oct. 10, 1900, the plaintiffs' solicitor sent to the defendant's solicitor a copy of the agreement with a copy plan annexed, but, owing to a mistake in tracing, the copy plan did not show the above-mentioned point from which the 96 ft. of frontage to Matlock Road were to be measured. And from this copy the defendant's solicitor prepared the deed with a plan contained in the margin to convey the property to the defendant. In pursuance of the agreement the plaintiffs conveyed to the defendant, by an indenture dated Nov. 16, 1900,

> "All that piece of land (divided into three plots) situate at the south corner of Maldon Road and Matlock Road in the parish of Preston in the county of Brighton, and having a frontage of 96 ft. to Matlock Road and of 7 ft. 5 in. to Maldon Road, and a depth on the north-eastern side of 80 ft. and thereabouts, and which piece of land is with its abuttals, boundaries, and dimensions more particularly delineated and described in the plan drawn in the margin of these presents and thereon coloured pink."

In the plan in the margin of this deed, the point from which the frontage to Matlock Road was to be measured was situated within the lands to be conveyed, instead of from a point situated in the junction of the two roads at some 7 ft. beyond the property. The

deed, with the plan in the margin, thus purported to convey some 7 ft. of a plot numbered 104, and which was represented in Parson's plan as the adjoining plot to plot 103. The plots still remained undivided, and, on Mar. 25, 1905, the plaintiffs conveyed to Henry James Salvage amongst others the plot numbered in Parson's plan 104, and on this Salvage built. On Mar. 5, 1906, the defendant, relying on the indenture of Nov. 16, 1900, complained to Salvage of an encroachment; and shortly afterwards the plaintiffs became aware for the first time of the discrepancy between the plan annexed to the agreement of Oct. 4, 1900, and the plan drawn in the margin of the indenture. The plaintiffs brought this action, claiming to have the indenture dated Nov. 16, 1900, rectified by the alteration of the length of frontage to Matlock Road shown on the plan drawn in the margin thereof, so as to accord with the length of frontage to the road shown by the plan annexed to the agreement dated Oct. 4, 1900. The defendant contended that what he agreed to buy was 96 ft. of actual frontage to Matlock Road, as represented in the plan in the margin of the indenture.

Jenkins, K.C., and *A. L. Morris* for the plaintiffs.
Butcher, K.C., and *F. E. Farrer* for the defendant.

NEVILLE, J.—In this case I think that the execution of the indenture of Nov. 16, 1900, in its existing form, notably with regard to the plan, was the result of mistake common to both the parties concerned. It appears from the evidence that the defendant had considerable knowledge of all the other plots besides those which he actually bought. As the plots had not been pegged out, he could only have obtained this knowledge from Parson's plan, which was the only means by which their identity could be ascertained. The defendant must, therefore, have consulted Parson's plan when he was purchasing his plots, and, as the situation of the point in the plan annexed to the agreement from which the frontage was to be measured is in accordance with Parson's plan, the agreement with the plan annexed correctly represents what the intention of the parties was at the date of the transaction. I do not wish to suggest that the defendant was intentionally misleading the court when he was giving his evidence, but, as the transaction took place six or seven years ago, I think he has since persuaded himself that the bargain he made was the one which the conveyance actually carries into effect.

I was referred to *Bloomer* v. *Spittle* (1), and it was argued on the authority of that case, that the plaintiffs were too late in coming to the court and seeking rectification, inasmuch as a longer time had elapsed in the present case, between the execution of the conveyance and the bringing of the action, than elapsed in *Bloomer* v. *Spittle* (1), in which apparently it was held to be fatal to the claim for rectification. All I will say about *Bloomer* v. *Spittle* (1) is, that, as it is reported, it is to my mind wholly unintelligible, and I think that there must be some mistake in the report. As the case is reported, it appears that the learned judge came to the conclusion, on the evidence, that a conveyance containing a very serious and important error had been executed by a mutual mistake of the parties, and, further, that the defendant in the action was improperly seeking to take advantage of that mistake. Having come to that conclusion, he refused relief on the ground, apparently, that, although he was persuaded it was false, the defendant had sworn there was no mistake at all; and, further, on the ground, apparently, that four years had elapsed between the date of the execution of the conveyance and the bringing of the action. At the same time, the learned judge offered relief by rescission to the plaintiff, giving the defendant the alternative of accepting rectification of the deed or accepting rescission. In the first place, it seems to me that that offer was inconsistent with the view that the plaintiff had been guilty of laches, because, if laches were a sufficient answer to the claim for rectification, they were equally a sufficient answer to any claim for rescission. Consequently, to my mind, the case is unintelligible on that point. But, further than that, in all cases of mistake there must be notice of error from the time when the error is committed, and it is inconceivable to my mind that on a question of laches time can run from the time when the mistake was committed. It seems to me that it must run from the time when the plaintiffs' attention was first called to the error.

In the present case, the plaintiffs' attention was not called to the error until shortly before the commencement of the action. The principal reason why their attention was

not called to it was because the defendant failed to carry out the covenant which was contained in his conveyance to build three houses on the land. Had he taken possession of the land in a practical sense, had the land been measured and fenced, which would have been necessary if the buildings had been put up, he could not have failed to ascertain the difference between himself and his vendor at once. But he did nothing, the land lay open, and it was not until the purchaser of the neighbouring plot 104 had erected or nearly finished the erection of a house on his property that the defendant took any steps to ascertain what he supposed to be his rights under the conveyance. I think that laches are not pleaded in the present case, but, if they were, it seems to me the time to be considered is not from the date of the execution of the conveyance but the time when the attention of the plaintiffs was called to the fact that the conveyance contained a mistake in the description of the parcels. I think, therefore, that the conveyance ought to be rectified.

Solicitors: *Burton, Yeates & Hart*, for *G. A. Flowers*, Steyning; *Radford & Frankland*, for *Holmes & Johnson*, Brighton.

[*Reported by* A. J. B. TAPLING, ESQ., *Barrister-at-Law.*]

Re LEAD COMPANY'S WORKMEN'S FUND SOCIETY. LOWES *v.* GOVERNOR AND COMPANY FOR SMELTING DOWN LEAD WITH PIT AND SEA COAL

[CHANCERY DIVISION (Warrington, J.), May 9, 1904]

[Reported [1904] 2 Ch. 196; 73 L.J.Ch. 628; 91 L.T. 433; 52 W.R. 571; 20 T.L.R. 504]

Equity—Dissolution of society—Distribution of funds—Society regulated by rules—Rules no longer capable of operation—Power of court to order dissolution and distribution.

In a case where funds belong to a number of persons who have individually interests therein regulated by a trust deed or rules and the funds are vested in trustees to be held for the benefit of the members of the society, and where, if it were sought to carry into effect the interests of the members under the rules, justice could not be done as between the members, the court has jurisdiction to interfere and to order an equitable distribution of the funds.

Friendly Society—Dissolution—Power of court to order—Equitable distribution of funds—Society for benefit of employees of company—Cessation of business of company—Rules of society no longer capable of operation.

A society was founded, but not registered, in 1817 for the benefit solely of the workmen in the employ of a lead company. That company having ceased its operations,

Held: the court had jurisdiction to make an order for the dissolution of the society, followed by an equitable distribution of the funds in accordance with a scheme to be settled in chambers.

Pearce v. *Piper* (1) (1810), 17 Ves. 1, applied.

Notes. Distinguished: *Blake* v. *Smither* (1906), 22 T.L.R. 698. Referred to: *Braithwaite* v. *A.-G.*, [1909] 1 Ch. 510; *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund*, [1945] 2 All E.R. 711.

As to unregistered friendly societies, see 18 HALSBURY'S LAWS (3rd Edn.) 23–27; and for cases 25 DIGEST 341.

Cases referred to:

(1) *Pearce* v. *Piper* (1810), 17 Ves. 1; 34 E.R. 1; 25 Digest 296, *55.*

(2) *Lloyd* v. *Loaring* (1802), 6 Ves. 773; 31 E.R. 1302, L.C.; 25 Digest 290, *11.*

(3) *Beaumont* v. *Meredith* (1814), 3 Ves. & B. 180; 35 E.R. 447, L.C.; 25 Digest 290, *12.*

(4) *Silver* v. *Barnes* (1839), 6 Bing. N.C. 180; 8 Scott, 300; 9 L.J.C.P. 118; 133 E.R. 71; 25 Digest 317, *205.*

Also referred to in argument:

Re Alfreton District Friendly and Provident Society (1863), 7 L.T. 817; 27 J.P. 132; 11 W.R. 301; 25 Digest 340, *414.*

Re Independent Protestant Loan Fund Society, Ex parte Morton, Friendly Protestant Partnership Loan Fund Co., Ex parte Hall, [1895] 1 I.R. 1; 25 Digest 340, *k.*

Jones v. *Lord Charlemont* (1848), 16 Sim. 271.

Clements v. *Bowes* (1852), 17 Sim. 167; 21 L.J.Ch. 306; 18 L.T.O.S. 220; 16 Jur. 96; 60 E.R. 1092; 16 Digest (Repl.) 131, *153.*

Ward v. *Sittingbourne and Sheerness Rail. Co.* (1874), 9 Ch. App. 488; 43 L.J.Ch. 533; 30 L.T. 450; 22 W.R. 565, L.JJ.; 10 Digest (Repl.) 1180, *8223.*

Duke of Bedford v. *Ellis*, [1901] A.C. 1; 70 L.J.Ch. 102; 83 L.T. 686; 17 T.L.R. 139, H.L.; 16 Digest (Repl.) 544, *545.*

Oldham Our Lady's Sick and Burial Society v. *Taylor* (1887), 3 T.L.R. 472, C.A.; 25 Digest 290, *13.*

M'kenny v. *Barnsley Corpn.* (1894), 10 T.L.R. 533, C.A.; 25 Digest 294, *45.*

Shaw v. *Simmons* (1883), 12 Q.B.D. 117; 53 L.J.Q.B. 29; 32 W.R. 292, D.C.; 9 Digest (Repl.) 70, *269.*

Marrs v. *Thompson* (1902), 86 L.T. 759; 18 T.L.R. 565, D.C.; 9 Digest (Repl.) 73, *291.*

Kemp v. *Wright*, [1895] 1 Ch. 121; 64 L.J.Ch. 59; 71 L.T. 650; 59 J.P. 133; 43 W.R. 213; 39 Sol. Jo. 43; 7 R. 631, C.A.; 7 Digest (Repl.) 530, *320.*

Botten v. *City and Suburban Permanent Building Society*, [1895] 2 Ch. 441; 64 L.J.Ch. 609; 72 L.T. 722; 44 W.R. 12; 11 T.L.R. 418; 39 Sol. Jo. 504; 13 R. 591; 7 Digest (Repl.) 531, *331.*

R. v. *Robson* (1885), 16 Q.B.D. 137; 55 L.J.M.C. 55; 53 L.T. 823; 50 J.P. 488; 34 W.R. 276; 15 Cox, C.C. 772, C.C.R.; 36 Digest (Repl.) 632, *1954.*

Action brought on without pleadings, asking for a declaration with regard to the rights of members of a friendly society who had attained the age of twenty-one years, and to have the society dissolved, and its affairs wound-up by the court.

In 1817 a society was started for the benefit of the workmen employed by the defendant company, called the Lead Co.'s Workmen's Fund Society, which from 1828 was governed by certain rules but was never registered under the Friendly Society's Acts. No deed of any kind was entered into by or on behalf of the company with reference to the society, but the funds of the society stood in the name or in the books of the company. The main objects of the society were to provide, by mutual assistance among its members, aid out of the society's funds towards a comfortable subsistence in times of sickness and old age. The members on their admission paid fines varying in amount according to age and a yearly contribution of 30s. to the funds of the society until they attained sixty-five when they ceased to contribute and became entitled to a pension of 6s. a week for life. The society was managed by a general committee in accordance with the rules, which were varied from time to time, the latest being those sanctioned in 1891. Owing to a fall in prices, the company discontinued working their mines, had ceased their business, and were selling off their property. The local officials of the company had been discharged, and workmen were no longer employed, and no new members of the society had been admitted since 1899. The result was that the rules as to the management of the funds of the society could no longer practically be carried into effect, as the officials who constituted the committee whose duty it was to frame and carry out the rules in many instances no longer existed as such. Evidence was given by the actuary to the society that if it were allowed to go on and no immediate division of the funds were made, they would soon become exhausted, and there would be a large deficiency in the

payment of the existing pensions and sick allowances, with the result that many of those who had some interest in the fund, and the expectation of getting some tangible benefit out of it, would be deprived of any such benefit. The invested funds of the society consisted of over £32,000 in Consols standing in the name of the company. There were at the time of the action 439 members of the society, of whom eighty-eight were sixty-five years old.

The motion came before BYRNE, J., in March, 1904, and, in accordance with his desire, a meeting of the members was convened at which fifty-four pensioners and 250 non-pensioners voted for a dissolution of the society, and twenty-nine pensioners and thirty-one non-pensioners voted against a dissolution in any form, either by the court or under the Friendly Societies Act. The present action was brought by two plaintiffs, who were members of the society under the age of sixty-five years, on behalf of themselves and all other members under that age, against the company as custodians of the trust funds, and against four members of the society who had attained sixty-five years, two of whom had voted for and two against the dissolution of the society. The plaintiffs, after claiming upon the construction of the rules as to the rights of the members over sixty-five years to have their weekly allowance paid without regard to the members under that age, claimed to have the society dissolved and its affairs wound-up under the direction of the court, and to have the rights of all parties beneficially interested in the trust funds ascertained and declared.

Norton, K.C., and *MacSwinney* for the plaintiffs.

Cave, K.C., and *Adler* for persons representing pensioners who had voted in favour of a dissolution.

Rowden, K.C., and *P. S. Stokes* for the defendents.

T. H. Carson, K.C., and *A. J. Spencer*, for the Lead Co., the trustees of the fund.

WARRINGTON, J., stated the facts and continued.—What is proposed is that judgment should be pronounced for winding-up the affairs of the society, that the contributions should cease, and that the existing assets should be divided among the members of the society equitably, according to the interests which, under the rules, they have.

It is said that the court has no power to make such an order. Counsel for the plaintiffs in the first instance put the case upon the ground of partnership. He said that this was a partnership, and could be wound-up like any other business, and he cited in support of that contention *Lloyd* v. *Loaring* (2), *Beaumont* v. *Meredith* (3), and *Silver* v. *Barnes* (4). In each of these three cases a society having some similarity to the present was referred to as a partnership, but it was referred to as such for a different purpose, and not, with a view of founding upon it any decree for dissolution, or any relief such as is usually given in partnership cases. It has been pointed out in LINDLEY ON PARTNERSHIP (6th Edn.), p. 13, that the use of the word "partnership" in connection with these societies was really a misuse of the term, and I quite agree with that, if I may say so respectfully. I think that they are not partnerships either within the definition of the Partnership Act, 1890, or within the general acceptance of the word "partnership." But does the jurisdiction of the court to deal with funds vested in a number of persons for their joint benefit depend upon its being shown that the number of persons constitute what is properly and technically a "partnership"? Under which particular jurisdiction one may put it is perhaps rather difficult to say, but where you have, as you have in the present case, funds which belong to a number of persons who have individually certain interests therein regulated either by a trust deed, or, as in the present case, by a body of rules, and especially when, as in the present case, you find these funds vested in trustees for the members of that society, then I think that the court has jurisdiction to interfere. If it finds that the interests of those to whom the funds belong cannot be carried into effect modo et forma, as they have at other times determined among themselves they shall be divided, then I think that the court has power to interfere and say that justice cannot be done by allowing these rules to go on as they have gone on hitherto; because, if that is allowed, certain members of the society will get benefits to which as between themselves and the other members they were never entitled, and the only way in which justice can be administered on equitable principles will be to endeavour to do the best

one can to give to each member of the society that interest in the funds to which he is justly entitled, and that can only be done by winding the society up. It seems to me, therefore, that on that ground I must make an order for the winding-up of the society and its affairs; and for the distribution of the fund among the persons beneficially interested therein.

With regard to authority, I can find no case, and no case has been cited to me on either side, which tends to show that I have no jurisdiction such as I am minded to assume. On the other hand, no case has been cited directly showing that I have such jurisdiction; but *Pearce* v. *Piper* (1) has been cited, and it is, I think, clear, when the case is carefully examined, that the Lord Chancellor, perhaps without deciding it, assumed and acted upon the assumption that he had jurisdiction to deal with the fund in a case very much like the present. In that case there was a society called "The Amicable Society of Master Bakers." It had been established in the year 1798 under certain articles of agreement very like the rules in the present case. It was a society established for the purpose of raising a fund to provide certain annuities for superannuated workmen, and to provide sick pay. The society had got into difficulties very much as the present society has, and the Master of the Rolls, before whom the matter came, at the suggestion of the plaintiffs, dealt with it in this way. The plaintiffs there, unlike the plaintiffs in the present case, did not claim a dissolution, but claimed to have the society continued, and to have directions given which would ensure their funds, and so enable them to go on; and the Master of the Rolls, in compliance with the prayer of the plaintiffs, made a decree for an account against the trustees, and directed an inquiry to ascertain what was due to the plaintiffs for arrears of their annuities, and to have the produce of the fund applied in payment of the annuities; and, if the subscriptions and the rents and the produce of the fund were not sufficient to provide the annuities in full, then to have the subscriptions increased. That was appealed from to the Lord Chancellor. There had been a resolution in that case, apparently of a majority, to dissolve the society, and the prayer of the petition of appeal insisted "that the bill should be dismissed, that the resolution to dissolve the society was proper, and that a court of equity ought not to lend its aid and give effect and duration to an undertaking founded upon a mistake, and the consequence of which must inevitably involve in ruin many of the parties." The appellants desired that the undertaking should be ended, and the respondents, supporting the decree of the Master of the Rolls, desired to have it continued. It is difficult to follow the case throughout, because it extended over many days, and there are detached bits of judgment, some on one day and some on another, but at the end we find the Lord Chancellor saying (17 Ves. at p. 19):

> "This society will be sensible that it is much more easy for them than for the court to arrange this. [What he means, I think, is to arrange the terms on which the society should be wound-up and its funds distributed.] If they cannot agree on some plan, I must refer it to the master to make similar inquiries to those directed by Lord Thurlow, taking the assistance of a calculator, and to inform me, if this security cannot longer exist, what will be an equitable distribution of the fund subscribed."

(Perhaps I was wrong in saying that to arrange this meant to arrange the disposition of the funds on a dissolution, but the Lord Chancellor meant to arrange these funds generally.) Then he says:

> "But that course is not to be taken unless the court is unable to do more justice by securing to those who have, and may become entitled to, annuities, the enjoyment of them."

I think it is clear that the Lord Chancellor considered that if, as he says, the security could no longer exist, the proper course was, after having obtained the advice and the assistance of the master and of a calculator, to make an equitable distribution of the funds which had been subscribed. He inserts one caution—namely, that that course is not to be taken unless the court is unable to do more justice.

The Lord Chancellor, therefore, in that case does provide me with an authority sufficient to enable me to pronounce the judgment which I am asked to pronounce. Having

had the evidence read to me, I have come to the conclusion upon the facts that the court is unable to do more justice by securing the annuities than by making a distribution of the fund. I think, therefore, that I must pronounce a judgment declaring that the affairs of the society ought to be wound-up by and under the direction of the court, and that the rights of all parties beneficially interested in the funds of the society ought to be ascertained, and that such funds ought to be distributed among the members of the society accordingly.

Solicitors: *Ridsdale & Son*, for *W. J. & H. C. Watson*, Barnard Castle; *Clarke, Rawlins & Co.*

[*Reported by* H. M. CHARTERS MACPHERSON, ESQ., *Barrister-at-Law.*]

CABLE *v.* BRYANT

[CHANCERY DIVISION (Neville, J.), November 12, 13, 14, 1907]

[Reported [1908] 1 Ch. 259; 77 L.J.Ch. 78; 98 L.T. 98]

Easement—Grant of dominant tenement to plaintiff—Servient tenement in occupation of tenant—Subsequent conveyance of servient tenement to defendant—Right of plaintiff to injunction to restrain interference with easement by defendant—Derogation from grant.

In 1905 the H. company conveyed to the plaintiff in fee a piece of land with a stable on it. The stable was ventilated by apertures to which the air had access over an open yard which the company owned in fee subject to an unexpired lease. In the same year the company conveyed the yard to the defendant, the lessee joining to merge the term. The defendant put up a hoarding entirely closing the ventilators of the stable.

Held: the doctrine that a grantor might not derogate from his grant applied to persons deriving title from the grantor as it applied to the grantor himself; it was also applicable to a case where a grantor of land was at the time of the grant possessed of adjoining land under lease to another person, and on the termination of the lease the grantor, and those claiming through him, could not derogate from the grant by any act which would render the subject-matter of the grant unfit from a reasonable point of view for the purpose for which it was granted; and, therefore, the plaintiff was entitled to a mandatory injunction directing the defendant to remove the hoarding.

Coutts v. *Gorham* (1) (1829), 1 Mood & M. 396 and *Davies* v. *Marshall* (*No. 1*), (2) (1861), 1 Drew & Sm. 557, applied.

Easement—Air—Acquirement by prescription—Flow of air through aperture in dominant tenement.

A right to air through a particular aperture on the dominant tenement is capable of being acquired by prescription.

Notes. The Conveyancing Act, 1881, s. 6, has been replaced by the Law of Property Act, 1925, s. 62; see 20 HALSBURY'S STATUTES (2nd Edn.) 559.

Referred to: *Schwann* v. *Cotton*, [1916–17] All E.R.Rep. 368; *Westwood* v. *Heywood*, [1921] All E.R.Rep. 721.

As to creation of easements by implication of law, see 12 HALSBURY'S LAWS (3rd Edn.) 538–543; and for cases see 19 DIGEST (Repl.) 40–57, 191.

Cases referred to:

(1) *Coutts* v. *Gorham* (1829), Mood. & M. 396, N.P.; 19 Digest (Repl.) 40, *210*.

(2) *Davies* v. *Marshall* (*No. 1*) (1861), 1 Drew. & Sm. 557; 4 L.T. 105; 25 J.P. 548; 7 Jur.N.S. 720; 9 W.R. 368; 19 Digest (Repl.) 40, *211*.

(3) *Tulk* v. *Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, *2774.*

(4) *Hall* v. *Lichfield Brewery Co.* (1880), 49 L.J.Ch. 655; 43 L.T. 380; 45 J.P. 53; 19 Digest (Repl.) 64, *358.*

(5) *Aldin* v. *Latimer, Clark, Muirhead & Co.*, [1894] 2 Ch. 437; 63 L.J.Ch. 601; 71 L.T. 119; 42 W.R. 553; 10 T.L.R. 452; 38 Sol. Jo. 458; 8 R. 352; 19 Digest (Repl.) 51, *280.*

(6) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 46 J.P. 132; 30 W.R. 191, H.L.; 19 Digest (Repl.) 6, *4.*

(7) *Quicke* v. *Chapman*, [1903] 1 Ch. 659; 72 L.J.Ch. 373; 88 L.T. 610; 51 W.R. 452; 19 T.L.R. 284, C.A.; 19 Digest (Repl.) 37, *196.*

Also referred to in argument:

Booth v. *Alcock* (1873), 8 Ch. App. 663; 42 L.J.Ch. 557; 29 L.T. 231; 37 J.P. 709; 21 W.R. 743, L.JJ.; 19 Digest (Repl.) 23, *95.*

Godwin v. *Schweppes, Ltd.*, [1902] 1 Ch. 926; 71 L.J.Ch. 438; 86 L.T. 377; 50 W.R. 409; 19 Digest (Repl.) 37, *195.*

Webb v. *Bird* (1862), 13 C.B.N.S. 841; 31 L.J.C.P. 335; 8 Jur.N.S. 621; 143 E.R. 332, Ex. Ch.; 19 Digest (Repl.) 69, *384.*

Bryant v. *Lefever* (1879), 4 C.P.D. 172; 48 L.J.Q.B. 380; 40 L.T. 579; 43 J.P. 478; 27 W.R. 612, C.A.; 19 Digest (Repl.), 67, *368.*

Harris v. *De Pinna* (1886), 33 Ch.D. 238; 56 L.J.Ch. 344; 54 L.T. 770; 50 J.P. 486; 2 T.L.R. 529, C.A.; 19 Digest (Repl.) 139, *895.*

Bass v. *Gregory* (1890), 25 Q.B.D. 481; 59 L.J.Q.B. 574; 55 J.P. 119; 6 T.L.R. 412; 19 Digest (Repl.) 71, *402.*

Moore v. *Rawson* (1824), 3 B. & C. 332; 5 Dow. & Ry.K.B. 234; 3 L.J.O.S.K.B. 32; 107 E.R. 756; 19 Digest (Repl.) 93, *538.*

Witness Action for an injunction and a mandatory injunction.

The plaintiff was a jobmaster carrying on business at St. Albans, Hertfordshire, and was the owner of certain messuages, stables, and premises known as 81, St. Peter's Street, St. Albans. The stables, which were used in the carrying on of the business, were situate in the rear of the plaintiff's messuage fronting St. Peter's Street, and were bounded on the east or south-east by a plot of land belonging to the defendant. The hereditaments and premises occupied by the plaintiff and defendant respectively had been acquired from a common owner under the following circumstances. By an indenture of lease dated July 16, 1884, the defendant's plot had been demised to a lessee for a term of twenty-one years from Mar. 25, 1884. By an agreement in writing dated Mar. 20, 1900, it was agreed between the lessors and the lessee that the lessee should lay out certain moneys in repairs and improvements and surrender the existing lease, and that thereupon the lessors should grant and the lessee should accept a lease of the same premises for the term of thirty-four years less ten days from Dec. 25, 1899. In July, 1903, the Hatfield and Harpenden Breweries, Ltd., became the owners in fee simple in possession of the plaintiff's premises, 81, St. Peter's Street, and the owners in fee simple of the adjoining premises belonging to the defendant, subject, however, to the subsisting leasehold interest under the agreement of Mar. 20, 1900. By an indenture dated Jan. 19, 1905, the Hatfield and Harpenden Breweries, Ltd., conveyed the stables and premises with the appurtenances thereunto known as 81, St. Peter's Street, to the plaintiff for an estate in fee simple in possession. Subsequently the defendant agreed to purchase the adjoining plot, and by an indenture of Aug. 3, 1905, the brewery company conveyed this plot to the defendant in fee simple, and the persons interested under the agreement of Mar. 20, 1900, joined in the conveyance to assign and surrender their interest under the agreement to the intent that their interest might be merged and extinguished in the reversion.

In the wall at the end of the plaintiff's stables abutting on the defendant's land there were three apertures of about 2 ft. 6 in. by 9 in. in size and at about 7 ft. from the ground. In these apertures were open iron gratings through which air passed so as to ventilate the stables. In or about April, 1906, the defendant erected a wooden hoarding or

screen on his plot of land close up to the wall of the stables so as to completely shut out and block all the light and nearly all the air coming to or passing through the three ventilators. Although repeatedly requested to remove the hoarding, the defendant refused to do so. The plaintiff thereupon commenced the present action asking for an injunction to restrain the defendant from darkening, hindering, and obstructing the free access of light and air to the three apertures or ventilators as such access was previously enjoyed, and for a mandatory injunction that the defendant might be ordered to pull down and remove the screen or hoarding. Evidence was adduced to show that the apertures were necessary for the proper ventilation of the stables and that the hoarding or screen obstructed the ventilation so as materially to injure the stables by depriving them of proper ventilation. The claim as to the right to light through these apertures was not pressed, as it was felt that the matter of real importance was the claim for air needed to keep the stables properly ventilated.

Peterson, K.C., and *Whitmore L. Richards* for the plaintiff.
Jenkins, K.C., and *Beddall* (*W. F. Barrett* with them) for the defendant.

NEVILLE, J.—The point that I have to decide is whether where a man grants a stable adjoining land which he owns, but which is in the occupation of a lessee from him, and subsequently a grant is made of the neighbouring land and the lease is merged in the fee, there is any obligation on the part of the then owner of the adjoining land not to interfere with the reasonable use of the stable for the purposes of a stable for which it was granted. Supposing that the adjoining land has been in the occupation of the grantor and not of the lessee under him at the time of the original grant, there could be no question about it. The question whether a difference is made in consequence of the adjoining land at the time of the grant being in the occupation of the lessee is concluded by two cases which have been cited to me—the first is *Coutts* v. *Gorham* (1) and the second a decision of KINDERSLEY, V.-C., is *Davies* v. *Marshall* (*No. 1*) (2). Those seem to me to be in point, but certain arguments have been addressed to me to which I think I ought to refer.

It has been said, first of all, that the right to air is different in its nature from the right to light, and cannot be granted as an easement at all. Secondly, it is said that inasmuch as an easement cannot be granted in reversion therefore, where a grantor is not in possession of the adjoining land no obligation can be imposed upon him with regard to interference with property granted, except upon the presumption or implication of a covenant by him not to interfere with the enjoyment. Then it is said that if that be the true ground which imposes upon the grantor the obligation of non-interference, that cannot affect a purchaser without notice, inasmuch as the covenant would not run with the land, and the doctrine of *Tulk* v. *Moxhay* (3) must be relied upon.

With regard first of all to the question of the right of air, cases have been cited showing that a general right to air cannot be acquired by prescription, and it is suggested, and I think has been suggested in some of the cases that where a right to air has been enjoyed through a particular aperture in the house on the dominant tenement, an easement with respect to air cannot be acquired. That seems to have been thought to be the case by FRY, J., in *Hall* v. *Lichfield Brewery Co.* (4), in which he refers to a proposition of LITTLEDALE, J., supporting his view. The cases I have referred to and *Aldin* v. *Latimer, Clark Muirhead & Co.* (5) are authorities to the contrary, and I think also one must not lose sight of the observations of LORD SELBORNE, L.C., in *Dalton* v. *Angus* (6) in the House of Lords. In its result there is no distinction between the acquisition of a right to light and of a right to air. The measure of interference with light and with air which entitles the plaintiff to relief of course may differ to a very considerable extent, but it appears to me that both the right to light and the right to air through a particular aperture in a house on the dominant tenement is capable of being acquired by prescription.

It is next said that, however that may be, there could not be a grant in the present case because one cannot have a grant of an easement in reversion, and the adjoining property was not in possession of the grantor at the time of the grant. It is a question as put by the plaintiffs, of derogation from grant. The rule that a man may not derogate from his grant is a rule of law and not a rule of equity at all. I do not think it depends

upon an implication of a covenant on the part of a grantor. I think it is quite clear that the obligation not to derogate from a grant applies to a person deriving title from a grantor in the same way as it applies to a grantor himself, and that is conclusive upon the point of whether the rule depends on the implication of a covenant or whether it does not, because if it depends upon the implication of a covenant it is only those who take with notice of a covenant who would be subject to the obligation of it, and that would be an equitable obligation, and not a legal obligation, as an obligation not to derogate from grant I believe to be. With regard to that point, I may refer to *Quicke* v. *Chapman* (7), which has been cited for a somewhat different purpose. I think, looking at ROMER, L.J.'s judgment there, it is quite clear that he considered the question of implication of a covenant to be quite distinct from the question of derogation from grant, because he says ([1903] 1 Ch. at p. 669):

> "In fact, the defendant was not in that position; he had entered into no such covenant, express or implied. And, indeed, the counsel for the plaintiffs did not attempt to base their case on such a covenant. They based their case on the doctrine that a grantor shall not derogate from his own grant,"

from which he draws the distinction between the obligation resulting from an implied covenant on the part of the grantor and the doctrine which I think, as I said before, to be a legal doctrine, that the grantor may not derogate from his own grant. It appears to me, therefore, that both upon principle and authority it is clear that where a man grants a stable, even though the adjoining premises at the time may be under lease from him to somebody else, he and any person claiming through him by subsequent grant is subject to the obligation imposed by the rule, and cannot derogate from the grant he has made by any act which shall render the subject-matter of the grant unfit, from a reasonable point of view, for the purpose for which it is granted.

[HIS LORDSHIP made an order granting the mandatory injunction asked for, and an injunction restraining the defendant from interfering with the access of air to the three ventilators so as to render the stables unfit for fair and comfortable use as stables.]

Solicitors: *Clifford, Turner & Hopton*; *Wallington, Fabian, Best & Co.*, for *Wallington, Fabian & Co.*, St. Albans.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

BRINCKMAN *v.* MATLEY

[COURT OF APPEAL (Vaughan Williams, Romer and Cozens-Hardy, L.JJ.), July 13, 14, 1904]

[Reported [1904] 2 Ch. 313; 73 L.J.Ch. 642; 91 L.T. 429; 68 J.P. 534; 20 T.L.R. 671; 48 Sol. Jo. 639; 2 L.G.R. 1057]

Sea—No common law right to bathe—Foreshore—No right of public to cross.

Whether the foreshore is the property of the Crown or that of a private person the public have no right to use it for bathing in the sea or to cross it for that purpose without permission.

Blundell v. *Catterall* (1) (1821), 5 B. & Ald. 268, applied.

Notes. Considered: *Williams-Ellis* v. *Cobb*, [1934] All E.R.Rep. 465. Referred to: *Behrens* v. *Richards*, [1905] 2 Ch. 614; *Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 139; *Bournemouth–Swanage Motor Road and Ferry Co.* v. *Harvey & Sons* (*No. 2*) (1930), 144 L.T. 132.

As to the right to bathe, see 33 HALSBURY'S LAWS (2nd Edn.) 539; and for cases see 44 DIGEST 78.

Cases referred to:

(1) *Blundell* v. *Catterall* (1821), 5 B. & Ald. 268; 106 E.R. 1190; 44 Digest 77, *580*.
(2) *Dickens and Kemp* v. *Shaw* (1823), 1 L.J.O.S.K.B. 122; 44 Digest 75, *558*.
(3) *Bagott* v. *Orr* (1801), 2 Bos. & P. 472; 126 E.R. 1391; 44 Digest 78, *592*.

Also referred to in argument:

Ball v. *Herbert* (1789), 3 Term Rep. 253; 100 E.R. 560; 44 Digest 109, *879*.
R. v. *Crunden* (1809), 2 Camp. 89; 15 Digest (Repl.) 893, *8610*.
A.-G. v. *Chambers* (1854), 4 De G.M. & G. 206; 23 L.T.O.S. 238; 18 Jur. 779; 2 W.R. 636; 43 E.R. 486; sub nom. *A.-G.* v. *Chambers*, *A.-G.* v. *Rees*. 2 Eq. Rep. 1195, 23 L.J.Ch. 662; 18 J.P. 583, L.C., 44 Digest 65, *457*.
Llandudno U.D.C. v. *Woods*, [1899] 2 Ch. 705; 68 L.J.Ch. 623; 81 L.T. 170; 63 J.P. 775; 48 W.R. 43; 43 Sol. Jo. 689; 44 Digest 77, *575*.
Howe v. *Stawell* (1833), Alc. & N. 348; 44 Digest 78, *h*.
Tyson v. *Smith* (1838), 9 Ad. & El. 406; 3 J.P. 65; 112 E.R. 1265; sub nom. *Smith* v. *Tyson*, 1 Per. & Dav. 307; 1 Will. Woll. & H. 749, Ex. Ch.; 17 Digest (Repl.) 3, *5*.
Mace v. *Philcox* (1864), 15 C.B.N.S. 600; 3 New Rep. 472; 33 L.J.C.P. 124; 9 L.T. 766; 28 J.P. 297; 10 Jur.N.S. 680; 12 W.R. 670; 143 E.R. 920; 38 Digest (Repl.) 208, *314*.
A.-G. v. *Tomline* (1880), 14 Ch.D. 58; 49 L.J.Ch. 377; 42 L.T. 880; 44 J.P. 617; 28 W.R. 870, C.A.; 44 Digest 79, *606*.
Lord Advocate v. *Young*, *North British Rail. Co.* v. *Young* (1887), 12 App. Cas. 544, H.L.; 44 Digest 75, *559*.

Appeal by the defendant from a decision of BUCKLEY, J.

The plaintiff the Marquis of Conyngham and the plaintiffs Sir Theodore Brinckman and the Hon. Arthur William de Moleyns, as trustees for him, were the owners of the manor of Minster, in the Isle of Thanet, and of the foreshore lying between the ordinary high-water mark and the ordinary low-water mark of the sea at a bay called Joss Bay. The title of the plaintiffs to the foreshore was derived under a grant by the King in the ninth year of James I, whereby he granted the manor of Minster, and all lands theretofore overflown with the water of the sea which had been gained from the sea and reduced to dry ground, and lands then overflown with the water of the sea which should thereafter be gained and be reduced to dry ground, abutting on the manor, and lands subject to the inundation of the sea between the flowing and ebbing of the sea. In the court rolls of the manor were to be found, for at least 150 years past, entries of payments made upon the footing that the ownership of the foreshore was in the plaintiffs' predecessors in title. Thus there were entries from 1756 onwards in respect of fines for the groundage of

vessels on the foreshore, and of sums paid for permission to gather seaweed and sand in the manor between high- and low-water mark, and of payments made for trespass to gather flints, and of payments made for trespass in working part of the cargo of a vessel, and going with carts for that purpose. There were also accounts of payments made to the lord of the manor for wreckage taken up on the foreshore. In later times, after the Board of Trade became entitled to collect wreckage, there were accounts rendered by the Board of Trade and payments made by them to the lord for proceeds of sale of wreck taken upon the foreshore. In 1889, in two cases decided by STIRLING, J., injunctions were granted at the suit of the plaintiff to restrain persons from digging and getting sand, shingle, stone, or beach from the foreshore. BUCKLEY, J., held that this foreshore was plainly proved to be the property of the plaintiffs, and as private owners. Another plaintiff was Frederick William Turner, who, under a deed dated Feb. 9, 1903, executed by the steward of the manor, had obtained liberty to enter on a portion of the foreshore, including Joss Bay, for the purpose of placing bathing machines, tents, and pay-boxes on the shore. In July, 1903, he was exercising his rights under that deed.

The defendant was the headmaster of St. Saviour's Elementary School, Poplar, Middlesex. In July, 1903, he brought some 200 boys belonging to his school down to a camp situate on the cliffs immediately adjoining Joss Bay. The land upon which he placed his camp belonged to a Mr. Harmsworth. It was customary freehold held by Mr. Harmsworth of the manor at a quit-rent. Mr. Harmsworth had been admitted tenant on the court rolls with services, and paid the quit-rent. The defendant pitched his camp with the permission of Mr. Harmsworth, who allowed the master and the boys to come down for a summer holiday, and occupy his land for the time being. In July, 1903, the attention of the steward of the manor was called to the fact that these boys were bathing in Joss Bay. On July 25, 1903, the steward wrote a letter to the defendant to the effect that, as a matter of right, they were not entitled to do so, adding that, in the event of the defendant's considering the bathing beneficial to the boys under his charge, he would be prepared to make arrangements with him. The defendant, by his reply, did not accept the offer. He said that the boys did no harm, and added that, if the steward wished to raise the question of the right of the boys to bathe in Joss Bay, he must refer him to Mr. Harmsworth's solicitors, Messrs. Lewis and Lewis. The defendant thus setting up a claim of right, the writ in this action was issued on July 28, 1903. The defendant claimed, in the first instance, the right to bathe from the foreshore by prescription and by custom, and also a common law right of all the King's subjects. But at the conclusion of the evidence the defendant's counsel abandoned the defence of right by prescription. The action came on for trial before BUCKLEY, J., in January, 1904, when his Lordship held that no right by custom had been proved to exist, and also, on the authority of *Blundell* v. *Catterall* (1), that there was no common law right to go upon the foreshore and to bathe in the sea therefrom; that the plaintiffs, other than F. W. Turner, were entitled to the foreshore and were entitled to an injunction to restrain the defendant, his servants, and agents, from bathing from the foreshore or any part thereof, and from wrongfully entering upon the foreshore or any part thereof for that purpose. The defendant appealed. On the hearing of the appeal only the question of the alleged common law right was raised.

Buckmaster, *K.C.*, and *W. R. Sheldon* for the defendant.
Astbury, *K.C.*, and *Leonard Mossop*, for the plaintiffs, were not called on to argue.

VAUGHAN WILLIAMS, L.J.—This case raises what at one time in the history of the law of this country might have been a very difficult question, and certainly is a very important question. But, according to my understanding, the law as laid down by the majority of the Court of King's Bench in *Blundell* v. *Catterall* (1) in the year 1821 has been recognised ever since by the whole of the profession as an accurate and binding statement of the law. I do not think, if that which I have just stated is the fact, that we ought now, after the lapse of eighty years, to upset the law as thus settled. I know that it may be properly said that the exact question which the Court of King's Bench had to decide in *Blundell* v. *Catterall* (1) is not the question that we have to decide to-day.

Each of the judges there began his judgment by stating what the question to be decided was. HOLROYD, J., says (5 B. & Ald. at p. 288):

> "The question put in this case for our opinion is the general question whether there is a common law right for all the King's subjects to bathe in the sea, and to pass over the seashore for that purpose on foot and with horses and carriages. But coupled with the facts stated in the case, the question really is, whether there is common law right in all the King's subjects to do so in the locus in quo, though the soil of the seashore, and an exclusive right of fishing there in a particular manner (namely, with stake nets), are private property belonging to a subject, and though the same have been a special peculiar property from time immemorial."

When ABBOTT, C.J., comes at the conclusion of the case to state shortly what the judgment of the court is, he says (ibid. at p. 316):

> "But where one man endeavours to make his own special profit by conveying persons over the soil of another, and claims a public right to do so, as in the present case, it does not seem to me that he has any just reason to complain if the owner of the soil shall insist upon participating in the profit and endeavour to maintain his own private right and preserve the evidence thereof. For these reasons I am of opinion that there is not any such common law right as the defendant has claimed."

I have read those passages to show that I quite recognise and bear in mind that that which had to be decided by the Court of King's Bench in *Blundell* v. *Catterall* (1) was, strictly speaking, not the same question as that which we have to decide here to-day. But when the majority of the judges of the court came to discuss the narrower question which they had to decide in that case, they each of them did determine the wider right which is claimed by the defendant in the present action, i.e., the question whether there is a common law right, to go upon that part of the foreshore which has become private property for the purpose of bathing. They did discuss the question whether there is a common law right to go upon a part of the foreshore which has become private property for the purpose of bathing and they also discuss the question whether there existed any such right at a time when the foreshore was still the property of the Crown. In my judgment, we should be doing very wrong if we were now to re-open the questions which were determined once and for always in the judgments of the majority of the court in that case.

Having said that, I feel that it would be a presumption on my part, when I am following the judgments of the majority of the court in that case, if I were to attempt to give again the grounds which justify those judgments, in particular the judgment of HOLROYD, J., which has come to be regarded as one of the finest examples that we have of how the judgment of an English judge ought to be expressed. I am unwilling, therefore, to attempt to do anything of the sort. I propose, however, to say a word or two about some grounds which were urged by counsel for the defendant, when he was attacking this judgment—I mean things that he said when he was asked how he would state his own case apart from the decision of HOLROYD, J. He contended that, so far as the sea is concerned, no one can possibly deny the right to swim in the sea. He said that the only thing that could be in question was the right of access to the sea from the land in order to enable one to get into the sea and swim. He said that there was a right of access to the sea across the foreshore—the land which lies between the high-water and low-water marks of ordinary tides—the foreshore being the property of the Crown. He at first said that there was a right of access to every part of the foreshore, and that that right was essential to the exercise of rights which it was admitted that the public had over the sea, like the right of navigation and the right of fishing. It was put to him that it might be that those rights had to be exercised by getting access to the sea from public highways which, when they reached the foreshore, would be treated as prolonged, when the sea was out, over the foreshore in a direct line to the sea. Apparently counsel rejected that as being the limit of the right of the public on the ground that when you exercise the right of fishing you would want to progress along the beach right and left in order to exercise that right. In fact, he was driven to say, in order to maintain his

position, that there was a public highway along the whole of the beach, the frontage of the sea, in so far as it fell within the foreshore.

All I can say is that that is a proposition which I could not see that he produced any authority whatsoever to support. As he does not seem to me either to show that the right that he contends for is essential to the exercise of any admitted public right on the sea, or any authority which affirms such a right, I do not think that we ought to affirm the right now that the affirmance of it would, in my opinion, be entirely inconsistent with the judgment of the majority of the learned judges in *Blundell* v. *Catterall* (1). He cited to us text-books—text-books no doubt written by authors of great learning and authority—and he relied very much upon propositions in *Dickens and Kemp* v. *Shaw* (2) (HALL ON THE SEASHORE (2nd Edn.), 1875, App. xlv, lxiv), which is said to affirm the proposition that the right of the Crown is not in general for any beneficial interest to the Crown itself, but for securing to the public certain privileges on the land between high and low water mark. If all that is meant by that proposition is the proposition which was affirmed by BAYLEY, J., in his judgment in *Blundell* v. *Catterall* (1), I have not a word to say against it, but I do not see how it helps counsel's contention. I have not seen the report at length in *Dickens and Kemp* v. *Shaw* (2), but COZENS-HARDY, L.J., tells me that it was BAYLEY, J., who delivered the judgment in that case, and it is not likely that he meant to say anything different. BAYLEY, J., said (5 B. & Ald. at p. 304):

> "Many of the King's rights are to a certain extent for the benefit of his subjects, and that is the case as to the sea in which all his subjects have the right of navigation and of fishing, and it is so in highways along which all his subjects have the right of passage, and the King can make no modern grants in derogation of those rights."

If that was all that Mr. HALL meant to say in his essay on the RIGHTS OF THE CROWN IN THE SEASHORE, that statement in no way supports counsel for the defendant in saying that it is impossible that the Crown should have any beneficial interest in the foreshore. One knows perfectly well that the Crown has large beneficial rights in the foreshore—rights which are now, I think, enjoyed by the public exchequer. But they are none the less the rights of the Crown, and, as was pointed out in the argument by COZENS-HARDY, L.J., who referred to the example of a railway coming along the foreshore, the railway company have to pay the Crown for their rights over the foreshore. And there are all sorts of rights on the foreshore, pecuniary beneficial rights, which the Crown has habitually exercised.

It is sufficient to say that it is true that the Crown holds the foreshore upon such terms that it has to recognise the jus publicum, whatever it is, over the foreshore, and to do nothing which is inconsistent with that jus. The jus, so far as the right of navigation and the right of fishing are concerned, to use the foreshore for those purposes is a right which has a great deal of authority to support it. But except for those rights, the Crown has beneficial ownership of the foreshore, and the plaintiffs, have those rights vested in them. Under those circumstances it seems to me that we ought to affirm the judgment of BUCKLEY, J., because we are bound to follow *Blundell* v. *Catterall* (1) which, to my mind, is conclusive of this case.

ROMER, L.J.—I hope I may be excused for saying that I have listened most sympathetically to the arguments addressed by the defendant's counsel in this case, but my duty as a judge is to say that I cannot accede to those arguments. No doubt in connection with the foreshore of this country there are certain rights of the public in relation to navigation and fishing, and what the extent of those rights may be I need not consider now, for the right claimed before us is in nowise connected with rights of navigation or of fishery. Also no doubt the public have certain rights of necessity. But I am obliged to say that, in the eyes of the law, bathing cannot be regarded as a question of necessity in dealing with the proposition which I have just mentioned. I suppose that bathing in the sea would be regarded in the eyes of the law, if it was a claim as of right, as a claim for a species of recreation. That being so, on what grounds does the defendant base his claim? He has to put it in one of two ways. In the first way he puts it as part of a general right. He says that there is a general right on the part of the public of passing

A and re-passing for all lawful purposes along every part of the foreshore. In other words, he says that the foreshore is to be regarded as a species of public highway. In the alternative he says that, if that is not so, at any rate the public have a limited right or a special right to use the foreshore for the purposes of bathing. If that question had not been considered more than eighty years ago, I think it would have had to receive most careful consideration, and might have been treated as giving rise to some difficulty. B But both those points had to be considered, and were most carefully and fully dealt with, in *Blundell* v. *Catterall* (1). No one can read the judgments in that case without seeing how very fully all the points bearing upon the questions involved were considered, and how careful the judgments were. In particular, I think it may be said that the judgment of HOLROYD, J., has been regarded as one of the most remarkable judgments that was delivered by that learned judge in the course of his career on the Bench. The points in C question there received the most minute and careful consideration. The judgments of the majority of the judges in that case have remained unchallenged by judicial authority from that time to the present. They have received recognition, and have never been dissented from. Throughout the long period that has elapsed no single judgment can be pointed to in which the judgments of the majority on the points I have been considering have been impugned or reflected upon. Under these circumstances I agree with my D Lord in thinking that it is too late to ask us to treat this as an open question. I think that we are bound by the decision in that case. At this period of time I am not prepared to differ from the judgment of the majority in that case, and I think that this court ought to follow that judgment. I agree, therefore, in thinking that this appeal fails.

COZENS-HARDY, L.J.—I agree, but, having regard to the very admirable arguments E which have been addressed to us on behalf of the defendant, I desire to add just a very few words. If we were in 1804 instead of 1904, the question raised in this appeal would, undoubtedly, have required much consideration and elaborate research. But the great case of *Blundell* v. *Catterall* (1), decided in the Court of King's Bench in the year 1821, has relieved us from this task. No earlier authority has been cited to us which was not discussed in the Court of King's Bench in that case. The whole law relating to the F foreshore was there investigated, and with a learning which it is impossible not to envy. I take that decision to amount to a positive assertion that no such right as is now claimed exists at common law. The principles there laid down have never since been questioned in any authority which has been called to our attention. Under those circumstances it is a matter which we ought not in this court even to attempt to discuss. One word more only about the case which was very much relied on—namely, *Bagott* v. *Orr* (3). G Whether that case is good law or not, it is not necessary for us to decide. Certainly I do not desire to attack it, but it only proceeds on the footing that the common right of fishing enjoyed by the public includes the right to get shell fish when the foreshore is dry. In nowise, however, does it support the right of the public to go on the foreshore for the purpose of bathing or for the purpose of recreation. For these reasons I also think that the appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors: *Lewis & Lewis*; *Saltwell, Tryon & Saltwell.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

JOHN HALL JUNIOR AND CO. *v.* RICKMAN

[King's Bench Division (Walton, J.), December 8, 1905]

[Reported [1906] 1 K.B. 311; 75 L.J.K.B. 178; 94 L.T. 224; 54 W.R. 380; 22 T.L.R. 131]

Income Tax—Deduction in computing profits—Wear and tear—Consideration of former allowances in estimating depreciation during year of assessment.

Upon the assessment of the profits of the appellants' ships to income tax under Schedule D it was admitted that prior to the year of assessment the appellants had received allowances for depreciation of the ships by wear and tear of an amount not less than 96 per cent. of their prime cost, and that at the time of assessment the break-up value of the ships was considerably more than 4 per cent., and that in one instance they had received more than 100 per cent. of the prime cost:

Held: the commissioners, in estimating what was a fair and reasonable deduction to be made for depreciation of the ships by wear and tear during the year under s. 12 of the Customs and Inland Revenue Act, 1878, which required them "to allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of machinery or plant," were not entitled to take into account the allowances that had been made in past years for the depreciation of the ships by wear and tear, even though the sum of such allowances for depreciation in past years equalled or exceeded the first or prime cost of the ships; if there were any depreciation by wear and tear during the actual year of assessment, the commissioners were bound to allow a fair and reasonable deduction in respect thereof, irrespective of the amounts of the previous allowances; the same principle applied whether a ship continued in the possession of the original owner or was in the hands of a purchaser.

Income Tax—Deduction in computing profits—Wear and tear—"Machinery or plant"—Dismantled ship used for storage.

A hulk which was formerly a sailing ship but had been dismantled and used as a floating store was "plant" within the Customs and Inland Revenue Act, 1878, s. 12.

Notes. The Income Tax Act, 1842, s. 100, Case I, n. 3, has been repealed and replaced by the Income Tax Act, 1952, s. 137, para. (d). The Customs and Inland Revenue Act, 1878, has been repealed and the provisions for allowances in respect of machinery and plant are contained in the Income Tax Act, 1952, ss. 279–304 (as amended); and for the definition of machinery and plant, see also the Income Tax Act, 1952, s. 333 (2).

Considered: *Birmingham Corpn.* v. *Barnes*, [1935] All E.R.Rep. 533; *Union Cold Storage Co., Ltd.* v. *Simpson*, [1939] All E.R. 94. Referred to: *Heyhoe* v. *Slough Theatre Co.* (1933), 17 Tax Cas. 488.

As to allowances for machinery and plant, see generally 12 Halsbury's Laws (3rd Edn.) 493 et seq.; and for cases see 28 Digest (Repl.) 134–140. For the Income Tax Act, 1952, ss. 137, 279–304 and 333, see respectively 31 Halsbury's Statutes (2nd Edn.) 134–137, 271–293, 320–322.

Cases referred to in argument:

Yarmouth v. *France* (1887), 19 Q.B.D. 647; 57 L.J.Q.B. 7; 36 W.R. 281; 4 T.L.R. 1, D.C.; on appeal (1888), 4 T.L.R. 561, C.A.; 34 Digest 225, *1884*.

Carter v. *Clarke* (1898), 78 L.T. 76; 14 T.L.R. 172, D.C.; 34 Digest 225, *1889*.

Cunard Steamship Co. v. *Coulson*, [1899] 1 Q.B. 865; 68 L.J.Q.B. 554; 80 L.T. 326; 15 T.L.R. 285; 4 Tax Cas. 63, D.C.; 28 Digest (Repl.) 137, *520*.

Peninsular and Oriental Steam Navigation Co. v. *Leslie* (1900), 82 L.T. 137; 4 Tax Cas. 177, C.A.; 28 Digest (Repl.) 136, *518*.

British India Steam Navigation Co., Ltd. v. *Leslie* (1900), 17 T.L.R. 104; 4 Tax Cas. 257, D.C.; 28 Digest (Repl.) 136, *519*.

Case Stated under the Taxes Management Act, 1880, s. 59, by the Commissioners for the General Purposes of the Income Tax Acts for the City of London for the opinion of the King's Bench Division of the High Court.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the City of London on Nov. 13, 1902, Messrs. John Hall, jun., & Co. (the appellants) appealed in regard to assessments made upon them under Sched. D of £20,227 15s. made on the appellants' own return of gross profits for the year ending April 6, 1901, and of £20,721 7s. 8d. on the appellants' own return of gross profits for the year ending April 5, 1902, such returns being duly based upon an average of the three preceding years according to the provisions of the Income Tax Acts. The appellants in their returns claimed the following allowances from gross profits:

"For the year ending April 5, 1901:—Steamers, 6 per cent. on £51,843 17s. 2d., £3,110 12s. 7d.; hulk, 5 per cent. on £2,952 17s. 8d., £147 12s. 11d.; total, £3,258 5s. 6d. £51,843 17s. 2d. is the sum entered in the appellants' books as the value of the steamers on Dec. 31, 1900. This sum is made up of £41,843 17s. 2d. the written down value entered in the appellants' books on Jan. 1, 1900, plus £10,000 the purchase price of the *Peninsula* bought in 1900. The value on Jan. 1, 1901, is entered in the appellants' books as £48,733 4s. 7d., being the written down value after deducting £3,100 12s. 7d. for depreciation at 6 per cent. from £51,843 17s. 2d. £2,952 17s. 8d. is the value according to the appellants' books of the hulk on Jan. 1, 1900, and £2,805 4s. 9d. is the written down value in the appellants' books on Jan. 1, 1901, after deducting £147 12s. 11d. for depreciation at 5 per cent. from £2,952 17s. 8d.

"For the year ending April 5, 1902:—Steamers, 6 per cent. on £55,233 4s. 7d. £3,314; hulk, 5 per cent. on £2,805 4s. 9d., £140 5s. 3d.; total, £3,454 5s. 3d. £55,233 4s. 7d. is the value of the steamers on Dec. 31, 1901, according to appellants' books before making any deduction for depreciation. This sum is made up of £48,733 4s. 7d. the written down value on Jan. 1, 1901, plus £6,500 the amount expended since Jan. 1, 1901, in re-boilering one of the steamers—viz., the steamship *Malaga*. A copy of the appellants' depreciation account in respect of the steamers is hereto annexed."

The appellants claimed the above-stated allowances as representing the diminished value by wear and tear during the said respective years, and they appealed to the commissioners for an allowance of the depreciation so claimed. In making the assessments stated in para. 1 no allowances had been made for depreciation.

The appellants carried on business as shipowners at Nos. 31 and 32, Crutched Friars, in the city of London, and a coal-bunkering business at Gibraltar, under the name of the Union Coal Co. They were the owners of a fleet consisting of the following vessels built in the respective years stated: The steamship *London*, 1862; the steamship *Galicia*, 1866; the steamship *Gibraltar*, 1869; the steamship *Cadiz*, 1869; the steamship *Lisbon*, 1871; the steamship *Malaga*, 1876; the steamship *Peninsula*, 1877; also a hulk built at St. John's, Newfoundland, as a wooden sailing ship in the year 1860. The average age of the ships (exclusive of the hulk) forming the fleet during the years of assessment was thirty-one years. The age of the hulk at the time of the first of the years of assessment was forty years.

By the Income Tax Act, 1842, s. 100, Case 1, r. 3:

"In estimating the balance of profits and gains chargeable under Sched. D or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made. . . ."

By the Customs and Inland Revenue Act, 1878, s. 12:

"Notwithstanding any provision to the contrary contained in any Act relating to income tax, the commissioners for general or special purposes shall, in assessing to profits or gains of any trade, manufacture, adventure, or concern in the nature of

trade, chargeable under Sched. D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on. . . ."

The question for the consideration of the commissioners was what was a just and reasonable allowance to be made from the assessments for the years 1900–1 and 1901–2 respectively as representing the diminished value by reason of wear and tear during those years respectively of the ships and hulk comprised in the appellants' fleet.

The appellants' firm was founded about 1830, and after certain changes from time to time in the constitution of the firm, the present appellants succeeded to the business, goodwill, fleet, and assets in 1891, upon the death of the then sole partner, Mr. John Hall. It was admitted that the appellants' firm, prior to the first year of the assessment, had been allowed from their gross profits assessed to income tax schedule D an amount by way of deduction for diminished value by reason of wear and tear in respect of the vessels of the fleet other than the steamship *Peninsula*, sums amounting in the aggregate to not less than 96 per cent. on the first or prime cost of the vessels (including such sums as had been expended prior to the first of the years of assessment upon the same vessels by way of addition or repairs other than ordinary annual repairs). The ordinary annual repairs had been from time to time allowed in each annual account delivered for income tax purposes as an expense chargeable against profits. The appellant's firm was not incorporated. It was not disputed that the individual members of the appellants' firm as constituted since 1891 had not personally received the whole of the above allowance of 96 per cent. by way of depreciation, but the contention that the appellants were, therefore, to be treated as not having received the allowance for depreciation was abandoned, and it was admitted that the appellants and their predecessors constituted the same firm.

The commissioners, having heard evidence, found as a fact that the appellants had already been allowed in assessments prior to the first of the years of assessment in question by way of deduction from profits and in regard to the depreciation of the ships, with the exception of the steamship *Peninsula*, not less than 96 per cent. of their first or prime cost (including such sums as had been expended prior to the first of the years of assessment on the same ships by way of addition or repairs other than ordinary annual repairs), and they found that the break-up value of the ships, without including the value of the boilers added to the steamship *Malaga* in 1901, was considerably more than 4 per cent. of the first or prime cost, together with such additions and repairs as aforesaid.

The hulk was formerly a sailing ship, but had been dismantled and her rudder removed, and it was used as a floating warehouse for coal at Gibraltar. The commissioners found as a fact, and it was not disputed, that the total of the amounts allowed to the appellants in previous years for depreciation in respect of the hulk exceeded 100 per cent. of its first or prime cost, together with such sums as had been expended on the hulk by way of addition or repairs other than ordinary annual repairs. The ordinary annual repairs had been from time to time allowed in each annual account delivered for income tax purposes as an expense chargeable against profits. The steamship *Peninsula* was built in 1877 at a first or prime cost of £23,500. She was purchased by the appellants in 1899 for £9,400; £1,000 was then expended in structural improvements. The written down value of the steamship *Peninsula* according to the vendors' books at the date of the purchase was £9,280.

The appellants claimed to be allowed in respect of all the ships and of the hulk such amount as fairly represented the diminished value by reason of wear and tear during the year of assessment of each of the ships and hulk, and contended that for the purpose of ascertaining such diminished value regard should be had only to the value at the year in question, and a just and reasonable percentage upon such value should be allowed for depreciation, and that no regard should be had to the allowances made in previous years, and referred to the terms of the Customs and Inland Revenue Act, 1878. The surveyor of taxes contended that as the appellants had received in the previous years on the six

ships other than the steamship *Peninsula* an allowance for diminution in value by reason of wear and tear, which amounted to not less than 96 per cent. of the first or prime cost of such ships (together with such additions and repairs as aforesaid), and as the break-up value of the ships was more than 4 per cent. of their prime cost (with such additions and repairs as aforesaid), the appellants were not entitled to any further allowance in respect of the six ships. The surveyor further contended that no allowance could properly be made in respect of the hulk, on the ground that the allowances received by the appellants in previous years for depreciation amounted in the aggregate to more than 100 per cent. of the prime cost of the hulk (with such additions and repairs as aforesaid), and on the further ground that the hulk was a floating warehouse and was not plant or machinery within the meaning of s. 12 of the Customs and Inland Revenue Act, 1878. The surveyor further contended that the only allowance which could properly be made to the appellants in respect of the depreciation of their fleet was an allowance in respect of the steamship *Peninsula*, and he stated that he was willing that an allowance should be made of £980 for each of the years of assessment, being 4 per cent. on £24,500, the amount of the prime cost of the steamship *Peninsula* (with such additions and repairs as aforesaid), and that such allowances should be continued in future years until the total of such allowance added to the allowances made in previous years to the former owners of the steamship *Peninsula* should amount to 96 per cent. of the said sum of £24,500. The surveyor pointed out that, as the written down value of the steamship *Peninsula* at the date of purchase by the appellants in 1899 was £9,280, and as £1,000 had subsequently been expended by the appellants in additions, the appellants would be entitled to receive annual allowances of £980 in respect of the steamship *Peninsula* until such allowances should amount in the aggregate to £9,300, which, being deducted from £10,280, would leave £980, whereupon the allowance should cease, as the break-up value of the steamship *Peninsula* would be more than £980 (i.e., 4 per cent. on the prime cost and additions, £24,500).

The commissioners having heard evidence both for the appellants and for respondent on the subject of diminished value by reason of wear and tear, came to the conclusion that the allowance already made and received by the appellants was a sum which was just and reasonable as sufficiently representing the diminished value by reason of wear and tear of the vessels of the fleet other than the steamship *Peninsula* and of the hulk during the years of assessment, and that an allowance of £980 in respect of each of the years of assessment in regard to the steamship *Peninsula* was a sum which was just and reasonable as sufficiently representing the diminished value of the said vessel by reason of wear and tear during the years of assessment, and they amended the assessments accordingly. The commissioners further came to the conclusion that no allowance could be made in respect of the new boilers added to the steamship *Malaga* in 1901, on the ground that the boilers had not diminished in value by reason of wear and tear, but they were prepared to make an allowance in future years for depreciation of the boilers. The commissioners also determined that no allowance could be made in respect of the hulk on the further ground that it was a floating warehouse, and was not plant or machinery within the meaning of s. 12 of the Customs and Inland Revenue Act, 1878. The appellants thereupon expressed their dissatisfaction with the decision of the commissioners as being erroneous in point of law, and duly required them to state and sign a Case for the opinion of the High Court of Justice, which they stated and signed accordingly. No question was raised as to the *Peninsula*.

Asquith, K.C. (*Maurice Hill* with him), for the appellants.
The Solicitor-General (*Sir Edward Carson, K.C.*), *and Rowlatt* for the respondent.

WALTON, J.—The question here is whether any allowance should be made to the appellants in respect of diminished value by reason of wear and tear during the two years of the assessment in question of their plant, such plant being in this case certain vessels belonging to the appellants, a list of which is given in the Case.

The case for allowance is based on s. 12 of the Customs and Inland Revenue Act, 1878, The first year of assessment began on April 5, 1900, and that year and the following year are the years in respect of which this question arises. During those years the appellants

were the owners and used for the purposes of their business the several vessels whose names are set forth in the Case. The commissioners have decided that the allowance already made and received by the appellants was a sum which was just and reasonable as sufficiently representing the diminished value by reason of wear and tear of the vessels of their fleet other than the steamship *Peninsula*. I understand there is no question now with regard to the steamship *Peninsula*. So that the commissioners have come to this conclusion that, because the appellants in the years before April 5, 1900, have had certain allowances made to them for wear and tear, they are not entitled in the two years following April 5, 1900—and, as I understand, the effect of their decision is that they never will for the future be entitled—to have any allowance made for wear and tear in respect of these particular vessels.

The foundation for that decision is this. The commissioners have during a period of years made allowances to the appellants in respect of the wear and tear of these vessels of sums which in the aggregate amounted to 96 per cent. of the prime cost of the ships, and, as the value of the ships—the breaking-up value of the ships—amounts to more than 4 per cent. of their original value, therefore the owners (the appellants) had received before April 5, 1900, an amount or allowances representing the full original value of the ships. Therefore, it is said that after that date they could not suffer any further loss of capital by depreciation, because their capital had been restored, and restored in this way: They had received by way of allowance for depreciation 96 per cent. of that full value, and they have the breaking-up value of the vessels. These allowances have been made upon the basis that what I may call the life of the vessels was represented by a certain number of years—I think it is twenty-eight years. Upon that assumption, before the beginning of the years in question—that is, before April 5, 1900—these vessels ought to be treated as if they were dead. The difficulty in the case arises from the fact that they are not dead, but still are of considerable value and are being used, and are still, in fact depreciating. The contention of the commissioners seems to me not in itself an unreasonable one, assuming, of course, that during the whole of the period the vessels have been owned by the same owner; and that assumption, I think, represents the fact in the present case—at any rate the case is presented upon that assumption. I have not to decide what, on the whole, having regard to all the facts, past and present, it would be fair to do. I have to give effect to the Act of Parliament. The case would be quite different if there were anything to show that there had been an agreement between the appellants and the Commissioners of Inland Revenue that the allowance for depreciation should be made upon this basis; that it should be an allowance which at the end of a period of years would, taking into account the breaking-up value of the vessels, fully replace their capital, and after that date no further allowance should be made. In fact, there is no evidence of any such agreement, and no such agreement is relied upon.

I have, therefore, to state under the existing circumstances what is the effect of s. 12 of the Customs and Inland Revenue Act, 1878. It is not denied that during the two years in question the value of these vessels has diminished by reason of wear and tear during those years. If it has, then I think the commissioners must consider to what extent there has been such a diminution of value, and what would be a just and reasonable allowance to make in respect of that depreciation, and I do not think they are entitled to take into account the allowances that have been made in previous years. Those allowances may have been too great or may have been too small, but I do not think it can affect the question, apart from an agreement or something of that kind, as to what is a just and reasonable allowance for the years in question. It seems to me plain that if the vessels had been sold and come into the hands of purchasers, and had belonged to someone else other than the appellants during the years in question, and had been used by those other owners for the purposes of their business, the commissioners would have had to make up their minds what was the "just and reasonable" allowance. I do not think it can make any difference, apart from agreement, that the vessels remain in the possession and continue to be used by the same owners. It seems to me that all the commissioners have to do with is the amount of the depreciation during the years in question. They have to consider what is a fair and reasonable allowance to make for

that depreciation, and, of course, they are the judges of what is fair and reasonable—that I have not to decide.

With regard to the hulk, I think the hulk is plant, and, therefore, the hulk must be dealt with in the same way as the other ships. Therefore, this appeal must be allowed.

Appeal allowed.

Solicitors: *Cattarns & Co.*; *Solicitor of Inland Revenue.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

STEVENS *v.* KING

[CHANCERY DIVISION (Farwell, J.), April 19, 1904]

[Reported [1904] 2 Ch. 30; 73 L.J.Ch. 535; 90 L.T. 665; 52 W.R. 443]

Will—Bequest—Lapse—Debt owing by testator—Legacy given to discharge obligation—Death of legatee during life of testator—Satisfaction of debt by legacy.

Where a bequest is given, not to confer a benefit but to discharge an obligation, whether legally binding or not, the bequest does not lapse if the legatee predeceases the testator, provided that the moral duty continues.

Per Curiam: In such a case the legatee cannot claim the legacy if the debt is fully discharged in the testator's lifetime, even if the legatee survives the testator.

Williamson v. *Naylor* (1) (1838), 3 Y. & C. Ex. 208, applied.

Notes. Applied: *Re Leach's Will Trusts, Chatterton* v. *Leach*, [1948] 1 All E.R. 383.

As to lapse of bequests, see generally 34 HALSBURY'S LAWS (2nd Edn.) 134 et seq.; and for cases see 44 DIGEST 495–496.

Cases referred to:

(1) *Williamson* v. *Naylor* (1838), 3 Y. & C. Ex. 208; 160 E.R. 676; 23 Digest (Repl.) 360, *4292.*

(2) *Philips* v. *Philips* (1844), 3 Hare, 281; 13 L.J.Ch. 445; 67 E.R. 388; 23 Digest (Repl.) 360, *4293.*

(3) *Re Sowerby's Trusts* (1856), 2 K. & J. 630; 69 E.R. 935; 44 Digest 495, *3149.*

Also referred to in argument:

Re Boyd, Kelly v. *Boyd*, [1897] 2 Ch. 232; 66 L.J.Ch. 614; 77 L.T. 76; 45 W.R. 648; 37 Digest 464, *647.*

Re Marten, Shaw v. *Marten*, [1902] 1 Ch. 314; 71 L.J.Ch. 203; 85 L.T. 704; 50 W.R. 209; 46 Sol. Jo. 163, C.A.; 37 Digest 464, *652.*

Turner v. *Martin* (1857), 7 De G.M. & G. 429; 26 L.J.Ch. 216; 28 L.T.O.S. 349; 3 Jur.N.S. 397; 5 W.R. 277; 44 E.R. 168, L.C.; 44 Digest 495, *3150.*

Petition to determine whether or not a bequest under the will of a testatrix had lapsed owing to the death of the legatee before that of the testatrix.

Under the will of Thomas John King, his daughter, Charlotte, became entitled to a third share of his residuary estate. The testator died in 1859, appointing the defendant William King his sole executor and trustee. By a deed of arrangement of April 23, 1860, made between the beneficiaries under the will and William King as executor and trustee, it was agreed that William King should hold the proceeds of sale of certain of the testator's land upon trust as to one-third for Charlotte. By a settlement dated April 26, 1860, made on the occasion of her second marriage, Charlotte assigned her one-third share under the deed of arrangement of April 23, 1860, to the trustees upon trust for herself for life, and after her death upon trust to pay £2,000 to a daughter of her first marriage, and subject thereto, upon such trusts as Charlotte, notwithstanding her then intended or any future coverture, should appoint, with remainders over in default of appointment. In 1861 Charlotte's second husband died, and in 1874 she married a

third husband. In 1872 the present suit was commenced for the execution of the trusts of the deed of arrangement of April 23, 1860. Charlotte admitted that she had received over-payments in respect of her interest in the trust funds, and that the sum of £284 8s. 1d. was then due and owing from her to the defendant William King for the payment whereof her separate estate was liable. By an order made on Aug. 6, 1877, upon further consideration, it was declared that Charlotte had undertaken to execute in favour of William King a valid appointment of a sum of £284 8s. 1d. out of the property subject to the marriage settlement of April 26, 1860. On Sept. 14, 1877, Charlotte duly made her last will, and out of the property subject to the marriage settlement, she appointed £284 8s. 1d. to the defendant William King, and also a sum equivalent to the amount for which she was liable for principal and interest under a mortgage to one John Madocks, and she appointed her daughter Julia Charlotte Lidington her sole executrix, but she did not dispose of any of her own property.

William King died on Jan. 10, 1889, having appointed his daughter Alice Jane King his sole legatee and executrix. Charlotte died on Dec. 4, 1903, and probate of her will was taken out by the petitioner Julia Charlotte Lidington.

The question arose whether the bequest of £284 8s. 1d. to William King contained in the will of Charlotte lapsed upon his predeceasing her.

Vaughan Hawkins for the petition.
Hart for Miss Alice Jane King.

FARWELL, J., stated the facts, and, after reading the order made upon further consideration, continued:—Charlotte having given this undertaking, duly made her will. [His Lordship read the bequest to William King.] She then appointed a sum of £500 to John Madocks, which was also a debt of her separate estate, and appointed her daughter her executrix. William King predeceased the testatrix, and it is, therefore, said that the bequest to him lapsed.

The reason that a legacy lapses upon the death of the legatee before the testator is that the whole object of the testator in making the bequest is presumed to have failed through the death of the person whom he intended to benefit. Whether the object of the legacy has failed must depend, therefore, upon the testator's intention in making the gift; and in each case the question of lapse becomes a question of fact, or rather a question partly of fact and partly of construction. It is settled by *Williamson* v. *Naylor* (1), *Philips* v. *Philips* (2), and *Re Sowerby's Trusts* (3) that where the court finds that by a bequest a testator has intended to satisfy a moral duty, whether it be legally binding or not, and not to perform an act of bounty, the bequest does not lapse through the death of the legatee before the testator, provided that the moral duty continues. Here there has been no desire to confer a benefit, but an intention to discharge an obligation; and, notwithstanding the arguments of the plaintiffs' counsel, I am satisfied that, if William King had been paid the whole of the sum of £284 8s. 1d. during the testatrix's life, he could not have retained the amount appointed to him by her will if he had survived her. The appointment was not in fact due to a desire on the part of the testatrix to perform an act of bounty, but to her intention to discharge a liability, and consequently there is no lapse. The fact that the testatrix was a married woman, that she dealt with no property of her own, but only with property over which she had a power of appointment, and that in spite of this she appointed an executrix; the fact, too, that the only other exercise of her power of appointment was for the purpose of paying off a mortgage debt for which she was personally liable, all afford, in my opinion, additional evidence that her intention was solely to perform a duty. And that is an intention which is equally fulfilled by payment to William King or his estate. Except to discharge this obligation and to discover the persons to whom that obligation should then be due, there could have been no possible reason for the appointment of an executrix.

The result is that there is no lapse in the present case, and that the amount appointed must be paid to the personal representatives of William King. The costs will be paid out of the fund subject to the testatrix's power of appointment.

Solicitors: *W. J. Fraser & Son*; *W. W. Box.*

[*Reported by* H. C. Garsia, Esq., *Barrister-at-Law.*]

STRONG & CO., LTD. *v.* WOODIFIELD

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Robertson and Lord Atkinson), June 14, July 30, 1906]

[Reported [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 22 T.L.R. 754; 50 Sol. Jo. 666; 5 Tax. Cas. 215]

Income Tax—Deduction in computing profits—Expenditure for purposes of trade—Expenses not incidental to the trade—Damages payable by innkeeper to visitor injured by defective premises—Income Tax Act, 1842 (5 & 6 *Vict.*, *c.* 35), *s.* 100, *Sched. D, Case* 1, *rr.* 1 *and* 3.

In estimating the profits of a trade or business for the purposes of income tax only such losses can be deducted as are incidental to the trade itself. Therefore, where a firm of brewers, who carried on a hotel as part of their business, had been compelled to pay damages to a guest in the hotel who had been injured through their negligence in allowing the building to be out of repair,

Held: in estimating the profits of their business for the purposes of income tax they were not entitled to deduct the sum so paid.

Notes. The Income Tax Act, 1842, s. 100, has been repealed. Under Case I or Case II of Sched. D (defined by the Income Tax Act 1952, s. 123) tax is charged on the full amount of the profits or gains (s. 127 (1)). The general rules as to deductions not allowable under Case I or Case II of Sched. D are now contained in the Income Tax Act, 1952, s. 137.

Considered: *Smith* v. *Lion Brewery Co.*, [1909] 2 K.B. 912. Applied: *I. R. Comrs.* v. *Warnes*, [1919] 2 K.B. 444. Considered: *Morley* v. *Lawford & Co.* (1928), 140 L.T. 125; *I.R. Comrs.* v. *Van Glehn*, [1920] 2 K.B. 553; *Allen* v. *Farquharson Brothers & Co.* (1932), 17 Tax Cas. 59; *Worsley Brewery Co.* v. *I.R.Comrs.* (1932), 17 Tax Cas. 349; *Thomas Merthyr Colliery Co.* v. *Davis*, [1933] 1 K.B. 349. Followed: *Rushden Heel Co.* v. *Keene, Rushden Heel Co.* v. *I.R.Comrs.*, [1947] 1 All E.R. 699. Applied: *Fairrie* v. *Hall*, [1947] 2 All E.R. 141. Considered: *Smith's Potato Estates, Ltd.* v. *Bolland, Smith's Potato Crisps (1929), Ltd.* v. *I.R.Comrs.*, [1948] 2 All E.R. 367; *Morgan* v. *Tate and Lyle, Ltd.*, [1954] 2 All E.R. 413; *Racecourse Betting Control Board* v. *Young (Inspector of Taxes)*, [1958] 1 All E.R. 274. Referred to: *Usher's Wiltshire Brewery* v. *Bruce*, [1914] 1 K.B. 357; *Small* v. *Easson* (1920), 12 Tax Cas. 351; *Williams* v. *Singer, Pool* v. *Royal Exchange Assurance Co.*, [1921] A.C. 65; *Addie's Collieries* v. *I.R.Comrs.* (1924), 8 Tax Cas. 671; *Mitchell* v. *Noble*, [1927] 1 K.B. 719; *I.R.Comrs.* v. *Scottish Central Electric Power Co.*, [1931] All E.R.Rep. 746; *Union Cold Storage Co.* v. *Adamson* (1931), 16 Tax Cas. 293; *Hughes* v. *Bank of New Zealand*, [1936] 3 All E.R. 975; *Allied Newspapers, Ltd.* v. *Hindsley*, [1937] 2 All E.R. 633; *Spofforth and Prince* v. *Golder*, [1945] 1 All E.R. 367; *Bentleys, Stokes and Lowless* v. *Beeson*, [1952] 2 All E.R. 82; *I.R.Comrs.* v. *Dowdell O'Mahoney & Co.*, [1952] 1 All E.R. 531; *Boarland* v. *Kramat Pulai, Ltd., I.R.Comrs.* v. *Malayan Tin Dredging, Ltd.*, [1953] 2 All E.R. 1122; *London Investment and Mortgage Co.* v. *Worthington*, [1956] 2 All E.R. 613.

As to deductions of expenses incurred for the purposes of trade, see 20 HALSBURY'S LAWS (3rd Edn.) 166–170; and for cases, see 28 DIGEST (Repl.) 76–80. For the Income Tax Act, 1952, ss. 123, 127, 137, see 31 HALSBURY'S STATUTES (2nd Edn.) 116, 122, 134 respectively.

Cases referred to in argument:

Coltness Iron Co. v. *Black* (1881), 6 App. Cas. 315; 51 L.J.Q.B. 626; 45 L.T. 145; 46 J.P. 20; 29 W.R. 717; 1 Tax Cas. 287, H.L.; 28 Digest (Repl.) 143, *546*.

Gresham Life Assurance Society v. *Styles*, [1892] A.C. 309; 62 L.J.Q.B. 41; 57 L.T. 479; 56 J.P. 709; 41 W.R. 270; 8 T.L.R. 618; 3 Tax Cas. 185, H.L.; 28 Digest (Repl.) 83, *315*.

London County Council v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest (Repl.) 191, *790*.

Reid's Brewery Co. v. *Male*, [1891] 2 Q.B. 1; 60 L.J.Q.B. 340; 64 L.T. 294; 55 J.P. 216; 39 W.R. 459; 7 T.L.R. 278; 3 Tax Cas. 279, D.C.; 28 Digest (Repl.) 77, *291*.

Russell v. *Town and County Bank* (1888), 13 App. Cas. 418; 58 L.J.P.C. 8; 59 L.R. 481; 53 J.P. 244; 4 T.L.R. 500; 2 Tax Cas. 321, H.L.; 28 Digest (Repl.) 107, *402*.

Brickwood & Co. v. *Reynolds*, [1898] 1 Q.B. 95; 67 L.J.Q.B. 26; 77 L.T. 456; 62 J.P. 51; 46 W.R. 130; 14 T.L.R. 45; 3 Tax Cas. 600, C.A.; 28 Digest (Repl.) 109, *411*.

Royal Insurance Co. v. *Watson*, [1897] A.C. 1; 66 L.J.Q.B. 1; 75 L.T. 334; 61 J.P. 404; 13 T.L.R. 37; 3 Tax Cas. 500, H.L.; 28 Digest (Repl.) 117, *448*.

Rhymney Iron Co. v. *Fowler*, [1896] 2 Q.B. 79; 65 L.J.Q.B. 524; 44 W.R. 651; 12 T.L.R. 404; 40 Sol. Jo. 546; 3 Tax Cas. 476, D.C.; 28 Digest (Repl.) 93, *358*.

Lawless v. *Sullivan* (1881), 6 App. Cas. 373; 50 L.J.P.C. 33; 44 L.T. 897; 29 W.R. 917, P.C.; 42 Digest 632, *353*.

A.-G. v. *Ashton Gas Co.*, [1904] 2 Ch. 621; 73 L.J.Ch. 673; 91 L.T. 673; 68 J.P. 477; 20 T.L.R. 601; affirmed sub nom. *Ashton Gas Co.* v. *A.-G.*, [1906] A.C. 10; 75 L.J.Ch. 1; 93 L.T. 676; 70 J.P. 49; 22 T.L.R. 82; 13 Mans. 35, H.L.; 10 Digest (Repl.) 1253, *8827*.

Appeal from a decision of the Court of Appeal (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), reported [1905] 2 K.B. 350, reversing a decision of Phillimore, J., in favour of the appellants upon a Case Stated by the Commissioners for the General Purposes of the Income Tax Acts for the division of Romsey, in the county of Southampton.

The appellants carried on business at Romsey and other places in the neighbourhood as brewers, maltsters, wine and spirit merchants and manufacturers, and vendors of mineral waters. They had power also to carry on other businesses, to acquire any hotels, beerhouses, public-houses, or any share, right, or interest therein. Among other licensed houses, the appellants owned and managed the Lion and Lamb Inn, Poole. On Mar. 2, 1901, during a gale a chimney belonging to this house fell in and caused injury to a guest, who subsequently brought an action against the appellants and recovered damages and costs, amounting to the sum of £1,490. The sole question was whether such sum of £1,490 was a proper deduction in arriving at the profits of the appellants' trade for income tax purposes.

The enactments applicable were the Income Tax Act, 1842, s. 100, Sched. D, Case 1, being the Case relating to trades, manufactures, adventures, or concerns in the nature of trade. Case 1, provided:

"Rule 1. The duty to be charged . . . shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average . . . and shall be assessed, charged, and paid without other deduction that is hereinafter allowed. . . . Rule 3. In estimating the balance of profits and gains chargeable under Sched. D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises occupied for the purposes of such trade, manufacture, adventure, or concern . . . beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made, nor on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern, nor on account of any capital withdrawn therefrom. . . ."

Rules applying to both Cases I and II:

"Rule I. In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains for any disbursements or expenses whatever not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern. . . ."

The commissioners disallowed the deduction. This decision was reversed by Phillimore, J., but was restored by the Court of Appeal.

Danckwerts, K.C., Bremner and *P. G. Henriques* for the appellants.

The Attorney-General (Sir J. Lawson Walton, K.C.), Sir R. Finlay, K.C., and *W. Finlay* for the respondent.

Their Lordships took time for consideration.

July 30, 1906. The following opinions were read.

LORD LOREBURN, L.C.—In this case the appellants are a brewery company who owned an inn and conducted it through a manager. A customer sleeping in the inn was injured by the falling of a chimney upon him, and the appellants had to pay £1,490 in costs and damages, because the fall of the chimney was due to the negligence of the appellants' servants, whose duty it was to see that the buildings were in proper condition. The appellants claim a right to deduct this sum of £1,490 from the amount of their profits and gains assessable to income tax, and the question is whether the commissioners were right in disallowing the deduction.

The Court of Appeal held that the commissioners were right, and I am of the same opinion. It is unnecessary to recite the different sections of the Income Tax Act, 1842, which govern the present appeal. They are s. 100, Sched. D, Case 1, rr. 1 and 3, and r. 1 of the rules applying to both the Cases I and II. That which has to be assessed is the balance of the profits or gains of a trade—that is to say, the sum left after subtracting the proper deductions from the profits and gains. A deduction may be allowed on account of loss, and this is a loss. The Act does not affirmatively state what losses may be deducted. It furnishes merely negative information. A deduction cannot be allowed on account of loss not connected with or arising out of such trade. That is one indication. And no sum can be deducted unless it be money wholly and exclusively laid out or expended for the purposes of such trade. That is another indication. Beyond that the Act is silent. In my opinion, however, it does not follow that if a loss is in any sense connected with the trade it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think that only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration, losses sustained by a railway company in compensating passengers for accident in travelling might be deducted. On the other hand, if a man kept a grocer's shop, for keeping which a house is necessary, and one of the window shutters fell upon and injured a man walking in the street, the loss arising thereby to the grocer ought not to be deducted. Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to solve at sight all the cases that may arise.

In the present case I think that the loss sustained by the appellants was not really incidental to their trade as innkeepers, and fell upon them in their character not of traders but of householders. Accordingly I think that this appeal must be dismissed.

LORD MACNAGHTEN.—I am of the same opinion.

LORD DAVEY.—The question in this appeal is whether a sum of £1,490 which the appellants have had to pay for costs and damages occasioned to a person staying in their inn by the fall of a chimney is a proper deduction in arriving at the profits of the appellants' trade for the purpose of the income tax. The answer to that question, in my opinion, depends on the answer to be given to another question, whether the deduction claimed was a disbursement or expense wholly and exclusively laid out or expended for the purpose of the appellants' trade within the meaning of r. 1 applying to both Cases I and II of Sched. D. in s. 100 of the Income Tax Act, 1842.

It has been argued that the deduction claimed was a loss connected with or arising out of the appellant's trade within r. 3 applying to Case I only. Case I relates to trades,

manufactures, adventures, or concerns in the nature of trade, and I think that the word "loss" in r. 3 means what is usually known as a loss in trading or in speculation. It contemplates a case in which the result of the trading or adventure is a loss, wholly or partially, of the capital employed in it. I doubt whether the damages in the present case can properly be called a trading loss.

I prefer to decide the case upon r. 1, which applies to profits of trades and also to professions, employments, or vocations. I think that the payment of these damages was not money expended "for the purpose of the trade." These words are used in other rules, and appear to me to mean "for the purpose of enabling a person to carry on and earn profits in the trade," etc. I think that the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits. In short, I agree with the judgment of SIR RICHARD HENN COLLINS, M.R. I therefore think that the appeal should be dismissed with costs.

LORD JAMES OF HEREFORD.—I confess that I did entertain some doubts during the discussion of this case at the Bar, but they are not doubts sufficient to cause me to differ from the judgments which have been delivered. In order to explain my position I may say that I agree entirely with the principle laid down by the Lord Chancellor. The only question is as to the application of that principle in one small matter to the facts of this case. If the fact were that the accident had occurred to a stranger walking in the street, then I should have no doubt at all. The doubt that was raised in my mind was caused by the fact that the accident happened to a person who was a customer in the house, and would not have been injured if the business of an innkeeper had not been carried on, and when it was in the course of the carrying on of a portion of that business that the customer who was injured was there. In that case I think that a different principle might be appealed to, and consequently my doubts existed. But they are not strong enough in relation to the application of this principle, about which there is no question, to cause me to dissent from the judgment proposed.

LORD ROBERTSON and **LORD ATKINSON** also concurred.

Appeal dismissed.

Solicitors: *Metcalfe, Birkett, & Rowlatt*; *Sir F. C. Gore, Solicitor of Inland Revenue.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re BUTTON. Ex Parte HAVISIDE

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Vaughan Williams and Buckley, L.JJ.), March 14, 26, 1907]

[Reported [1907] 2 K.B. 180; 76 L.J.K.B. 833; 97 L.T. 71; 23 T.L.R. 422; 51 Sol. Jo. 373; 14 Mans. 180]

Bankruptcy—Property available for distribution—Property in reputed ownership of bankrupt—Right of true owner of property to prove in bankruptcy—Damage suffered through loss of property—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *ss.* 37, 44 (2) (iii).

When the true owner of goods bailed to a person who becomes bankrupt loses those goods by virtue of the doctrine of reputed ownership, he is entitled to prove in the bankruptcy for the damage he has sustained by reason of his goods not being returned to him according to the contract of bailment.

A bankrupt, who was a dealer in antiques, had in his possession goods which had been bought from him by H. but had been left with him, together with other goods which had been bought elsewhere, for him to sell. The goods having passed to the trustee in bankruptcy by virtue of s. 44 of the Bankruptcy Act, 1883, as being in the order and disposition of the bankrupt at the commencement of the bankruptcy,

Held: H. was entitled to prove in the bankruptcy for the value of the goods.

Notes. Section 44 (2) (iii) of the Bankruptcy Act, 1883, has been repealed and replaced by s. 38 (c) of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 373).

As to reputed ownership, see 2 HALSBURY'S LAWS (3rd Edn.) 438 et seq.; and for cases see 4 DIGEST (Repl.) 276 et seq.

Cases referred to:

(1) *Re Painter, Ex parte Painter*, [1895] 1 Q.B. 85; 64 L.J.Q.B. 22; 71 L.T. 581; 43 W.R. 144; 11 T.L.R. 9; 39 Sol. Jo. 168; 1 Mans. 499; 15 R. 16, D.C.; 4 Digest (Repl.) 204, *1836*.

(2) *Re Drinkwater, Ex parte Hewitt* (1862), 31 L.J.Bcy. 83; 6 L.T. 730; 8 Jur.N.S. 757, L.JJ.; 4 Digest (Repl.) 146, *1307*.

(3) *Heslop* v. *Baker* (1851), 6 Exch. 740; 20 L.J.Ex. 350; subsequent proceedings (1853), 8 Exch. 411; 22 L.J.Ex. 333; 20 L.T.O.S. 191; 17 J.P. 136; 135 E.R. 1408; 5 Digest (Repl.) 688, *6040*.

(4) *Joy* v. *Campbell* (1804), 1 Sch. & Leg. 328; 3 Bli.N.S. 110, n.; 5 Digest (Repl.) 857, *3368*.

(5) *Exall* v. *Partridge* (1799), 8 Term Rep. 308; 3 Esp. 8; 101 E.R. 1405; 31 Digest (Repl.) 447, *5741*.

(6) *Edmunds* v. *Wallingford* (1885), 14 Q.B.D. 811; 54 L.J.Q.B. 305; 52 L.T. 720; 49 J.P. 549; 33 W.R. 647, C.A.; 12 Digest (Repl.) 592, *4587*.

Also referred to in argument.

Bryson v. *Wylie* (1784), 1 Bos. & P. 83, n.; 1 Cooke's Bankrupt Laws, 7th Edn., p. 341; 126 E.R. 791; 5 Digest (Repl.) 810, *6848*.

Utterson v. *Vernon* (1790), 3 Term Rep. 539; subsequent proceedings (1792), 4 Term Rep. 570; 100 E.R. 1181; 4 Digest (Repl.) 340, *3091*.

Re Watson & Co., Ex parte Atkin Brothers, [1904] 2 K.B. 753; 73 L.J.K.B. 854; 91 L.T. 709; 20 T.L.R. 727; 48 Sol. Jo. 673; 11 Mans. 256, C.A.; 5 Digest (Repl.) 844, *7107*.

Appeal from a decision of BIGHAM, J., reported [1907] 1 K.B. 397, holding that there is no right of proof by the true owner in respect of goods which have passed to a trustee in bankruptcy by the operation of the reputed ownership section of the Bankruptcy Act.

The bankrupt, who had filed his own petition, was a dealer in antiquities and works of art, and the claimant, Haviside, had been one of his customers. He bought certain goods from the bankrupt and paid for them, but, having given up collecting antiquities,

he left them with him, together with other goods which he had bought elsewhere, with instructions to sell them. At the commencement of the bankruptcy the value of these goods in the possession of the bankrupt was £758, and the court afterwards held that they passed to the trustee by virtue of s. 44 (iii) of the Bankruptcy Act, 1883, as goods being at the commencement of the bankruptcy in the order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner under such circumstances that he was the reputed owner thereof. Haviside then lodged a proof in the bankruptcy for the value of his goods intrusted by him to the debtor for sale on his behalf, and which goods had not been returned to him; and alternatively he claimed £758 by way of damages for the breach of an implied contract by the bankrupt that he would either sell the goods and account for the proceeds, or would return them if unsold. The trustee rejected the proof, on the grounds, amongst others—(i) that there was no demand for the goods before the commencement of the bankruptcy; (ii) that there was no breach by the bankrupt of any express or implied contract with Haviside; and (iii) that the goods had been adjudged to be the property of the trustee by the order of the court. Against this rejection of his proof Haviside appealed, but BIGHAM, J., dismissed the application, being of opinion that the goods were lost, not by any act of the bankrupt, but by operation of law, and that there was no debt and no right to damages, nor any hardship, for it was by reason of the original owner's consent and permission that his goods were placed in jeopardy and then lost to him. Haviside appealed from this decision.

Herbert Reed, K.C., and *F. Mellor* for the claimant Haviside.
Hansell for the trustee.

Cur. adv. vult.

March 26, 1907. **SIR HERBERT COZENS-HARDY, M.R.**—I have had the opportunity of reading the judgment about to be delivered by VAUGHAN WILLIAMS, L.J., and I entirely agree with it and have nothing to add.

The following judgments were then read.

VAUGHAN WILLIAMS, L.J.—I think this is a case of great difficulty. An order was made that certain goods were in the order and disposition of the bankrupt, Henry Button, and passed to the trustee of the property of the bankrupt divisible among his creditors by s. 44 (2) (iii), as being goods in the possession, order, or disposition of the bankrupt at the commencement of the bankruptcy by the consent and permission of the true owner, Tom Haviside. Haviside presented a proof in bankruptcy, claiming—

> "(a) the value of the goods, £758 16s. 6d.; (b) alternatively the said sum as damages for the breach by the bankrupt of an implied contract that the debtor would either sell goods for me and account for the proceeds, or would return them to me, but the debtor neither sold the said goods nor returned them to me."

That proof was rejected by the trustee on the ground—(i) that there was no breach of the bankrupt of any contract, express or implied, with Haviside; (ii) that there was no demand and or refusal on or by the bankrupt to return the goods to the claimant; (iii) that any loss or damage the claimant might have sustained did not arise out of any breach of contract by the bankrupt; (iv) that any such loss or damage arose (a) from the provisions of the Bankruptcy Law, (b) by the act or default of the claimant in consenting to the goods being in the order or disposition of the bankrupt. Haviside appealed against this rejection by the trustee, and BIGHAM, J., dismissed the appeal. The learned judge said ([1907] 1 K.B. at p. 401):

> "It is now suggested that by presenting his own petition the bankrupt wrongfully terminated the contract of bailment, and so gave to Mr. Haviside a right of proof for damages within the meaning of s. 37 of the Act. It is also further contended that to reject this proof would be to violate a well-known principle of law that, where one man's goods are lawfully taken to satisfy another man's debt, the owner of the goods shall have a remedy against the debtor for an indemnity. There is, in my opinion, nothing in either of these contentions."

As to the first of these contentions I agree. The presentation by the bankrupt of his own petition was not an abuse of the process of the court, or in any way wrongful; see *Re Painter, Ex parte Painter* (1); *Re Drinkwater, Ex parte Hewitt* (2).

As to the second contention on behalf of Mr. Haviside, there is much more reason to be urged in support of it. Under all the Bankruptcy Acts down to the Act of 1869 [repealed] goods and chattels in the reputed ownership of the bankrupt did not pass to his assignees by the adjudication. In order to divest the true owner's property in such goods the Court of Bankruptcy had to make an order to sell and dispose of them; *Heslop* v. *Baker* (3). Under the Act of 1869, s. 15 [repealed], it is different; goods in the reputed ownership of the bankrupt are declared to be property of the bankrupt divisible amongst his creditors. But in practice the trustee always obtains an order declaring that goods passed to the trustee and form part of the property divisible by the bankrupt amongst his creditors as being in the bankrupt's reputed ownership. The importance of this difference is this—that under the old law there clearly could be no proof, because proof and the certificate of the bankrupt discharging him from liability in respect of provable claims were confined to claims in existence at the commencement of the bankruptcy, and no claim could arise until the order for sale. This accounts for the absence of authority in the reports for the proposition that the person who suffered by the order for sale had a right of proof against the bankrupt's estate.

I will now deal with such authorities as there are. I do not think they come to much. They nearly all relate, not to cases of damage for a breach of the contract of bailment, but to cases where there was a debt which had arisen in respect of the goods declared to be the subject of the reputed ownership section, and thus liable to be sold for the benefit of the creditors. The case of a purchaser who had paid for goods, but left them in the hands of the vendor, is one case. The case of a mortgagee who left the goods which were his security in the hands of the mortgagor is another. This prevents the application of the passage cited from MONTAGUE AND AYRTON'S BANKRUPT LAW (2nd Edn.), p. 290. The passage in COOKE'S BANKRUPT LAWS (8th Edn.), p. 343, is more relevant. It says:

> "The statute Jac. 1, c. 19, relating to property by possession, makes the reputed ownership as real for the benefit of creditors in general, the persons' own misbehaviour depriving them of the benefit of the conveyance, though made for good consideration, and they are reduced to the same situation as other creditors."

But that does not go far. The passage from *Joy* v. *Campbell* (4) (1 Sch. & Lef. at p. 338) cited by MR. CHRISTIAN in his book on BANKRUPT LAW (2nd Edn.), p. 214, is more to the point. It says:

> "And here I would observe that the effect of this law is not a forfeiture of the property."

It is true that LORD REDESDALE, L.C., is speaking of the case of a purchaser, but he says the real owner can be admitted as a creditor and prove for the value of it. MR. CHRISTIAN differs from this conclusion. The passage does not deal with damages for breach of the bailment.

It seems to me, therefore, that we have to deal with the contention on behalf of Mr. Haviside almost independently of authority. The contention can only be supported on the basis of *Exall* v. *Partridge* (5) and *Edmunds* v. *Wallingford* (6), both of which deal with the case where a man's goods are taken for another's debt. Neither authority touches directly the question of reputed ownership, but I think that the principle would certainly apply if it were not for the contention that any such loss or damage arises from the creditor's own act or default in consenting to the goods being in the order and disposition of the bankrupt. There is no express authority on this point, and I am inclined to think that the severity of the doctrine of reputed ownership may, in the absence of evidence to the contrary, be mitigated by allowing him to prove for the damage which he has sustained by reason of his goods not being returned to him as they should have been according to the contract of bailment. I think, therefore, that this appeal should be allowed.

BUCKLEY, L.J.—On Mar. 10, 1906, when the debtor presented his petition, there were in his possession, order, and disposition certain goods which were the goods, not of the debtor, but of the claimant, which it has been decided were in the debtor's order and disposition within s. 44 (2) (iii), of the Bankruptcy Act, 1883. The language of s. 44 is that the property of the bankrupt divisible amongst his creditors shall comprise goods such as these which were not his property. The fair meaning of this language, I think, is that for the purposes of the bankruptcy, goods which were not the debtor's property shall be dealt with as if they were the debtor's property. If there had been no bankruptcy, the right of the owner of the goods would have been to recover the goods if he could, and, if not, then to have damages for being deprived of them. For the purposes of the bankruptcy the statute deprives the true owner of his goods, but I do not think it follows that it deprives him of any remedy for loss which follows from the statute. In my judgment the statute takes the goods away from the true owner, not for all purposes, but for the purposes of the bankruptcy, so that, for instance, if there resulted a surplus for the debtor after all his debts were paid and these goods still remained intact, then as between the true owner and the debtor the former and not the latter would be entitled.

Secondly, the statute does not take away from the true owner (who ex necessis is for the purposes of the bankruptcy deprived of his goods) all remedy for the loss of his goods. If the claimant is right in saying that he is entitled to prove, the result, no doubt, is that the creditors in the bankruptcy get the goods, but upon the terms that they shall pay for them in the sense that there shall be admitted to proof and rank with them a claim by the true owner of the goods for the loss which he has sustained. But this is a result from which I do not shrink if I find that as between the true owner and the debtor that which has happened is such as to give rise to a liability arising by reason of an obligation incurred before the date of the receiving order.

It is remarkable how bare this question is of authority. Such authorities as exist seem to me in favour of the right of proof. The words of Lord Redesdale, L.C., in *Joy* v. *Campbell* (4) can, I think, mean only that he would be entitled to a right of proof. He said (1 Sch. & Lef. at p. 338):

> "If a man were to purchase goods and pay for them, and permitted them to remain in the hands of the seller who became bankrupt, he would be a creditor for the amount of the money he paid for the purchase."

In the case put, there would not have been a total failure of consideration, and there would be no right to the return of the money on that footing. The passages in Christian's Bankrupt Law (2nd Edn.) vol. 1, p. 214, Montagu and Ayrton's Bankrupt Law (2nd Edn.) vol. 1, p. 290, and Cooke's Bankrupt Laws (8th Edn.) p. 343, are, so far as they go, expressions of opinion of learned text-writers in the same direction. Where the goods of a stranger on the premises of a lessee are distrained for rent and the stranger is obliged to pay the rent to redeem them, he may maintain assumpsit against the lessee: *Exall* v. *Partridge* (5). In *Edmunds* v. *Wallingford* (6) Lindley, L.J., said (14 Q.B.D. at p. 814):

> "Speaking generally, and excluding exceptional cases, where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor."

The analogy of these cases is, in my opinion, very close to the present. At the date of the bankruptcy the debtor was under such obligations as resulted from the contract of bailment. It is true that down to the moment of the presentation of his petition no right of action had arisen; but there was, as it seems to me, in the bankruptcy proceedings a breach by reason of the bankrupt suffering an act which prevented him from performing his contract. I do not rely upon the fact that he presented his own petition as an act which was affirmatively and actively a breach by way of contrast to what would have been the position if a creditor had presented it against him. In presenting his own petition he did but avail himself of an Act of Parliament of which he could lawfully

avail himself. But from that act there resulted certain consequences. The only question is what those consequences are. Being under the obligation above stated, a state of things ensued by virtue of which the true owner was dispossessed of his goods and the debtor became incapable of performing the contract of bailment. It seems to me that there thus arose a liability by reason of the obligation under which the debtor lay at the date of the receiving order, and that this gave rise to a provable claim. Upon these grounds I think that this appeal succeeds.

Appeal allowed.

Solicitors: *Jackson, Smart, Geake, & Co.*; *Piesse & Sons.*

[*Reported by* W. C. BISS, ESQ.; *Barrister-at-Law.*]

NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS *v.* SMITHIES

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Robertson and Lord Atkinson), June 29, 1906]

[Reported [1906] A.C. 434; 75 L.J.K.B. 861; 95 L.T. 71; 22 T.L.R. 678]

Discovery—Privilege—Production of document—Production tending to incriminate person ordered.

An objection that an action is in the nature of a criminal charge and that an order for discovery of documents might tend to incriminate the party ordered is not sufficient to give immunity from discovery.

In an action for damages for a conspiracy to induce workmen to break their contracts of employment the conspirators refused to disclose material documents on the ground that they might be laid open to criminal penalties.

Held: the refusal to disclose was unjustified and discovery was ordered.

Spokes v. *Grosvenor Hotel Co.*, (1), [1897] 2 Q.B. 124, applied.

Notes. By s. 3 of the Trades Disputes Act, 1906 (25 HALSBURY'S STATUTES (2nd Edn.) 1268): "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person to dispose of his capital or his labour as he wills."

As to disclosure of documents generally, see 12 HALSBURY'S LAWS (3rd Edn.) 26 et seq., and for cases see 18 DIGEST (Repl.) 10 et seq.

Cases referred to:

(1) *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q.B. 124; 66 L.J.Q.B. 572, 598; 76 L.T. 677, 679; 45 W.R. 545, 546; 13 T.L.R. 426, 431, C.A.; 18 Digest (Repl.) 11, *60.*

(2) *Fisher* v. *Owen* (1878), 8 Ch.D. 645; 47 L.J.Ch. 681; 38 L.T. 577; 42 J.P. 758; 26 W.R. 581, C.A.; 18 Digest (Repl.) 226, *1939.*

(3) *Allhusen* v. *Labouchere* (1878), 3 Q.B.D. 654; 47 L.J.Ch. 819; 39 L.T. 207; 42 J.P. 742; 27 W.R. 12, C.A.; 18 Digest (Repl.) 178, *1529.*

Also referred to in argument:

East India Co. v. *Campbell* (1749), 1 Ves. Sen. 246; 27 E.R. 1010; 18 Digest (Repl.) 137, *1226.*

Ramsden v. *Brearley* (1875), 33 L. T. 322; 20 Sol. Jo. 30; 1 Char. Cham. Cas. 96; 18 Digest (Repl.) 184, *1591.*

Jones v. *Jones* (1889), 22 Q.B.D. 425; 58 L.J.Q.B. 178; 60 L.T. 421; 37 W.R. 479, D.C.; 18 Digest (Repl.) 15, *97.*

Redfern v. *Redfern*, [1891] P. 139; 60 L.J.P. 9; 64 L.T. 68; 55 J.P. 37; 39 W.R. 212; 7 T.L.R. 157, C.A.; 18 Digest (Repl.) 16, *103.*

Earl of Mexborough v. *Whitwood Urban District Council*, [1897] 2 Q.B. 111; 66 L.J.Q.B. 637; 76 L.T. 765; 45 W.R. 564; 13 T.L.R. 443, C.A.; 18 Digest (Repl.) 18, *130.*

Martin v. *Treacher* (1886), 16 Q.B.D. 507; 55 L.J.Q.B. 209; 54 L.T. 7; 50 J.P. 356; 34 W.R. 315; 2 T.L.R. 268, C.A.; 18 Digest (Repl.) 159, *1410.*

Cartwright v. *Green* (1803), 8 Ves. 405; 2 Leach, 952; 32 E.R. 412, L.C.; 18 Digest (Repl.) 136, *1212.*

Paxton v. *Douglas* (1812), 19 Ves. 225; 34 E.R. 502, L.C.; 22 Digest (Repl.) 392, *4204.*

Maccallum v. *Turton* (1828), 2 Y. & J. 183; 18 Digest (Repl.) 224, *1913.*

Orme v. *Crockford* (1824), M'Cle. 185; 13 Price 376; 147 E.R. 1022; 18 Digest (Repl.) 15, *95.*

Hill v. *Campbell* (1875), L.R. 10 C.P. 222; 44 L.J.C.P. 97; 32 L.T. 59; 23 W.R. 336; 18 Digest (Repl.) 135, *1209.*

Alabaster v. *Harness* (1894), 70 L.T. 375; 10 T.L.R. 233; 1 Digest (Repl.) 104, *803.*

Appeal from an order of the Court of Appeal (Sir Richard Henn Collins, M.R., and Romer, L.J.), affirming an order of Bucknill, J., made in chambers, affirming an order of Master Archibald by which the appellants were ordered to make discovery of documents.

The appellant association were a registered trade union, and the other appellants were trustees of the association, in whom their property was vested, and they were sued in that capacity. The respondent was a master plasterer carrying on business at Islington Row, Birmingham, and a member of the National Association of Master Plasterers. The action was brought by the respondent against the appellants, other than the trustees, for damages for conspiracy—substantially the conspiracy alleged being that they unlawfully and maliciously and with intent to injure the respondent conspired together and with others to induce, persuade, influence, and coerce certain workmen, and in fact induced, persuaded, influenced, and coerced such workmen not to fulfil their contracts with the respondent, and not to enter into further contracts with him, or to engage in his service—and for an injunction and for damages against one William Henry Ecclesby and one John Forester for breach of contract. Several defences were raised, among them that the acts complained of were lawful and done for the purpose of persuading the respondent to adhere to an agreement to which he was a party as a member of the master plasterer's association.

The respondent issued a summons for directions, asking for discovery. The appellants objected to making such discovery on the grounds that the action was in the nature of a criminal charge and might involve them in pains and penalties, that it was contrary to law that discovery should be ordered in cases where criminal penalties might follow, and that when a charge of conspiracy was made no person was a compellable witness. Master Archibald ordered discovery against all the defendants, and Bucknill, J., in chambers confirmed the master's order. The defendants appealed, and the Court of Appeal, conceiving themselves bound by *Spokes* v. *Grosvenor Hotel Co.* (1), dismissed the appeal with costs.

S. T. Evans, K.C., and *Clement Edwards* for the appellants.

M. Lush, K.C., and *McCardie* for the respondent.

LORD LOREBURN, L.C.—This is an appeal from a decision of the Court of Appeal affirming a decision of Bucknill, J., at chambers, and also a decision of the master. The effect of the order appealed against is that the defendants were required to state on affidavit

> "what documents are or have been in their possession or power relating to the matters in question in this action."

The appeal was really rested on two grounds; the first, only faintly relied upon, that, assuming that the court had power to make the order in question, yet it ought not to have made it as a matter of discretion. That was a very difficult ground of appeal to sustain, because nothing but an extremely exceptional case would warrant this House in

interfering with the exercise of discretion by three successive tribunals in a matter which rested on discretion. It is sufficient to say that I do not think that we can interfere in any way upon that ground.

The second ground, which was really the important and main ground of the argument, was that in a case of this kind, which involved a charge of conspiracy, no order for an affidavit of documents could be made. That would be a very far-reaching proposition. I have listened with attention to the able statement of the cases by counsel for the appellants, but he has not satisfied me that that ever was the law or the practice in Chancery, and certainly it would come as a great surprise to a great many of those who have practised in the courts of common law. I think that the right law on the subject is laid down in *Spokes* v. *Grosvenor Hotel Co.* (1), which followed an earlier case of *Fisher* v. *Owen* (2). In my opinion those two cases are conclusive, and the judgment appealed from is right, and the appeal ought to be dismissed with costs.

LORD MACNAGHTEN.—I am of the same opinion. I do not think that there is the slightest ground for this appeal. I think that the law is laid down and the practice of the Court of Chancery is perfectly correctly described in the judgments of James and Cotton, L.JJ., in *Allhusen* v. *Labouchere* (3). Cotton, L.J., there said (3 Q.B.D. at p. 666):

> "It has always been the practice of the Court of Chancery, and that practice is now under the Act of 1873, s. 25 (11), universal, that it is no objection to an interrogatory, and no ground for taking the interrogatory off the file, if relevant, that the answer might tend to incriminate the party to whom it is exhibited. He may say, if he thinks fit, 'I refuse to answer on the ground that the answer may tend to incriminate me', but then he must take the objection on his oath, and if he does raise that objection on his oath in the proper way, he is not bound to answer the interrogatory."

In this particular case there is no interrogatory which could possibly tend to incriminate the defendants. They are merely asked if they have any documents relevant to the matters in question, and the defence is that they are entitled to say, "We have a bundle of documents; we will not tell you what they are, but we think that some of them may possibly tend to incriminate us."

LORD JAMES OF HEREFORD.—I desire to add very shortly that I concur entirely in the result arrived at by my noble and learned friends. The argument at the Bar, if acted upon, would really carry the decisions of the court almost to the point of absurdity. The argument was that in every action which presented in its nature the capability of having two aspects, one of which would be criminal, no order for discovery could be obtained. Thus, taking the instance given, in an action for libel where discovery was sought, it would be sufficient for the person against whom the discovery was sought to appear, and simply make answer and say, "This is an action in which a criminal aspect may present itself, and therefore I am entitled not to answer or make discovery." Why in an action like this there should be an entirely new objection to discovery, without good cause for it, I really do not know. No doubt in the instances given the reason why courts of equity would not relieve in actions of forfeiture and penalties was not made very clear at the Bar, but I should suppose it to be this: that the courts of equity were so averse to actions of that nature being brought at all that they would not assist them, and therefore they did not allow discovery to be obtained. But in the action with which we are dealing here of course no such natural objection can possibly be found. If this argument were acted upon, the immunity from discovery would go infinitely further, as was pointed out in the course of the argument, than the immunity which is accorded to a witness. If a witness says, "I decline to answer this question because it would tend to incriminate me," he does not escape by so saying unless he can satisfy the court that there is reasonable ground for the objection being made. Here all that the defendants are asked to do is to make a statement, and they may say, "This will tend to incriminate us if we give an answer." If they make that statement the court will have to deal with the answer so given. But the argument goes much further than that, and relies upon

the nature of the action itself as giving immunity from making an answer. In addition to the very strong reason which prevails in this matter for the determination that the appeal should be dismissed, I entirely agree with what the Lord Chancellor has said, that this case is concluded by authority. *Spokes* v. *Grosvenor Hotel Co.* (1) really determined the question which we have now to decide, and I think that there is no reason whatever for overruling that decision.

LORD ROBERTSON and **LORD ATKINSON** concurred.

Appeal dismissed.

Solicitors: *Pattinson & Brewer*; *Ward, Bowie, & Co.*, for *T. W. Walthall*, Birmingham.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

R. *v.* TOLHURST AND OTHER JUSTICES. Ex Parte FARRELL AND OTHER CASES

[King's Bench Division (Lord Alverstone, C.J., Kennedy and Ridley, JJ.), May 16, 22, 1905]

[Reported [1905] 2 K.B. 478; 74 L.J.K.B. 652; 93 L.T. 76; 69 J.P. 308; 53 W.R. 619; 21 T.L.R. 533; 49 Sol. Jo. 515]

Licensing—Licence—Renewal—Reference of application for renewal to compensation authority—Need for notice to be given to applicant for renewal—Decision whether to refer to be taken after evidence given on oath, with opportunity for cross-examination—Relevance of justices' own knowledge or information—Licensing Act, 1872 (35 & 36 *Vict.*, *c.* 94), *s.* 42—*Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1 (2).

By s. 1 (2) of the Licensing Act, 1904 [re-enacted in all material respects by s. 15 of the Licensing Act, 1953]: "Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licence requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon . . ."

Held: (i) justices must not make a report under this section without giving to the licence holder notice and an opportunity to attend before the justices on the consideration of his application for renewal; (ii) where such notice has been given the justices, while entitled to avail themselves of their own knowledge of the locality on such questions as the character of the neighbourhood, the amount of the population, and the habits of the inhabitants, must not act solely on their own knowledge and information, but must base their decision whether or not to make a report on evidence taken on oath, with liberty given to the holder of the licence to cross-examine the witnesses called in opposition to the renewal and to call evidence in favour of his application for renewal.

Notes. Considered: *Dartford Brewery Co.* v. *County of London Quarter Sessions*, [1906] 1 K.B. 695; *R.* v. *Cheshire Licensing Justices, Ex parte Kay's Atlas Brewery*, [1906] 1 K.B. 362. Referred to: *R.* v. *Drinkwater, etc., Coventry Justices, Ex parte Conway* (1905), 70 J.P. 1; *Morgan* v. *Aylesford Licensing Justices*, [1906] 1 K.B. 437; *R.* v. *Johnson, etc., Leicester Justices, Ex parte Whitmore* (1906), 71 J.P. 59; *Howe* v. *Newington Licensing Justices*, post, p. 1001; *Colchester Brewing Co.* v. *Tendring Licensing Justices*, [1916–17] All E.R. Rep. 836.

As to renewal of licences, see 22 Halsbury's Laws (3rd Edn.) 549–557, and cases there cited. For Licensing Act, 1953, see 33 Halsbury's Statutes (2nd Edn.) 142.

Cases referred to:

(1) *Sharp* v. *Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 39 W.R. 561; 7 T.L.R. 389, H.L.; 30 Digest (Repl.) 12, *51*.

(2) *R.* v. *Howard, etc. Farnham Licensing Justices*, [1902] 2 K.B. 363; 71 L.J.K.B. 754; 51 W.R. 21; 18 T.L.R. 690; sub nom. *R.* v. *Farnham Licensing Justices, Ex parte Smith*, 86 L.T. 839; 66 J.P. 579, C.A.; 30 Digest (Repl.) 50, *377*.

(3) *Raven* v. *Southampton Justices*, [1904] 1 K.B. 430; 73 L.J.K.B. 282; 90 L.T. 94; 68 J.P. 68; 52 W.R. 574; 20 T.L.R. 146; 48 Sol. Jo. 143, D.C.; 30 Digest (Repl.) 69, *517*.

Also referred to in argument:

R. v. *Local Government Board* (1882), 10 Q.B.D. 309; 52 L.J.M.C. 4; 48 L.T. 173; 47 J.P. 228; 31 W.R. 72, C.A.; 16 Digest (Repl.) 418, *2202*.

Boulter v. *Kent Justices*, [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288; 61 J.P. 532; 46 W.R. 114; 13 T.L.R. 538, H.L.; 30 Digest (Repl.) 75, *579*.

Rules Nisi for writs of prohibition and mandamus to the licensing justices of the Penge division of the county of Kent and other licensing divisions.

The facts are stated by the Lord Chief Justice in the judgment of the court.

Avory, K.C., and *Hohler*, for the justices in *R.* v. *Tolhurst, Ex p. Farrell*, showed cause against the rules.

Frederick Low, K.C., and *Bruce Williamson* supported the rules.

After argument in this case and a number of other cases raising the same points the court reserved judgment.

May 22, 1905. **LORD ALVERSTONE, C.J.,** read the following judgment of the court.—In these cases rules nisi have been granted calling upon the licensing justices to show cause why writs of prohibition should not issue to prevent them from taking any further proceedings in a matter of certain reports which they propose to make to quarter sessions in respect of applications for the renewal of licences. Rules nisi for mandamus were granted at the same time calling upon the same justices to hear and determine the applications for renewal. We think it doubtful whether prohibition is the right remedy; as, however, the same point is raised upon the applications for writs of mandamus, it is unnecessary to decide this point on the present occasion, and in the event of it being necessary to decide it on any future occasion it must be taken that we have expressed no opinion upon it now.

The point raised on behalf of those for whom the rules were moved is that the justices had not before them any evidence sufficient to justify them in making reports to the quarter sessions in respect of the licensed houses in which the applicants for the rules were interested. This was the ground of the applications in seven cases. In ten others a further point was raised—viz., that no notice pursuant to s. 42 of the Act of 1872 as amended by the Act of 1874 had been given to the applicants for renewal to attend before the licensing justices. The questions really depend upon the construction which should be placed on s. 1 (2) of the Licensing Act, 1904; but in order to appreciate the point it will be convenient to consider the statutory enactments prior to that date. By s. 42 of the Act of 1872 as amended by the Act of 1874 it was provided that where a licensed person applies for a renewal of his licence he need not attend in person unless he is required by the licensing justices so to do for some special cause personal to himself; and that the justices shall not entertain any objection to the renewal of such licence or take any evidence in respect of the renewal thereof unless written notice of an intention to oppose the renewal of such licence, stating in general terms the grounds of opposition, has been served on such holder not less than seven days before the commencement of the general annual licensing meeting, with the proviso that the licensing justices may, notwithstanding that no notice has been given, upon an objection being made adjourn the granting of a licence to a future day, and require the attendance of the holder of the

licence when the case is to be heard and the objection considered [see now Licensing Act, 1953, s. 11 (3) proviso]. Section 1 (3) provides that the justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath [see s. 11 (5) of Act of 1953]. The decisions in *Sharp* v. *Wakefield* (1) and *R.* v. *Howard, etc. Farnham Licensing Justices* (2) establish that a notice under the proviso to sub-s. (2) of s. 42 [see s. 11 (3) of Act of 1953] may be given by the direction of the justices themselves, and, further, that the question whether the licence should be renewed, having regard to the wants and requirements of the neighbourhood and the number of licensed houses therein, is one of the grounds which the justices were entitled to consider upon the question of renewing any particular licence.

This, so far as it is necessary to refer to it for the purpose of the case before us, was the position of matters at the time of the passing of the Act of 1904. That Act by sub-s. (1) of s. 1 confined the power of the licensing justices to refuse renewal to certain specified grounds, which do not include the question of the necessity for the houses, having regard to the requirements of the district [see s. 14 (4) of Act of 1953], and sub-s. (2) provided that where the justices of a licensing district, on the consideration by them in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licence requires consideration on grounds other than those

> "on which the renewal of an existing on-licence can be refused by them they shall refer the matter to quarter sessions, together with their report thereon" [see s. 15 (1) of Act of 1953].

It is upon these words that the question arises. It is contended by counsel on behalf of the justices showing cause against the rules that the justices may act on their own motion and rely solely on their own knowledge, that it is no longer necessary for them to require the attendance of any licence-holder in respect of whose house they propose to report or to direct any notice, under s. 42 (2) of the Act of 1872, to be given to the holders of such houses, and that the justices need not take evidence upon oath when the renewal of any existing on-licence requires consideration on grounds other than those on which the renewal can be refused by them. We summarise these contentions, not that they all arise in every case, but that they were urged in one or other of the cases as being the true position of the licensing justices under this section. On the other hand, it was contended in support of the rules that the justices must pursue the course which they would have followed under s. 42 of the Act of 1872 as amended by s. 46 of the Act of 1874, and give notice to all the applicants who are holders of the licences of the houses upon which they propose to report, and hear all the evidence as though they were themselves deciding under the old law the question whether the licence should be renewed.

It will be convenient to deal first with the cases in which no notice had been given to the licensed holders. We are clearly of opinion that the justices ought not to make a report respecting any house without giving notice to the licence holder, and giving him an opportunity of attending and, if he desires, of tendering evidence. This seems to us to be clear, not only in principle, but from a consideration of the previous legislation. The report may certainly affect and alter the position of the licence holder and in many cases his property. The objection that the house is not required may be raised by an opponent, independently of the justices themselves. In that case the Act of 1872 clearly provides that notice must be given to the licence holder. Section 1 (2) of the Act of 1904 directs the justices to report whether on the consideration by them in accordance with the Licensing Acts, 1828 to 1902, on the applications for the renewal of licences they are of opinion that the question requires consideration. It seems to us that, inasmuch as the question relating to a particular house can be raised by an opponent, and that the occasion referred to would, but for the Act of 1904, only arise where notice had been given, the language of sub-s. (2) is not sufficient to alter the existing law, which the new legislation nowhere repeals, which law requires that notice should be given. Further, the knowledge that the particular house is not required for the needs of the district may be brought to the notice of the justices for the first time by the evidence given on behalf of an objecting opponent. As the justices would certainly

have to hear any evidence tendered by a person objecting, it seems plain on general principles that the person who or whose property is affected by such evidence must have the opportunity of tendering evidence in favour of renewing the licence, instead of referring the matter to quarter sessions. We do not see how the justices could properly consider the question whether the renewal of any particular licence requires consideration on other grounds without at least giving the opportunity to the licensee of putting before them any evidence which he considers bears upon that question. In the cases, therefore, in which no notice was given to the licence holders we are clearly of opinion that the proceedings were not regular, and that the rule for mandamus should be made absolute.

In eight other cases notice was given to the licence holders pursuant to sub-s. (2) of s. 42, and the question in these cases is whether evidence must be taken before the licensing justices can make a report, and whether there was sufficient evidence in any of these cases to justify the justices in making such a report. In our opinion, the true position of the justices differs somewhat from that which was urged before us on either side. It must be remembered that the condition precedent to their making a report is that they shall be of opinion that the renewal of an existing licence requires consideration on grounds other than those on which the licence can be refused by them. This is obviously a somewhat different question from that which quarter sessions have to consider—namely, whether a particular house shall be selected as the house, or one of a number, in respect of which the renewal of the licence requires consideration; but we see nothing to alter the existing law that the justices' opinion upon this question is to be based upon evidence, and that such evidence must be taken upon oath, and liberty given to the applicant, the holder of the licence, to cross-examine the deponent, and to call evidence in favour of his application. The amount of evidence, however, which may be sufficient for the purpose of enabling the justices to form the opinion indicated in the section may, in our judgment, be properly treated as different from the amount which could be regarded as sufficient if they had to decide judicially whether or not the particular licence should be renewed or refused. It will not, we think, be necessary in all cases for them to have detailed evidence with regard to the differentiation between public-house and public-house, as the majority of the court thought was necessary in *Raven* v. *Southampton Justices* (3). There quarter sessions had to consider the same question as will arise before the committee of quarter sessions under the Act of 1904—namely, whether they will decline to renew the licence of each particular house in respect of which a report is made. Evidence of the character of the district, the locality of the public-house and of the public-houses, and the number of public-houses, in the district, might be quite sufficient to justify the justices in making a report to quarter sessions that the question of the renewal of any particular licence required consideration on grounds other than those on which the licensing justices could act. It was suggested in argument in opposition to the rules that in making a report the justices might act on their own knowledge and information only, and without any evidence given before them. In our opinion, it was not intended that in forming an opinion whether they shall make a report they should exclude their own knowledge of the locality upon such questions as the character of the neighbourhood, the amount of population, and the habits of the inhabitants. It seems to us, for the reasons expressed by Sir Richard Henn Collins, M.R., in *R.* v. *Howard, etc., Farnham Licensing Justices* (2)([1902] 2 K.B. at p. 376), that it cannot have been the intention of the legislature that the justices should divest themselves of such knowledge, or determine the question solely on materials provided by the individual who happens to object. But this seems to us to be an entirely different matter from that which we have to consider, and, in our opinion, is consistent with the view that notice must be given to the licensed persons whose licences will be affected, and in so far as the opinion of the justices is formed upon facts with regard to a particular house, those facts should be proved before them by evidence upon oath, so as to give the licensed person an opportunity of testing them and of himself giving evidence if he so desires to do.

[Dealing with the question whether in certain cases before the court there was sufficient evidence before the justices to enable them to make a report, His Lordship

said there was. In each case they had evidence as to the number of public-houses, the amount of population, and the character of the neighbourhood; in each case the applicants for the licences were present, and had the opportunity of cross-examining and calling further evidence, and, therefore, the justices in those cases acted in accordance with the view of the law which the court had already expressed, and it was not necessary for them before reporting to go further and inquire into matters which it might be necessary for quarter sessions to consider when they approached the question whether the licences of any particular houses should not be renewed. In those cases, therefore, the rules must be discharged. The rules nisi for writs of prohibition must be discharged in all the cases.]

Orders accordingly.

Solicitors: *Knapp-Fisher & Sons*; *Church, Adams & Prior*, for *C. G. Liddle*, Anerley; *Harry Wilson & Co.*; *Sharpe, Parker, Pritchards, Barham & Lawford.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

NASH *v.* CALTHORPE AND OTHERS

[Court of Appeal (Vaughan Williams, Romer and Stirling, L.JJ.), May 4, 5, 6, 8, June 6, 1905]

[Reported [1905] 2 Ch. 237; 74 L.J.Ch. 493; 93 L.T. 585; 21 T.L.R. 587; 12 Mans. 260]

Company—Prospectus—Statement as to material contract—Omission to specify in prospectus—Need for plaintiff to prove damage—Proof of effect of omission—Companies Act, 1867 (30 & 31 *Vict.*, *c.* 131), *s.* 38.

In order that a shareholder might succeed in an action against directors of the company to recover damages on the ground that he had been induced to subscribe for the shares on the faith of a prospectus which did not, as required by s. 38 of the Companies Act, 1867 [see now Companies Act, 1948, Sched. 4, para. 14], disclose particulars of a contract entered into by the company,

Held: he must prove, not merely that the omitted contract was a material one, but also that he had been damaged by the omission; the mere fact that a material contract has not been disclosed in the prospectus raises no presumption of law that the plaintiff was induced by the omission to take his shares, or would not have taken them if the contract had been disclosed.

Per Vaughan Williams and Stirling, L.JJ.: In order to succeed the plaintiff in such an action must prove that he would not have applied for the shares if the contract had been disclosed.

Per Romer, L.J.: In order to succeed in such an action the plaintiff must prove that if the omitted contract had been disclosed he might not have applied for the shares.

Notes. Considered: *MacLeay* v. *Tait*, [1906] A.C. 24. Referred to: *Marshall* v. *Morrison*, [1907] W.N. 29.

As to the matters required to be stated in a prospectus and remedies for misrepresentation therein, see 6 Halsbury's Laws (3rd Edn.) 173–182, 184 et seq., and for cases see 9 Digest (Repl.) 106–108, 113 et seq. For Companies Act, 1948, see 3 Halsbury's Statutes (2nd Edn.) 452.

Cases referred to:

(1) *Sullivan* v. *Mitcalfe* (1880), 5 C.P.D. 455; 49 L.J.Q.B. 815; 44 L.T. 8: 29 W.R. 181; 9 Digest (Repl.) 107, *503.*

(2) *Twycross* v. *Grant* (1877), 2 C.P.D. 469; 46 L.J.Q.B. 636; 36 L.T. 812; 25 W.R. 701, C.A.; 9 Digest (Repl.) 33, *35*.

(3) *Smith* v. *Chadwick* (1884), 9 App. Cas. 187; 53 L.J.Ch. 873; 50 L.T. 697; 48 J.P. 644; 32 W.R. 687, H.L.; 9 Digest (Repl.) 127, *695*.

(4) *Broome* v. *Speak*, [1903] 1 Ch. 586; 71 L.J.Ch. 716; 88 L.T. 580; 50 W.R. 614; 18 T.L.R. 571; affirmed, [1903] 1 Ch. 586; 72 L.J.Ch. 251; 88 L.T. 580; 51 W.R. 258; 19 T.L.R. 187; 47 Sol. Jo. 238; 10 Mans. 38, C.A.; affirmed sub nom. *Shepheard* v. *Broome*, [1904] A.C. 342; 73 L.J.Ch. 608; 91 L.T. 178; 53 W.R. 111; 20 T.L.R. 540; 11 Mans. 283, H.L.; 9 Digest (Repl.) 106, *496*.

(5) *Baily* v. *Merrell* (1615), 3 Bulst. 94; 81 E.R. 81; 35 Digest 59, *549*.

(6) *Pasley* v. *Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest 25, *163*.

(7) *Redgrave* v. *Hurd* (1881), 20 Ch.D. 1; 51 L.J.Ch. 113; 45 L.T. 485; 30 W.R. 251, C.A.; 35 Digest 47, *417*.

(8) *Cackett* v. *Keswick*, [1902] 2 Ch. 456; 71 L.J.Ch. 641; 87 L.T. 11; 51 W.R. 69; 18 T.L.R. 650; 46 Sol. Jo. 600; 9 Mans. 388, C.A.; 9 Digest (Repl.) 106, *494*.

(9) *Baty* v. *Keswick* (1901), 85 L.T. 18; 50 W.R. 14; 45 Sol. Jo. 672; sub nom. *Cackett* v. *Keswick*, *Baty* v. *Keswick*, 17 T.L.R. 664; 9 Digest (Repl.) 103, *474*.

Also referred to in argument:

Jennings v. *Broughton* (1853), 5 De G.M. & G. 126; 23 L.J.Ch. 999; 43 E.R. 818, L.JJ.; 9 Digest (Repl.) 120, *628*.

Charlton v. *Hay* (1874), 31 L.T. 437; 23 W.R. 129; 9 Digest (Repl.) 107, *499*.

Re Coal Economising Gas Co., *Gover's Case* (1875), 1 Ch.D. 182; 45 L.J.Ch. 83; 33 L.T. 619; 24 W.R. 125, C.A.; 9 Digest (Repl.) 110, *528*.

Appeal by the defendants against the decision of JOYCE, J.

The plaintiff subscribed for 1000 shares in the Standard Exploration Co., Ltd., on the faith, as he alleged, of the statements in the prospectus. He said that some of these statements were untrue, and also that he had been induced to apply for the shares by the omission to specify in the prospectus the date and names of the parties to a material contract dated Oct. 27, 1898. That contract was made between the London and Globe Finance Corporation, Ltd. (the promoters of the Standard Exploration Co., Ltd.) and the Standard Exploration Co., Ltd., and by it the corporation agreed to transfer to the company 5,000 deferred shares held by the corporation in the Austin Friars Finance Syndicate, Ltd., and the company agreed to allot and issue to the corporation 40,000 shares in the company in exchange therefor. The defendants were General Gough Calthorpe, Lord Edward Pelham-Clinton, and Mr. Sinclair McLeay, all of whom were directors of the company at the time the prospectus was issued. The plaintiff claimed—(i) a declaration that the defendants were, under the Directors' Liability Act, 1890, liable to pay him compensation for the loss he had sustained by reason of the said untrue statements; (ii) a declaration that the prospectus was fraudulent within the meaning of s. 38 of the Companies Act, 1867, and that the defendants were liable to pay him damages for the loss sustained by him by reason of his having been induced to subscribe for the shares on the faith of the prospectus; and (iii) payment of this compensation or damages.

Gore Browne, K.C., and *W. H. Cozens-Hardy* for the defendants, General Calthorpe and Lord Edward Pelham-Clinton.

Younger, K.C., and *Ashton Cross* for the defendant, McLeay.

Hughes, K.C., and *L. Ryland* for the plaintiff.

Cur. adv. vult.

June 6, 1905. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—Section 38 of the Companies Act, 1867, requires that every prospectus of a company shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus, whether subject to adoption by the directors or the company or otherwise, and enacts that any prospectus not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the

company knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract. The plaintiff complains, among other things, that an agreement of Oct. 27, 1898, made between the London and Globe Finance Corporation, Ltd. (who were promoters) and the Standard Exploration Co., Ltd., whereby the corporation agreed to transfer to the company 5,000 deferred shares held by the corporation in the Austin Friars Finance Syndicate, Ltd., and the company agreed to allot and issue to the corporation 40,000 shares in the company in exchange therefor, is not specified in the prospectus, with dates and names of parties, according to the provisions of s. 38. The plaintiff, in the statement of claim, says that he received a copy of the prospectus, and on the faith thereof and induced by the statements therein contained, and misled and induced by the omission to specify therein the dates and names of the parties to the contracts mentioned in the statement of claim, he subscribed for 1,000 shares in the company, and paid to the company £1,000 in respect of the shares. The plaintiff claims a declaration that the prospectus was fraudulent on the part of the defendants within the meaning of s. 38, and that the defendants are liable to pay him damages for the loss sustained by him by reason of his having been induced to subscribe for the shares on the faith of the prospectus, and he claims judgment for those damages. Nobody imputes to either of the defendants any want of good faith or honour in the issue of the prospectus. The claim is based exclusively on the provision that the prospectus, not specifying the contracts required to be specified, shall be deemed fraudulent. The statement of claim includes a great many other claims based on this section, besides the claim which I have mentioned in respect of the omission of the Austin Friars contract, but as the action has turned out the claim in respect of the omission of this contract is the only claim which we have to consider.

I shall assume for the purpose of this judgment that it has been proved that the prospectus received by the plaintiff was issued with the knowledge and by the authority of the defendants, although it has been argued strenuously that technically there is no evidence of this. It is not necessary, however, in the view which I take of this case to decide this question of fact. I hold also that the Austin Friars contract which was omitted from the prospectus was material for anyone to see who was minded to become a shareholder in the Standard Exploration Co., Ltd., before making his election so to do. But these assumptions do not conclude the case against the defendants, for, in my judgment, the authorities show, and show plainly, that although a contract is omitted which ought to have been set out in the prospectus, yet the plaintiff cannot recover unless he shows that he personally was injured, and, in my judgment, the plaintiff cannot do this unless he shows that he was induced by the omission to specify the contract in question to take the shares which he took. It is not sufficient for the plaintiff to show in the abstract that the prospectus must be deemed fraudulent on account of the omission, he must show that he personally has been injured.

As I understand the judgment of THESIGER, L.J., in *Sullivan* v. *Mitcalfe* (1), he lays it down that the plaintiff, in order to prove he has been injured, must give evidence to satisfy the court that he would not have taken the shares had he known of the omitted contract. The statute for the protection of those who are invited by a prospectus to become shareholders requires that the prospectus shall disclose contracts material to the election of those thus invited, but no cause of action arises except for those who suffer damage by the failure to comply with the statute. The words of THESIGER, L.J., are (5 C.P.D. at p. 460):

> "that no consequence follows the omission to disclose in a prospectus any contracts except in favour of a person taking shares on the faith of such prospectus, and that giving a reasonable meaning to this not very happily worded expression, no person can be said to have taken shares on the faith of a prospectus except a person who can prove to the satisfaction of a jury that he took his shares on the faith of there being no such contract as that omitted to be disclosed, and that if such contract had been disclosed to him he would not have taken his shares."

It seems to me that BAGGALLAY, L.J., who heard the judgment of THESIGER, L.J., before he delivered his own, would have used very different language if he meant to differ from the view of THESIGER, L.J. What BAGGALLAY, L.J., says is (ibid. at p. 464):

> "That any omission to obey the directions of s. 38 should be availed of for their own benefit by one class of persons only—namely, by persons who have taken shares in the company, and of such class by those only who have taken them upon the faith of the prospectus or notice from which the contract has been omitted, and who have had no notice of the contract from any other source."

These words of BAGGALLAY, L.J., are hardly consistent with the idea that he thought that the legislature intended by the section that if the prospectus omitted a material contract, a shareholder who had taken his shares on the faith of the prospectus could recover damages, although he admitted that he would have taken his shares all the same, if the prospectus had fully disclosed the omitted contract. This view is confirmed by the questions put by LORD COLERIDGE, C.J., to the jury in *Twycross* v. *Grant* (2), one of which was (2 C.P.D. at p. 476):

> "If these contracts had been disclosed in the prospectus or reference made thereto, would the plaintiff have taken the shares?"

I may observe that COCKBURN, C.J., in speaking of the grievance of the plaintiff in *Twycross* v. *Grant* (2) says (ibid. at p. 543):

> "The complaint of the plaintiff is that he has been induced by a suppression in the prospectus to which the statute attaches the character of fraud to take shares in an undertaking, which, but for this suppression, he would not have joined, and which has turned out to be worthless—a fact which the jury have found in his favour."

In my judgment, the result is that the legislature by s. 38 of the Act of 1867 gives those who are invited by a prospectus of the company to take shares a statutory protection by imposing on those who issue the prospectus a statutory obligation, and by enacting that the failure to comply with that obligation shall cause the prospectus to be deemed fraudulent. But I think that no one has a cause of action unless he satisfies the court that he has been damaged by the breach of the obligation—that is, by the omission or suppression of that which the statute requires to be disclosed. We have, therefore, in the present case to look at the evidence to ascertain if the plaintiff has satisfied the onus which has been thrown upon him. And I think that, so far as the evidence of the plaintiff personally is concerned, he has not satisfied this onus. He at all events nowhere says that knowledge of the contract of Oct. 27, 1898, whereby the corporation agreed to transfer to the Standard Exploration Co. 5,000 deferred shares in the Austin Friars Syndicate, would in any way have deterred him from taking his shares in the Standard Co. On the contrary, his evidence goes far to show that neither the terms upon which the Standard Co. had acquired the shares which they had purchased, nor the fact that the purchase of the Austin Friars shares was effected by a contract with the London and Globe Co., who were promoters, would in any way have affected the plaintiff's election whether he should take shares. It was suggested that the mere fact that the non-disclosed contract is material to such an election is sufficient to satisfy the onus thrown on the plaintiff, and to make the tribunal dealing with the question of fact presume that the plaintiff was induced to take his shares by that omission which the legislature has declared shall be deemed fraudulent. But I think the observations of LORD BLACKBURN in *Smith* v. *Chadwick* (3) negative this contention. The fact that a material contract has not been disclosed raises no presumption of law that the plaintiff was induced to take his shares by the omission, or would not have taken them if the contract in question had been disclosed, and any primâ facie presumption of fact arising on the non-disclosure in the prospectus which drew the plaintiff's attention to the shares which he ultimately took, operated to induce plaintiff so to do, may be, and, in my opinion, in the present case is, displaced by the plaintiff's own evidence.

I have only to add a few words about *Broome* v. *Speak* (4) in which SIR RICHARD HENN COLLINS, M.R., says ([1903] 1 Ch. at p. 620):

"It has been suggested that, unless it can be shown clearly that the plaintiff would have been deterred from buying the shares in this company had he known of the existence of this contract, he cannot succeed. That, it seems to me, is putting the case considerably higher against the plaintiff than the authorities warrant. To begin with, to come back simply to the words of the section, what does the section itself provide? 'Every prospectus . . . shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus . . . whether subject to adoption by the directors of the company, or otherwise; and any prospectus . . . not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking any shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.' Therefore the standard is: 'Did he knowingly issue the same?'—that means, intentionally put out a prospectus not including a contract of the existence of which he was aware."

The MASTER OF THE ROLLS then went on to say (ibid. at pp. 620, 621):

"I will refer to the judgment of BAGGALLAY, L.J., in *Sullivan* v. *Mitcalfe* (1), as stating, as it seems to me, quite accurately, and also in accordance with subsequent decisions, what the real meaning of that enactment is, so far as materiality to the plaintiff is concerned. He says this (5 C.P.D. at p. 464): 'Why should provision be made for its being specified in every prospectus or notice issued for this purpose'—that is, the purpose of inviting persons to subscribe for shares—'whilst no provision is made for its being specified in any prospectus or notice issued for any other purpose, unless it was the intention of the legislature to afford some protection to or to confer some benefit upon persons who might be likely to respond to the invitations so given to them? And if such was the intention of the legislature, it is difficult to suggest any other class of contracts as being within its contemplation than such as, if made known to a person reading the prospectus or notice, would be likely to influence him in determining whether he would or would not become a shareholder in the projected company.' Mr. Astbury has pointed out, and the learned judge [BUCKLEY, J.] also in a passage which I will presently read from his judgment, that it is really demanding impossibilities of the court to ask it to find, as a fact, that a person would have been influenced in a particular way if a contract which he had never seen, and of which he knew nothing, had been disclosed at the time. That is a problem too complicated for solution by anyone. What the attitude of the intending investor would have been had the contract been known to him becomes a question of mere speculation; but it seems to me that he is clearly entitled to this —to have every element material for enabling him to form a judgment as to whether he will or will not subscribe for shares fairly put before him; and, as regards the particular case of contract, the statute has made a specific enactment treating the prospectus which does not disclose material contracts as fraudulent, and giving remedies in such a case upon the basis of the prospectus being fraudulent."

It does not seem to me that BAGGALLAY, L.J., meant to say that if the omission of a material contract likely to induce a person to take shares is proved, it is to be presumed as a matter of law that the plaintiff was induced by the omission to take his shares, or that upon proof of such omission the plaintiff is entitled to relief.

LORD BLACKBURN, in *Smith* v. *Chadwick* (3), speaking of a material misstatement in an action of deceit, quoted the dictum of CROKE, J., in *Baily* v. *Merrell* (5) (3 Bulst. at p. 95), cited by BULLER, J., in *Pasley* v. *Freeman* (6) (3 Term Rep. at p. 56):

"Fraud without damage or damage without fraud gives no cause of action, but where these two concur an action lies."

And LORD BLACKBURN went on to say (9 App. Cas. at p. 196):

"I think that if the plaintiff did act upon these representations he shows damage; if he did not he shows none. And I think the plaintiff in such a case must not only allege, but prove, this damage. It is as to what is sufficient proof of this damage

that I wish to make any remarks. I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement. . . . I think that, if it is proved that the defendants, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into the contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In *Redgrave* v. *Hurd* (7), SIR GEORGE JESSEL is reported to have said that it was an inference of law. If he really meant this he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law. Its weight, as evidence, must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act."

These observations of LORD BLACKBURN are quite inconsistent with any presumption as a matter of law that the plaintiff would have been deterred from taking the shares if the omitted contract had been disclosed, or with any proposition such as the proof that there has been such an omission from a prospectus as that which s. 38 enacts shall cause the prospectus to be deemed fraudulent, will entitle the plaintiff to relief, and give him a cause of action without the proof of personal damage. I am aware that it is suggested that the plaintiff may prove this damage, even though he should admit that the disclosure of the omitted contract would have had no effect whatever upon his election, by proving that it was the receipt of the prospectus which induced him to consider the question whether or not he should take shares. Such a suggestion seems to me altogether inconsistent with *Twycross* v. *Grant* (2) and *Sullivan* v. *Mitcalfe* (1), and difficult to reconcile with the provision in the section excluding from the benefit of it any person taking shares in the company on the faith of the prospectus who "shall have had notice of such contract." At all events, I do not think that the Court of Appeal, or any member of it, meant by the judgment in *Broome* v. *Speak* (4) to impeach the authority of *Sullivan* v. *Mitcalfe* (1), or that of the judgment of THESIGER, L.J. I think that SIR RICHARD HENN COLLINS, M.R., when he dissented from the proposition that the plaintiff could not succeed unless it could be shown clearly that he would have been deterred from buying the shares in the company, meant no more than that the plaintiff would make a primâ facie case by proof of the omission of a material contract, and that he took his shares after the receipt of the prospectus. To this I entirely assent, but, in my judgment, no primâ facie case requiring an answer from the defendants would be made if the plaintiff went on to give evidence himself, from which the just inference would be that he would still have taken the shares if the suppressed contract had been disclosed, or that he was induced to take the shares by matters altogether outside the receipt and the reading of the prospectus. I think, therefore, that this appeal ought to be allowed.

ROMER, L.J.—It does not of necessity follow that if a person applies for and pays for shares on the faith and footing of a prospectus which is fraudulent as against him under s. 38 of the Companies Act, 1867, by reason of the omission of a material contract, and he thereby suffers damage, he can recover the damage against the directors who knowingly issued the fraudulent prospectus. Suppose, for example, he, as plaintiff in an action for the damage, admitted in the witness-box that, though he read the prospectus through, he attached no importance to the statements in it as to the contracts entered into, and that, if the omitted contract had been stated as provided by the Act, that fact would have made no difference to him, and he would still have applied for the shares. In that case it is clear that the plaintiff could not recover. And of course the plaintiff could not recover, even though he did not make an admission of the facts above-mentioned, if the result of the evidence before the court as a whole was to establish those facts.

What, then, must a plaintiff prove in such an action to entitle him to succeed? I think the answer to that question is to be found by considering what a plaintiff has to prove in order to succeed in an action of an analogous kind, based, not on s. 38, but on

fraudulent misrepresentations of a material character contained in a prospectus. In that case the plaintiff must prove that he relied on the fraudulent misrepresentations in applying for the shares, so that the court can reasonably conclude that but for the misrepresentations he might not have applied for the shares. I do not think the plaintiff would be bound to prove more than that. He would not, in my opinion, be bound to embark further upon a consideration of the hypothetical question as to what would have happened if the fraudulent misrepresentations had not been made so as to have the onus cast upon him of proving (if, indeed, he could possibly do so satisfactorily) that as a matter of fact he would certainly not have applied for the shares if the misrepresentations had not been made. So, in an action based on s. 38, it appears to me that by analogy the court must be able from the evidence before it reasonably to conclude that, if the omitted material contract had been stated in the prospectus, the plaintiff might not have applied for shares. I think this was the view taken by FARWELL, J., in his decisions in *Cackett* v. *Keswick* (8) and *Baty* v. *Keswick* (9), with which I agree. At the same time I think that the plaintiff in such a case would not be obliged to establish as a fact that if the contract had been stated it would certainly have prevented him from applying for the shares. I think this was what was pointed out and meant by SIR RICHARD HENN COLLINS, M.R., in what he said in *Broome* v. *Speak* (4).

That being, in my judgment, the law applicable to the case, I have to consider whether from the evidence before the court as a whole it can reasonably conclude that, if the omitted material contract had been stated in the prospectus, the plaintiff might not have applied for his shares. As to this, I will only say that, in my opinion, the court cannot reasonably come to such a conclusion. On the contrary, it appears to me that, so far as this particular plaintiff's application for shares was concerned, the omission of this contract from the prospectus was a matter of no substantial moment or weight. That being so, I think the appeal should be allowed.

STIRLING, L.J.—The question in this action is whether the defendant directors of the Standard Exploration Co. are, under s. 38 of the Companies Act, 1867, liable to pay to the plaintiff damages by reason of the prospectus of the company failing to specify the dates and names of the parties to a contract dated Oct. 27, 1898, and made between the London and Globe Finance Corporation (the promoters of the company), of the one part, and the company, of the other part, being a contract for the sale by the London and Globe Finance Corporation to the company of 5,000 deferred shares in a company called the Austin Friars Finance Syndicate.

The contract in question was one which, regard being had to the decision in *Broome* v. *Speak* (4), affirmed by the House of Lords in *Shepheard* v. *Broome* (4), ought to have been specified in the prospectus in manner provided by s. 38; and, consequently, the section requires that the prospectus be deemed fraudulent on the part of the directors of the company who knowingly issued the same. But, in order that the plaintiff may succeed in this action, he must prove not merely fraud, but damage occasioned by the fraud. In *Smith* v. *Chadwick* (3) LORD BLACKBURN said (9 App. Cas. at pp. 195, 196):

> "In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that, if he did act upon these representations, he shows damage; if he did not, he shows none. And I think the plaintiff in such a case must not only allege, but prove this damage."

On the question of what is sufficient proof, LORD BLACKBURN points out (ibid. at p. 196) that it is not necessary "that the plaintiff should always be called as a witness to swear that he acted on the inducement," and that

> "if it is proved that the defendants, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement";

but that

"Its weight as evidence must greatly depend on the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act";

and that whenever the inference is a matter of doubt the tribunal which has to decide the fact should remember that, in the present state of the law,

"the plaintiff can be called as a witness on his own behalf, and that if he is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one."

But he did not say that it is conclusive.

In *Cackett* v. *Keswick* (8) FARWELL, J., applied the law thus laid down to a case of the omission from a prospectus of the particulars of a contract under s. 38 of the Companies Act, 1867. He said ([1902] 2 Ch. at p. 464):

"If a material fact is omitted from a statement put forward to induce a person to enter into a contract, and he does enter into the contract on the faith of that statement, it is a fair inference that he would not have contracted if he had known of the fact, and that in this sense the omission induced the contract. . . . It would no doubt be matter of comment if a plaintiff was not called nowadays to swear that the fact omitted would have deterred him from contracting; but neither his testimony nor his absence is conclusive."

The decision in *Cackett* v. *Keswick* (8) was in favour of the plaintiff, and was affirmed by the Court of Appeal, but in *Baty* v. *Keswick* (9), which was heard immediately after and decided at the same time with *Cackett* v. *Keswick* (8), the same learned judge, acting on the principles laid down in *Cackett* v. *Keswick* (8) and finding as a fact that the plaintiff acted on the faith of the directors' names, and never read the clause in the prospectus and attached no importance to it, dismissed the action. In my judgment, the principles laid down by FARWELL, J., in *Cackett* v. *Keswick* (8) were correct, and were correctly applied by him in *Baty* v. *Keswick* (9). The subject was subsequently discussed in *Broome* v. *Speak* (4) before BUCKLEY, J., and in the Court of Appeal, their decision being affirmed sub nom. *Shepheard* v. *Broome* (4), in the House of Lords; but nothing is there laid down which appears to be inconsistent with what was decided in *Cackett* v. *Keswick* (8) and *Baty* v. *Keswick* (9).

The plaintiff in this action on cross-examination said that in 1899 Mr. Whitaker Wright was a gentleman who had a great reputation, whose lead a good many people (including the plaintiff himself) were prepared to follow; that the companies floated by the London and Globe stood in a good position and were all well thought of; that he held shares in the British American Corporation, a sister company to the London and Globe, and in seven other companies floated either by the London and Globe or the British American Corporation; and that he was very ready to go in for "anything that seemed reasonable" which was floated by either of these companies. He said that he read the prospectus of the Standard Exploration Co., and was attracted by its being issued by the London and Globe, and by the statement that the London and Globe was making no profit, and by Mr. Whitaker Wright being the chairman; that he noticed that among the properties to be acquired was the Austin Friars Syndicate, and that the purchase money for getting those assets was included in the 775,000 fully paid shares mentioned in the prospectus, and that it would not matter whether the shares came to the shareholders of the selling company directly or through an intermediary, provided no intermediate profit was taken and the price was fair. He also admitted that when the statement of claim was prepared he believed there were actual misrepresentations, and not merely an omission in the prospectus, and relied on them, but they were afterwards given up. He was cross-examined at considerable length as to the contract, the omission of which from the prospectus is complained of. I do not attempt to summarise the cross-examination, but will read the concluding part:

"Q. You did not think it worth while to inspect the contracts, among which you would have found the Austin Friars contract? A. No, that would have been very

unusual.—Q. It would have been very unusual I quite agree; so that I do not think I am doing you an injustice in saying that so long as the aggregate was correct of 775,000 shares paid for the properties you did not mind how it was divided between those companies? A. Not if it was true.—Q. And if not more than 775,000 shares were paid you have no grievance? A. Not on that point—the price was paid.—Q. If the 100,000 shares which were allocated to Austin Friars—I will use that word, although it is begging the question—if the 100,000 shares allocated to Austin Friars reached the hands of the shareholders in the Austin Friars Co. in exchange for their assets, I think you have told me that you would have no grievance? A. But is that so?—Q. I am putting it as a question. If it had reached their hands you would have no grievance. A. If the 100,000 shares—— Q. Which were allocated to Austin Friars reached the hands of the shareholders of the Austin Friars Co. you have no grievance? A. I think not.—Q. You think not? A. No.—Q. And the steps by which it reached their hands do not really matter as long as there is no intermediate profits? A. I do not admit that quite.—Q. I will take it from you in your own words. Always providing that there was no intermediate profit, would it matter to you what steps were gone through to make the 100,000 shares reach the hands of the shareholders? A. May I have that again?—Q. Yes, I want you to understand it. How does it matter to you that there were certain intermediate stages to be gone through, always provided that there was no intermediate profit taken? A. I think it might affect it.—Q. It might, but let us hear how it did, or could, or would? A. It might cover something up that it was undesirable to disclose.—Q. Do you suggest that in fact it covered up anything which it was undesirable to disclose? A. No. I do not." In re-examination he was asked: "Q. Do you think it would be likely to affect your mind if you saw in the prospectus that there was a contract with the London and Globe Co.? A. I think it might have. I cannot say."

This last answer is certainly wanting in decision; but it is not conclusive, and was rightly held by JOYCE, J., not to be so.

The court has to look at the whole of the evidence and say whether the fair inference to be drawn is that the plaintiff would not have contracted if he had known of the contract with the London and Globe Co., and that in this sense the omission induced the contract. I have endeavoured to perform this duty to the best of my ability, and my conclusion is that this inference ought not to be drawn; and, in my opinion, the appeal ought to be allowed.

Solicitors: *Burn & Berridge*; *Gilbert Robins*; *Carter & Bell.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

BUTTERKNOWLE COLLIERY CO. *v.* BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY

[House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord Davey, Lord Robertson and Lord Atkinson), March 5, 6, 9, May 7, 1906]

[Reported [1906] A.C. 305; 75 L.J.Ch. 541; 94 L.T. 795; 70 J.P. 361; 22 T.L.R. 516]

Land—Right to support—Presumption of right—Rebuttal—Need for unequivocal words—Effect of provision for compensation—Effect of Inclosure Act on liability of mine-owner.

Where there has been a severance in title and the upper and the lower strata of land are in different hands the surface owner is entitled to support for his property in its natural position and condition without interference or disturbance by or in consequence of mining operations unless such interference or disturbance is authorised by the instrument of severance—whether it be a lease, a deed of grant and reservation, or an Inclosure Act or award—in language which conveys unequivocally that intention either by express words or by necessary implication. To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants are conferred without stint or reserve, or that compensation is provided in measure adequate, or more than adequate, to cover any damage likely to be occasioned by the exercise of those powers and privileges. Nor is it enough in the case of a lease that the lessee is bound to work out the minerals or to work the minerals in a prescribed manner, or in the case of an Inclosure Act or award that the person in whose favour the mines are reserved or re-granted may be authorised to work the minerals and enjoy the property as fully and freely as if the Inclosure Act had not been passed. Words, however wide, that merely authorise the getting of all the minerals have been held not to authorise so getting them as to let down the surface. The presence of a provision for compensation which is obviously inadequate or plainly inappropriate if applied to damage by subsidence is cogent evidence to prove that subsidence was not contemplated. If the compensation clause is capable of being satisfied by reference to acts done on the surface, then, though it may be wide enough to cover also damage done to the surface by taking away the support, still it must be confined to damage done on the surface, and the inference that support may be taken away on payment of compensation will not be drawn. Where the surface owners are commoners and their interest is changed by an Inclosure Act their right to support changes also (unless otherwise provided) so that the owner of the minerals must work them in a way not to damage the extended interest which the commoner has acquired under the Act.

Notes. Applied: *Markham* v. *Paget*, [1908] 1 Ch. 697. Distinguished: *Butterley Co.* v. *New Hucknall Colliery Co.*, [1910] A.C. 381. Considered: *Beard* v. *Moira Colliery Co.*, [1915] 1 Ch. 257; *Jones* v. *Consolidated Anthracite Collieries and Dynevor*, [1916] 1 K.B. 123; *Thomson* v. *St. Catharine's College, Cambridge, etc.*, [1919] A.C. 468. Distinguished: *Welldon* v. *Butterley Co.*, [1920] 1 Ch. 130. Considered: *Consett Industrial and Provident Society* v. *Consett Iron Co.*, [1922] All E.R. Rep. 285; *Warwickshire Coal Co.* v. *Coventry Corpn.*, [1934] Ch. 488; *Wath-upon-Dearne U.D.C.* v. *Brown & Co.*, [1935] All E.R. Rep. 127; *Wolstanton Ltd. and Duchy of Lancaster* v. *Newcastle-under-Lyme Borough Council* [1940] 3 All E.R. 101; *Ilkeston Collieries, Ltd.* v. *Grand Union Canal Co.* (1946), 175 L.T. 12. Referred to: *Davies* v. *Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488.

As to the right of support of a surface owner, see 26 Halsbury's Laws (3rd Edn.) 339 et seq., and for cases see 34 Digest 700 et seq.

Cases referred to:

(1) *Blackett* v. *Bradley* (1862), 1 B. & S. 940; 31 L.J.Q.B. 65; 5 L.T. 832; 26 J.P. 358; 8 Jur. N.S. 588; 121 E.R. 963; 34 Digest 711, *963.*

(2) *Gill* v. *Dickinson* (1880), 5 Q.B.D. 159; 49 L.J.Q.B. 262; 42 L.T. 510; 44 J.P. 587; 28 W.R. 415, D.C.; 11 Digest (Repl.) 65, *904.*

(3) *Love* v. *Bell* (1884), 9 App. Cas. 286; 53 L.J.Q.B. 257; 51 L.T. 1; 48 J.P. 516; 32 W.R. 725, H.L.; 34 Digest 708, *947.*

(4) *Davis* v. *Treharne* (1881), 6 App. Cas. 460; 50 L.J.Q.B. 665; 29 W.R. 869, H.L.; 34 Digest 710, *954.*

(5) *Dixon* v. *White* (1883), 8 App. Cas. 833, H.L.; 34 Digest 708, *946.*

(6) *New Sharlston Collieries Co., Ltd.* v. *Earl of Westmorland* (1900), [1904] 2 Ch. 443, n.; 73 L.J.Ch. 338, n.; 82 L.T. 725, H.L.; 34 Digest 705, *933.*

(7) *Duke of Buccleuch* v. *Wakefield* (1870), L.R. 4 H.L. 377; sub nom. *Wakefield* v. *Duke of Buccleuch, Duke of Buccleuch* v. *Wakefield*, 39 L.J.Ch. 441; 23 L.T. 102; 34 J.P. 724, H.L.; 34 Digest 705, *927.*

(8) *Consett Waterworks Co.* v. *Ritson* (1889), 22 Q.B.D. 702; 64 L.J.Ch. 293, n.; 124 L.T. 818, n.; 59 J.P. 199; 43 W.R. 122, n.; 5 T.L.R. 435; 13 R. 123, n., C.A.; 11 Digest (Repl.) 65, *905.*

(9) *Roberts* v. *Haines* (1856), 6 E. & B. 643; 25 L.J.Q.B. 353; 2 Jur. N.S. 999; affirmed sub nom. *Haines* v. *Roberts* (1857), 7 E. & B. 625; 119 E.R. 1377; sub nom. *Roberts* v. *Haines*, 27 L.J.Ex. 49; 29 L.T.O.S. 233; 3 Jur. N.S. 886; 5 W.R. 631, Ex. Ch.; 11 Digest (Repl.) 67, *916.*

(10) *Smith* v. *Darby* (1872), L.R. 7 Q.B. 716; 42 L.J.Q.B. 140; 26 L.T. 762; 37 J.P. 4; 20 W.R. 982; 34 Digest 710, *957.*

(11) *Rowbotham* v. *Wilson* (1860), 8 H.L. Cas. 348; 30 L.J.Q.B. 49; 2 L.T. 642; 24 J.P. 579; 6 Jur. N.S. 965; 11 E.R. 463, H.L.; 34 Digest 613, *121.*

(12) *Williams* v. *Bagnall* (1866), 12 Jur. N.S. 987; 15 W.R. 272; 34 Digest 703, *925.*

(13) *Buchanan* v. *Andrew* (1873), L.R. 2 Sc. & Div. 286; sub nom. *Henderson* v. *Andrew*, 37 J.P. 436, H.L.; 34 Digest 704, *926.*

(14) *Bell* v. *Earl of Dudley*, [1895] 1 Ch. 182; 64 L.J.Ch. 291; 72 L.T. 14; 59 J.P. 199; 43 W.R. 122; 11 T.L.R. 60; 39 Sol. Jo. 79; 13 R. 120; 11 Digest (Repl.) 64, *902.*

(15) *Hext* v. *Gill* (1872), 7 Ch. App. 699; 41 L.J.Ch. 761; 27 L.T. 291; 20 W.R. 957; L.JJ.; 34 Digest 606, *41.*

Also referred to in argument:

Aspden v. *Seddon* (1875), 10 Ch. App. 394; 44 L.J.Ch. 359; 32 L.T. 415; 39 J.P. 597; 23 W.R. 580, L.JJ.; 34 Digest 710, *956.*

Harris v. *Ryding* (1839), 5 M. & W. 60; 8 L.J.Ex. 181; 151 E.R. 27; 34 Digest 707, 945.

Proud v. *Bates* (1865), 6 New Rep. 92; 34 L.J.Ch. 406; 12 L.T. 565; 13 L.T. 61; 11 Jur. N.S. 441; 34 Digest 604, *17.*

Hilton v. *Lord Granville* (1844), 5 Q.B. 701; 1 Dav. & Mer. 614; 13 L.J.Q.B. 193; 2 L.T.O.S. 419; 8 Jur. 311; 114 E.R. 1414; 34 Digest 703, *923.*

Chapman v. *Day* (1883), 47 L.T. 705; 11 Digest (Repl.) 66, *912.*

Smart v. *Morton* (1855), 5. E. & B. 30; 3 C.L.R. 1004; 24 L.J.Q.B. 260; 25 L.T.O.S. 97; 1 Jur. N.S. 825; 119 E.R. 393; 34 Digest 709, *953.*

Dugdale v. *Robertson* (1857), 3 K. & J. 695; 30 L.T.O.S. 52; 3 Jur. N.S. 687; 69 E.R. 1289; 34 Digest 703, *916.*

Taylor v. *Shafto* (1867), 8 B. & S. 228; 16 L.T. 205, Ex. Ch.; 34 Digest 706, *936.*

Eadon v. *Jeffcock* (1872), L.R. 7 Exch. 379; 42 L.J. Ex. 36; 28 L.T. 273; 20 W.R. 1033; 34 Digest 704, *928.*

Greenwell v. *Low Beechburn Coal Co.*, [1897] 2 Q.B. 165; 66 L.J.Q.B. 643; 76 L.T. 759; 13 T.L.R. 471; 34 Digest 712, *972.*

Appeal by the defendants in the action from a decision of the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.), reported [1904] 2 Ch. 419, affirming a decision of Farwell, J., in favour of the respondents, plaintiffs in the action.

The respondents were the owners of certain lands, about four acres in extent, situate within the chapelry of Hamsterley, in the manor of Wolsingham and county of Durham, and of certain houses and other buildings standing thereon. The appellants worked mines of coal subjacent and adjacent to the respondents' lands. In February, 1902, the respondents' lands subsided, and the buildings thereon were damaged in consequence

of such workings. The respondents, accordingly, brought this action in which (inter alia) they claimed: (i) A declaration that the appellants were not entitled as against the respondents to work their mines so as to lower or depress the surface of the respondents' lands, or so as to injure any of the respondents' buildings standing thereon; (ii) an injunction to restrain the appellants from working their mines so as to lower or depress the surface of the respondents' lands, or so as to injure any of the respondents' buildings; (iii) damages by way of compensation for the subsidence and the injury caused to the respondents' buildings. The appellants justified their acts (inter alia) under the provisions of 31 Geo. 2, c. x., entitled, "An Act for inclosing and dividing the moors and commons within the chapelry of Hamsterley, in the manor of Wolsingham and county of Durham," and an award thereunder. The Act, after reciting that there was a large tract of waste land situate within the chapelry of Hamsterley, containing about 7,000 acres, and that the Bishop of Durham was lord of the manor of Wolsingham, enacted that the commons and waste grounds therein mentioned should be inclosed, allotted, and divided as therein mentioned pursuant to an award to be made by the persons therein mentioned, and that immediately after finishing the allotment, and the execution of the award, all right of common in, over, and upon the commons or moors should be for ever extinguished. It was further enacted

> "That the said Lord Bishop of Durham, his successors and assigns, shall and may from time to time and at all times hereafter have, hold, and enjoy all mines and quarries of what nature or kind soever lying and being in and under the said moors and commons so to be divided and inclosed as aforesaid (other than and except such quarries of stone as are hereinafter mentioned), together with all convenient and necessary ways and wayleaves, and liberty of laying and repairing waggon ways and other ways in, over, and along the same, or any part thereof, and of searching for, winning, and working the said mines and quarries, and leading and carrying away the coals, lead, minerals, stones, and other things to be gotten thereout, and making drifts, levels, watercourses, erecting and using fire engines and other engines, pit-rooms, and other usual liberties as fully and freely as he or they might or could have had and enjoyed the same in case this Act had not been made, and that without making or paying any satisfaction for so doing."

Then it was provided:

> "Whereas great inconvenience may happen and damage be done to particular persons by reason of the searching for, winning, and working the mines and quarries within and under their respective allotments by the said Lord Bishop of Durham, his successors and assigns, without making or paying any satisfaction for so doing,"

a summary method of adjusting such questions should be provided by inquiry before a justice or justices of the peace, who were thereby

> "empowered and required to examine and inquire into such complaint or complaints in a summary way, either by examination of witnesses upon oath, or, being of the people called Quakers, upon their solemn affirmation (which said oath or affirmation the said justice or justices is and are hereby empowered to administer), or by such other evidence or proof, ways, and means as to him or them shall seem requisite and expedient in that behalf, and finally to assess, settle, and determine the damages sustained by such person or persons as aforesaid, which damages shall be paid and borne by the occupiers of the several other allotments lying and being in such and the same township in which the allotment or allotments in which such damages shall be committed, shall lie according to the respective yearly values or rents of such allotments in such proportions and shares as the said justice or justices shall direct or appoint. Provided always, and it is hereby enacted that it shall and may be lawful to and for the owners and proprietors of the shares and allotments for the time being at all times to win, work, get, and take stones in their several allotments, and also to get and take stones in the common quarries to be set forth as hereinafter mentioned, and also for the space of one year next after the execution of the said award in any other of the said allotments for necessary or convenient buildings and

reparations and for erecting of walls and fences in and upon the same. And be it further enacted, by the authority aforesaid, that the said commissioners and their successors, or any three or more of them shall and may, and they are hereby authorised and empowered to lay out, assign, or allot such part or parts of the said commons or moors hereby directed and appointed to be inclosed as they shall think fit and proper in the most convenient places for common quarries, for the purposes aforesaid, and also for common watering places for cattle."

Neville, K.C., *Danckwerts, K.C.*, and *MacSwinney* for the appellants.
Upjohn, K.C., *Cave, K.C.*, and *Schwann* for the respondents.

Their Lordships took time for consideration.
May 7, 1906. The following opinions were read.

LORD LOREBURN, L.C.—In this case the plaintiffs claim a declaration that the defendants are not entitled, as against them, to work the defendants' mines so as to lower or depress the surface of certain lands in the parish of Hamsterley or so as to injure any of the plaintiffs' buildings standing thereon, together with an injunction and damages, and the defence in substance is that the defendants are entitled so to work their mines under the terms of an Inclosure Act of 31 Geo. 2.

The facts material to a decision may be summarised as follows. Prior to the Inclosure Act, the Lord Bishops of Durham, who are the defendants' predecessors in title, were lords of the manor of Wolsingham. Certain commoners had rights of common of pasture over the commons, moors, or waste lands of the manor, and, except for those pasturage rights, no persons other than the Lord Bishops of Durham had any rights in respect thereof. The mines and minerals belonged to the lords of the manor, who had full power to work them, subject only to the commoners' rights of pasturage. Accordingly, the lords were at liberty to work their mines so as to lower the surface, provided that they left sufficient pasturage to satisfy the rights of the commoners. Under these circumstances an Inclosure Act was passed in the thirty-first year of George II, under which the commoners' rights of pasturage were extinguished and the common was divided into allotments, which were apportioned among the various commoners. The lands in question in this action are the lands or part of the lands allotted to Christopher Jackson in pursuance of the Inclosure Act, and Christopher Jackson was the predecessor in title of the plaintiffs. Under the same Act the rights of the lords of the manor to the mines and minerals were dealt with in two clauses upon the construction of which the determination of this case must depend. It is not in dispute that the mines have been worked so as to cause damage to the land by lowering or depressing the surface, nor is it disputed that the defendants' workings were quite proper and in the usual method of working, except in the sense that they in fact damaged the plaintiffs' property without, as is alleged, any legal right to do so.

Before examining the clauses in this particular Inclosure Act it is necessary to consider the effect of previous decisions. Many authorities have been cited in argument. Two of them are upon this very Act and those clauses. In the first of these, *Blackett* v. *Bradley* (1), the Court of Queen's Bench held that the surface was entitled to support. In the second case, *Gill* v. *Dickinson* (2), the court held the contrary. We cannot derive clear guidance from those authorities. The numerous other decisions to which we have been referred are undoubtedly of value. I do not propose to travel through them. It will be sufficient to state propositions which they appear to have established. Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support unless the language of the instrument regulating their rights or other evidence clearly shows the contrary. In order to exclude a right of support, the language used must convey unequivocally that intention, either by express words or by necessary implication. The same presumption in favour of a right of support which regulates the rights of parties in the absence of an instrument defining them will apply also in construing the instrument when it is produced. If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down. Illustrations are numerous in the

reports. Words, however wide, that merely authorise the getting of all the minerals have been held not to authorise so getting them as to let down the surface. Where power is given to get the minerals on paying compensation for damage done to the surface, the court will still scrutinise the compensation clause. Are there any rights belonging to the mineowner on the surface (such as a right of making roads) to which the compensation clause may refer? If the compensation clause is capable of being satisfied by reference to acts done on the surface, then, though it may be wide enough to cover also damage done to the surface by taking away the support, still it must be confined to damage done on the surface, and the inference that support may be taken away on payment of compensation will not be drawn. Again, courts have asked whether the compensation is manifestly inadequate for such an injury as letting down the surface, and have commented upon the absence of any provision for compensation. Either of these circumstances has supplied judges with a reason for so cutting down wide language in a grant of minerals as to imply a condition that the surface shall be supported. The process of reasoning in such cases seems to be that parties must not be supposed to have intended what would be unreasonable and unjust. I think that in each of them a clause providing for a continuance of support would not have been inconsistent with the actual clauses.

The most extreme instance of the solicitude displayed by courts of law for the maintenance of the right of support is to be found in *Love* v. *Bell* (3), decided in the House of Lords in 1884. In that case the waste of a manor was inclosed under an Inclosure Act. All rights of common were extinguished, and the commoners received allotments in exchange. Before the Act was passed the lords of the manor owned the minerals and were entitled to work them so as to let down the surface, provided they left enough of the surface undisturbed to satisfy the commoners' rights of pasturage. Under that Act the minerals and other royalties were reserved to the lords,

> "in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made,"

provided that if they should work the mines under any allotment, or use ways, etc., over any allotment, they should make

> "satisfaction for the damages and spoil of ground occasioned thereby to the person or persons in possession of such ground at the time or times of such damage or spoil,"

not exceeding £5 yearly for every acre so damaged or spoiled. In the face of these facts and enactments, the House of Lords held that the lords were bound to support the surface. Lord Selborne, L.C., explained that the clause enabling the lords to work their mines as fully as if the Act had not been passed did not mean that they could disturb the surface as they had been able to do when the land was common waste. Just as the maxim sic utere tuo ut alienum non lædas required them to leave sufficient pasturage when the commoners' rights were to have pasturage, so it now required them to leave support when the commoners' rights had been commuted for allotments. He held also that when the Act provided compensation for damage it meant compensation for damage by working the mines with only the usual powers—that is, without letting down the surface. Both these conclusions were essential to the decision at which the House of Lords unanimously arrived in *Love* v. *Bell* (3), and, as it seems to me, are binding upon us.

I now come to the clauses of the Inclosure Act with which we have to deal in the present appeal; and I am of opinion that the respondents are entitled to support because the language of the Act admits of an interpretation which preserves that right. I find a clause authorising the lords to do a number of things such as work the mines and quarries, use the surface for waggon ways or other ways, making drifts, levels, and waterways

> "as fully and freely as he or they might or could have had and enjoyed the same in case this Act had not been made, and that without making or paying any satisfaction for so doing."

Counsel for the appellants pressed us to give full effect to these words. He said that if the Act had not been passed the lord had the right to let down the surface provided that he left sufficient unbroken land to satisfy the old commoners' right of pasturage. That is so; and I might be entitled to assent to counsel's argument if I were not bound by the authority of *Love* v. *Bell* (3). The construction placed upon particular words in one instance does not necessarily prejudice their construction when in a different setting. But the principle laid down by LORD SELBORNE, L.C., in that case lay at the root of the judgment; and it amounted to this, that when the nature of the commoners' interest is changed by an Inclosure Act, such as this, his right to support changes also (unless otherwise provided), so that the owner of minerals must work them in a way not to damage the extended interest which the commoner has acquired under the Act. If that principle was applicable in *Love* v. *Bell* (3), I cannot see how it is to be excluded in the present case. Counsel for the appellants next pointed to the last words in the clause— viz., "and that without making or paying any satisfaction for so doing." What does "so doing" mean? It means, in my opinion, doing any of the things which the clause authorises to be done. One of them is winning and working the said mines. But there are also other things authorised in the same clause. Some of them are things in connection with working the mine which must be done upon the surface, such as making waggon roads, and the provision that the mineowner shall not make any satisfaction is capable of being applied to damage which the working may thus cause to the surface without letting it down at all. The meaning may be, and I ought, therefore, so to read it, that the lord is not to pay for any damage done to the surface by exercising his right of winning and working—that is to say, his right of winning and working so as to leave the proper support. It does not excuse him from paying the damage if he so wins and works as not to leave support.

It is quite true that the clause which I have already criticised ought to be read with the following clause, which prescribes that other persons are to make the satisfaction which the lord is exempted from making. To my mind, the latter clause strongly favours the construction which I put on the former. It requires the occupier of adjoining allotments to make good the damage done to any allotment by the exercise of the lord's rights, including the right of winning and working coal, and authorises a distress on their goods and chattels in the event of failure to pay. This is an absurd enactment if it applies to such damage as that which might be caused by subsidence. Why should occupiers with a temporary tenancy pay for permanent injury? What must have been the kind of compensation contemplated by the authors of the Act when they prescribed a distress on the goods and chattels of an allotment occupier as an appropriate means of levying the amount? On the other hand, such a provision might be suitable enough in a case of trifling damage, or even in case of quarries being opened, which, though they ruin the surface, do not extend over a great space. I do not dwell upon this subject, because FARWELL, J., has exposed in his judgment the ludicrous consequences which would flow from the construction urged upon us by the appellants. Under these circumstances I am of opinion that the judgment of FARWELL, J., as is that of the Court of Appeal, is right, and ought to be affirmed.

LORD MACNAGHTEN.—I agree with the opinion that has just been read by my noble and learned friend. Your Lordships have heard a most able and exhaustive argument, in the course of which, if I am not mistaken, every known case bearing on the relative and respective rights of surface owners and the owners of the minerals beneath the surface was cited and discussed. But, after all, it must, I think, be taken that the law has been ascertained and settled beyond question by the more recent decisions of this House, of which it is only necessary to mention *Davis* v. *Treharne* (4); *Dixon* v. *White* (5); *Love* v. *Bell* (3); and *New Sharlston Collieries Co., Ltd.* v. *Earl of Westmorland* (6).

The result seems to be that in all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations,

unless such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication. This presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of severance is a lease or a deed of grant and reservation or an Inclosure Act or award. To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable or that powers and privileges usually found in mining grants are conferred without stint or reserve, or that compensation is provided in measure adequate, or more than adequate, to cover any damage likely to be occasioned by the exercise of those powers and privileges. Nor is it enough, in the case of a lease, that the lessee is bound to work out the minerals or to work the minerals in a prescribed manner, or in the case of an Inclosure Act or award that the lord, in whose favour the mines are reserved or re-granted, may be authorised to work the minerals and enjoy the property as fully and freely as if the Inclosure Act had not been passed. The difficulty of applying such an hypothesis to the altered condition of things brought about by an Inclosure Act has, as it seems to me, led this House to treat the provision in which it is found, and of which it would seem at first sight to be the keynote, as a dead letter for any practical purpose. Although provision for compensation is not of itself sufficient to show that the mineowner, working in the usual and proper manner, is at liberty to let down the surface, the absence of any provision for compensation is some indication that the ordinary rights of the surface owner were intended to be left untouched. On the other hand, the presence of a provision for compensation which is obviously inadequate or plainly inappropriate if applied to damage by subsidence is cogent evidence to prove that subsidence was not contemplated. The only case in this House which is not altogether in harmony with recent decisions is *Duke of Buccleuch* v. *Wakefield* (7). Whether all the refined and somewhat subtle distinctions which the noble and learned Lords who decided *Love* v. *Bell* (3) were able to discover between the *Duke of Buccleuch's Case* (7) and the case before them are, or are not, wholly satisfactory, the way in which the *Duke of Buccleuch's Case* (7) was treated shows that it must be regarded as standing by itself, and outside the line of authorities embodying and illustrating the law.

Such being, in my opinion, the state of the law at the present day, I do not propose to trouble your Lordships by any reference to cases in the courts below preceding *Davis* v. *Treharne* (4). They are certainly not all consistent with the law as now established. They have all been considered in this House. Each has had its due weight in contributing to the result. And it seems to me that a minute and more careful study of cases where the language of the instrument to be construed is not quite the same, or where, if the language is the same, the decision is not binding on this House, is more likely to prove an embarrassment than any help to a right conclusion. I may, however, observe in passing that in my opinion *Consett Waterworks Co.* v. *Ritson* (8), which was cited in the courts below and in this House, can no longer be regarded as an authority. In the present case the provisions for compensation in the Act 31 Geo. 2, c. x., is absurdly inappropriate if applied to injury or damage occasioned by letting down the surface. And there is nothing, as it seems to me, in the other provisions of the Act, construed by the light of the recent decisions of this House, tending to show that injury by subsidence was in the contemplation of the parties concerned in the arrangement intended to be effected by the Act, or within the scope of the enactment. I think that the appeal fails, and ought to be dismissed with costs.

LORD DAVEY.—The general principles upon which questions of this kind are to be decided may be considered as settled. It cannot now be disputed that where the surface is in one owner and the minerals in another the latter cannot work the minerals so as to destroy the surface. The rule has been clearly enunciated in this House so recently as 1900 in *New Sharlston Collieries Co., Ltd.* v. *Earl of Westmorland* (6); but I do not know that it is better stated anywhere than in the case, which is not often cited, of *Roberts* v. *Haines* (9). If there is no provision for giving compensation for the injury done to the surface it is almost conclusive that the common law rule was intended to apply. But it is not so clear that if there be a provision giving such compensation it is sufficient to

exclude the common law rule. I see from the judgment of VAUGHAN WILLIAMS, L.J., in the present case that I am supposed to have laid down new law on this point in the *New Sharlston Case* (6). It was not my intention to do so, and I do not think that what I said bears that interpretation. I did not intend to say more than I understand to have been said by LORD BLACKBURN in *Davis* v. *Treharne* (4). If the words mean that the owner of the coal may take away the whole coal regardless of the consequences on making compensation for the injury done, the law will give effect to such a bargain or enactment; but, as LORD BLACKBURN says, a clause saying that the coalowner shall make compensation for damage done to the surface does not itself afford a strong argument for saying that he may destroy the surface, as there may be other injury to the surface in connection with the working of the coal to which the compensation will be applicable. On the point now before your Lordships the cases run very fine, and the question for our decision must ultimately depend on the proper construction of the words of the statute. No doubt there is some difficulty in reconciling LORD HATHERLEY'S decision in *Duke of Buccleuch* v. *Wakefield* (7) and *Love* v. *Bell* (3), but the words in the Acts in question in the two cases are not the same, and LORD SELBORNE in the latter case was able to distinguish them. I am prepared with your Lordships to follow the reasoning of LORD SELBORNE, and I think that we ought to give judgment for the respondents.

LORD ROBERTSON.—I have had the opportunity of reading and considering the opinion of the Lord Chancellor and LORD ATKINSON, and I agree entirely in all that they say.

LORD ATKINSON.—The question for decision in this appeal turns upon the construction of certain provisions in the Act 31 Geo. 2, c. x., under which the moors and commons in the chapelry of Hamsterley, in the manor of Wolsingham in the county of Durham, containing about 7,000 acres, then belonging to the Bishop of Durham, were inclosed. In the preamble of the statute it is recited that certain freeholders and copyholders therein named of lands within four specified townships situate within the manor, their trustees, lessees, farmers, and tenants, had in respect of, or as appurtenant to, their lands and tenements a right of common over these lands, and that, being desirous of improving their properties in the townships, and also that these common or waste grounds might be cultivated, improved, and rendered of some use and value, they had agreed, with the consent of the lord of the manor, that the wastes should be inclosed and allotted and divided among the several persons entitled to the right of common. Under the provisions of the statute the right of common is extinguished. Certain roads and drains and works, apparently for common or public benefit, are directed to be made and carried out by the commissioners appointed under it, and they are directed to divide the land itself among the owners of farms, mills, houses, or cottages without any land belonging thereto, in certain proportions therein mentioned, to be held by the respective allottees on the same tenure as the land or premises theretofore held by them, power being expressly conferred upon the allottees to quarry stone upon the moor for the purpose of erecting upon the portions allotted such buildings as might be required. The lands in question in this action are a portion of those allotted to one Christopher Jackson, the predecessor in title of the plaintiffs. It can scarcely be doubted that all the parties to the arrangement upon which the Act was founded contemplated at the time that the allotted lands should be used for the purpose of agriculture; but no restriction whatever is placed upon the use to which they may be devoted. The allottees would have been quite within their right in erecting factories, cottages, or other houses as well as farm buildings upon them.

There is no controversy as to some of the general principles of law which, according to the modern authorities, are applicable to the case. It is admitted that the owner of mines and minerals, whether under an Inclosure Act such as this or by grant or reservation under a deed, has primâ facie as against those having an estate or interest in the surface of the land the right properly and without negligence to search for, work, and win those minerals, provided that he does not thereby let down the surface to the injury and damage of the owners. It is further admitted that the owner of the surface has by

common law the primâ facie right to have the surface supported by the subjacent soil, and that statutes such as that under consideration, as well as deeds granting or reserving the right to mines and minerals as distinct from the ownership of or right to the possession and enjoyment of the surface, must be construed upon the principle that this right to support can only be taken away by the express words of the statute or deed, or by necessary implication from the language used in them. Such difficulty as may present itself in dealing with any given case of the present kind consists in the application of these general principles to the facts of the particular case. The existence in any Inclosure Act of any clause providing for compensation for the damage caused by subsidence, the adequacy or inadequacy of that compensation, and the person or class of persons by whom it is to be paid have always been regarded as guides to the true construction of the statute.

In *Smith* v. *Darby* (10) Lush, J., deals with the question in the words following (L.R. 7 Q.B. at p. 726):

> "And if to that grant [the grant of the mines and minerals] be super-added provisions for compensation for damage done to the surface if the words giving compensation can be fairly satisfied by reference to acts done on the surface though they may be large enough to extend to damage done to the surface by taking away support, still they must be read as confined to acts done on the surface, the presumption being that the grantor did not intend to enable the grantee of the minerals to take away the support from the surface soil."

The judgment of Lord Blackburn in *Davis* v. *Treharne* (4), approved of by Lord Selborne, L.C., in *Love* v. *Bell* (3), supports this view. In the former case it was held that the words

> "do and execute all such acts, works, and things in or under or above the said premises as shall be necessary or convenient for working and carrying away the same [the minerals], he or they [the lessor, his heirs and assigns] making all reasonable compensation to Thomas [the lessee of the surface], his assigns, &c., for all damage occasioned by the exercise of the rights hereby reserved,"

did not justify the letting down of the surface. There are not in the statute on which this case depends any words amounting in effect to a licence to the lord of the manor to work the mines so as to cause the surface to subside such as were found in *Rowbotham* v. *Wilson* (11), and it is not disputed that, before the inclosure, the lord was under an obligation to abstain from working and winning the mines and minerals in such a way as to cause injury and damage to the commoners' rights of pasturage. It was not, as I understood, contended, and, in my opinion, could not be contended successfully, that the liability for damage from which the lord is relieved in this case by the words (so much relied upon by the appellants) "without paying any compensation for so doing," is not commensurate with the liability in the clause immediately succeeding, thrown in each township upon the occupiers of the allotted lands. It is, I think, clear that the liability for damages is transferred, but the amount of the damages recoverable is neither increased nor diminished. And, of course, just as in *Love* v. *Bell* (3), the fact that the persons in possession of the allotted lands were the only persons to receive compensation for any injury done to the surface was treated as a vital matter for consideration in arriving at a true construction of the statute on which that case depended, so here the fact that the occupiers of the allotted lands are made responsible for the damage caused by the acts of the lord of the manor over whom they have no control, and are to the exclusion of the owners and lessees under whom they may claim, and irrespective of the nature of their tenure, or the quantum or value of their interest in the lands they occupy, bound to pay, and entitled to receive, compensation for the injury the lord may cause, must be treated as a circumstance affording much assistance in arriving at a conclusion as to what was at the time the statute was passed in the contemplation of the several parties to the arrangement which it embodies and was designed to carry out.

I agree with the appellants' counsel that the clause of the statute dealing with this matter cannot be disintegrated into distinct sentences, words, or phrases, and each

construed separately and independently of the other. The clause must be considered as a whole. There are, it appears to me, three possible constructions of which it is susceptible, and only three. It may mean: First, that the lord had over the allotted lands rights in respect to minerals equal to those he enjoyed before the inclosure—namely, the right to let down the surface to any extent not injurious to the right of pasturage to which the commoners were then entitled; secondly, that the extensive right of the lord before inclosure is, by force of the words "without paying compensation for so doing," enlarged into an absolute right to let down the entire surface, without any regard to, or liability for, the damage he may thereby cause; thirdly, that the lord is not entitled to work the mines so as to let down the surface to the prejudice of any person having an estate or interest in the surface.

The words "as fully and freely as he or they might or could have enjoyed the same in case this Act had not been made" were relied upon in support of the first construction. Words of this character, or to this effect, have been frequently considered, especially in *Duke of Buccleuch* v. *Wakefield* (7) and *Love* v. *Bell* (3). In each of these cases it was held that they could not receive a construction such as that here contended for. In the latter case, LORD SELBORNE, L.C., expresses himself thus (9 App. Cas. at pp. 291, 292):

> "As was pointed out in the case referred to at the Bar, *Duke of Buccleuch* v. *Wakefield* (7), it is impossible to understand such words as reserving the previous rights of working exactly as they were without reference to the fact that an inclosure had been made, and as if rights of common still continued to exist, and the rights of working were still subject to the rights of common. The right given by those words must in that respect, although it is still a right to be held and enjoyed in a full, ample, and beneficial manner, nevertheless be a right to be held and enjoyed by the lord after inclosure, and against the owners of allotments and no longer as against commoners."

It is difficult to suppose that it could have been intended to reserve to the lord in this case the power to take away or render useless the new and extended rights for good consideration conferred upon the allottees. And just as the principle of sic utere tuo ut alienum non lædas was applied before inclosure to protect from injury or encroachment the comparatively meagre rights of the commoners, so now, as far as these words are concerned, may the same principle be applied to protect from injury or encroachment the enlarged and substituted rights of the allottees. As the rights of the commoners have been enlarged into those of the allottees, so must it, I think, be taken that the obligation of the lord to respect those new rights has been enlarged correspondingly. In the face of the above-mentioned authorities, the first construction cannot, in my opinion, be sustained.

In support of the second construction much reliance was placed on the words "without paying any satisfaction for so doing." And six authorities, beginning with *Blackett* v. *Bradley* (1) and ending with *Williams* v. *Bagnall* (12), were cited to show that, wherever these words or similar words occur, the case has, owing, I presume, to their presence, been decided in favour of the right of the lord to let down the surface. On examination of these cases, however, it will be found that no such force and effect as is suggested has been given to the words by themselves, but that special facts existed in each case to account for the decision. *Blackett* v. *Bradley* (1) was decided on demurrer. The present Inclosure Act was there under consideration. The defendant representing the mineowner did not, as in this case, rely upon the statute alone, but averred in his plea that there existed from time immemorial a local custom under which he was entitled to let down the surface, and the plea was held to be bad, because the custom relied upon was held to be unreasonable. In *Gill* v. *Dickinson* (2), which was also decided on demurrer, the mineowner succeeded, not because of the effect of these words per se, or because of their effect taken in connection with the words "he might work the mines as freely and as fully as if this Act had not been made" which immediately preceded them, but because the defence contained an averment, accepted, of course, on demurrer, as true, that the lord of the manor had from time immemorial been accustomed to work the mines under the wastes without leaving sufficient support for the

surface, and without making any compensation for the injury caused thereby, to which practice the words first mentioned were held to have necessarily referred.

In *Buchanan* v. *Andrew* (13) it was expressly provided in the feu contracts that the superior "should not be liable for any damage which might happen to the land or buildings thereon, by the working of the minerals under the same, or in the neighbourhood thereof, under the long wall working or otherwise"; but it was conceded that under this system of working no support is, in the course of working, left for the surface except such as might be supplied by rubbish accumulated in the spaces from which the coal had been taken—a support admittedly insufficient to prevent subsidence. In *Bell* v. *Earl of Dudley* (14) the coal had been worked for 200 years. The working had caused subsidence of the surface. It was proved to be impracticable to work the existing seam of coal, 30 ft. in thickness, without causing subsidence. The compensation was to be paid by the allottees of the lands, of whom Lord Dudley, the defendant, was one, not, as here by the persons merely in occupation of them, and the Statute of Inclosure gave to the lord power "to do all such reasonable and necessary acts and things for working, winning, and disposing of the coal as he or they shall think proper without any molestation or interruption to any person or persons whatsoever without making any satisfaction for any damage that may be done thereby, he and they (his heirs and assigns) doing as little damage as may be." The Act was naturally construed with regard to the practice which had so long prevailed, and to the results necessarily arising in the working from the very nature of the subject-matter.

In *Consett Waterworks Co.* v. *Ritson* (8) the decision turned upon the construction of an Inclosure Act of 1773 (13 Geo. 3, c. lxvii.), under which the common and waste lands of the manor of Lancaster, belonging to the Bishop of Durham, were inclosed. In the Queen's Bench Division judgment was given against the defendant, claiming under the lord of the manor the right to let down the surface. The Court of Appeal reversed that decision, and gave judgment in the defendant's favour on the ground that the lord was, under the words of the Act, entitled to let down the surface; but the words of s. 45 of this statute are, I think, stronger in favour of the lord's right than those relied upon in the present case. Moreover, two material provisions distinguish 13 Geo. 3, c. lxvii., from the Inclosure Act now under consideration. First, in the former a fund is set apart for the payment of damages; secondly, if that fund prove insufficient the deficit is to be made up by the owners or occupiers of the allotted lands, but every occupier or tenant who pays such damages can deduct from his rent the sum he is obliged to pay, so that in the result the deficit is paid by the owners, not by the tenants, nor by those occupiers who are not owners. It may well be that the allottees of the land inclosed may in many cases by the very inclosure itself have received from the lord of the manor a benefit sufficient to recompense them for taking upon themselves, under a kind of mutual insurance system, the liability for the damages caused by their benefactor or those claiming under him; but it is obvious that this consideration does not apply to occupiers as distinct from owners. They receive no benefit whatever from the lord of the manor. In *Williams* v. *Bagnall* (12) no right was conferred on the person who was to work the mines to enter upon the surface at all. The mines were to be worked from adjoining lands, and the clause exempting this person from damage must almost necessarily be held to apply to damage caused by subsidence since that was the only kind of damage to the surface which could in all probability be caused.

All these cases were decided on their own special facts, which were in each instance more favourable to the claim of the lord of the manor than are the facts of this case. They by no means support the contention that the presence in the statute of words exempting the lord from liability for damages for his own acts per se strengthen his position to the extent suggested, while, on the other hand, it may be pointed out that the presence in the Inclosure Act under discussion in *Duke of Buccleuch* v. *Wakefield* (7) of a provision by which the lord of the manor was bound to make full compensation for the damage caused by his own acts was by Mellish, L.J., in *Hext* v. *Gill* (15), and by Lord Watson in *Love* v. *Bell* (3), considered to be the special feature on which the decision in favour of the lord in that case turned. The words of the clause dealing with

the working of the mines in this case are general in their character. They are "searching for, winning, and working the said mines and quarries within and under their respective allotments." No details are given as to the mode in which, or the degree to which, the mines are to be worked or the minerals won, nor is any particular operation indicated which would necessarily cause subsidence. The words "and under," in this connection, can no more, in my opinion, imply that the parties contemplated such underground working as might let down the surface than the words "or under," which were not considered by LORD SELBORNE to have that implication in *Davis* v. *Treharne* (4). After the words above set forth appear in the clause here under consideration there follows an enumeration of several operations, each of which would almost necessarily cause some injury to the surface. It may be that the words of this part of the clause are, as is contended, susceptible of a construction extending to injury to the surface by subsidence. They are, however, in my opinion, equally susceptible of the more limited construction which would exclude injury of that character, while the whole provision in reference to compensation points to the latter construction as the more just and reasonable of the two. But if the clause be susceptible of these two constructions, then the more limited of the two—namely, that which preserves to the owners of the surface the right to the support to which they are entitled at common law—must be preferred. Accordingly, I think that the second of these possible constructions is as inadmissible as the first, and that the third must be adopted; that, therefore, the judgment appealed from was right, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Milles, Jennings-White & Foster*; *Meredith, Roberts & Mills*, for *G. W. Jennings*, Bishop Auckland.

[*Reported by* C. A. MALDEN, ESQ., *Barrister-at-Law.*]

DEVONALD *v.* ROSSER & SONS

[COURT OF APPEAL (Lord Alverstone, C.J., Sir Gorell Barnes, P., and Farwell, L.J.), July 6, 1906]

[Reported [1906] 2 K.B. 728; 75 L.J.K.B. 688; 95 L.T. 232; 22 T.L.R. 682; 50 Sol. Jo. 616]

Master and Servant—Contract of service—Obligation of employer to provide work—Implication of term in contract.

By a contract, which was partly verbal and partly contained in printed rules, the plaintiff was regularly employed as a piece-worker in the defendants' works, one of the terms of the contract being that "no person regularly employed shall quit or be discharged from these works without giving or receiving twenty-eight days' notice in writing . . ." On July 20, 1903, the defendants without notice shut down their works, upon the ground that they could not get orders at remunerative prices. On Aug. 3 they gave the plaintiff twenty-eight days' notice in writing purporting to terminate his employment. From July 20 to the expiration of the notice the plaintiff received no work from the defendants, and so was unable to earn anything. In an action by the plaintiff to recover from the defendants a sum in respect of wages which he would have earned between July 20 and Aug. 31,

Held: a term, which must be presumed to have been in the minds of the parties when they entered into the contract and was necessary to give the transaction the business efficacy which both parties must have intended it should have, must be implied in the contract to the effect that the defendants were under an obligation to

provide a reasonable amount of work to enable the plaintiff to perform his part of the contract until the expiration of a notice to terminate the contract given in accordance with its terms, and, therefore, the plaintiff was entitled to succeed.

Per Curiam: The defendants' obligation might be subject to certain contingencies which would interfere with the work of the factory, such as accidents, want of material, and so on, not occurring.

Custom—Evidence of—Admissibility—Implication in contract—Custom to be reasonable, certain, and so notorious as to make it virtually part of the contract.

For a custom to be implied in a contract it must be shown to be reasonable, certain, and so universal that no person could be supposed to have entered into the contract without looking to it as part of the contract.

Notes. Considered: *Meek* v. *Port of London Authority*, [1918] 1 Ch. 415. Referred to: *Hulme* v. *Ferranti*, [1918] 2 K.B. 426; *Turpin* v. *Victoria Palace*, [1918] 2 K.B. 539; *Browning* v. *Crumlin Valley Collieries, Ltd.*, [1926] All E.R. Rep. 132; *Sagar* v. *H. Ridehalgh & Son, Ltd.*, [1930] All E.R. Rep. 288; *Thomas* v. *Hammersmith Borough Council*, [1938] 3 All E.R. 203; *Marshall* v. *English Electric Co.* (1944), 61 T.L.R. 186; *Bauman* v. *Hulton Press, Ltd.*, [1952] 2 All E.R. 1121.

As to an employer's obligation to provide his servant with work, see 25 HALSBURY'S LAWS (3rd Edn.) 467–469, and for cases see 34 DIGEST 49–51. As to the essential characteristics of a custom, see 11 HALSBURY'S LAWS (3rd Edn.) 160 et seq., and for cases see 17 DIGEST (Repl.) 8 et seq.

Cases referred to:

(1) *Williamson* v. *Taylor* (1843), 5 Q.B. 175; Dav. & Mer. 389; 13 L.J.Q.B. 81; 8 Jur. 79; 114 E.R. 1214; 12 Digest (Repl.) 701, *5360.*

(2) *Aspdin* v. *Austin* (1844), 5 Q.B. 671; 1 Dav. & Mer. 515; 13 L.J.Q.B. 155; 8 Jur. 355; 114 E.R. 1402; 12 Digest (Repl.) 681, *5251.*

(3) *Pilkington* v. *Scott* (1846), 15 M. & W. 657; 15 L.J.Ex. 329; 7 L.T.O.S. 340; 153 E.R. 1014; 34 Digest 50, *246.*

(4) *R.* v. *Welch* (1853), 2 E. & B. 357; 1 C.L.R. 319; 22 L.J.M.C. 145; 21 L.T.O.S. 127; 17 J.P. 553; 17 Jur. 1007; 118 E.R. 800; sub nom. *R.* v. *Birmingham Justices*, 1 W.R. 368; 34 Digest 49, *245.*

(5) *Whittle* v. *Frankland* (1862), 2 B. & S. 49; 31 L.J.M.C. 81; 5 L.T. 639; 26 J.P. 372; 8 Jur. N.S. 382; 121 E.R. 992; 34 Digest 51, *255.*

(6) *Emmens* v. *Elderton* (1853), 13 C.B. 495; 4 H.L. Cas. 624; 22 L.T.O.S. 1; 18 Jur. 21; 138 E.R. 1292, H.L.; 34 Digest 110, *826.*

(7) *Dunn* v. *Sayles* (1844), 5 Q.B. 685; Dav. & Mer. 579; 13 L.J.Q.B. 159; 2 L.T.O.S. 401; 8 Jur. 358; 114 E.R. 1408; 12 Digest (Repl.) 698, *5346.*

(8) *R.* v. *Inhabitants of Stoke-upon-Trent* (1843), 5 Q.B. 303; Dav. & Mer. 357; 13 L.J.M.C. 41; 2 L.T.O.S. 148; 8 J.P. 197; 8 Jur. 34; 114 E.R. 1263; 34 Digest 45, *212.*

(9) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp. M.L.C. 373, C.A.; 12 Digest (Repl.) 686, *5274.*

(10) *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256; 47 L.J.Q.B. 396; 34 L.T. 890; 24 W.R. 1078, H.L.; 12 Digest (Repl.) 700, *5355.*

Also referred to in argument:

Turner v. *Goldsmith*, [1891] 1 Q.B. 544; 60 L.J.Q.B. 247; 64 L.T. 301; 39 W.R. 547; 7 T.L.R. 233, C.A.; 12 Digest (Repl.) 701, *5358.*

Turner v. *Sawdon & Co.*, [1901] 2 K.B. 653; 70 L.J.K.B. 897; 85 L.T. 222; 49 W.R. 712; 17 T.L.R. 45, C.A.; 12 Digest (Repl.) 700, *5352.*

Hamlyn & Co. v. *Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, *5266.*

Appeal by the defendants from a decision of JELF, J., on further consideration of the action which was tried at Swansea Assizes.

The plaintiff was a rollerman who had been for thirteen years in the employment of the defendants at their Cilfrew Tinplate Works, and he brought this action to recover

£16 10*s.* as damages for breach by the defendants of an agreement by which, he alleged, they had undertaken to find him employment during a period of six weeks from July 20, 1903, to Aug. 31, 1903. The terms of his employment were partly contained in printed rules applicable to workmen in all departments of the works. These rules included the following:

> 1. "No person regularly employed shall quit or be discharged from these works without giving or receiving twenty-eight days' notice in writing, such notice to be given on the first Monday of any calendar month before twelve o'clock at noon. . . . 11. Every workman in the various departments of the works will, when required by the manager or agent, perform such duties as may be deemed necessary in case of emergency other than the special work he may be engaged in. . . . 14. Nothing herein contained shall in any way prejudice or affect the rights and remedies which either party might otherwise have under the laws for the time being affecting masters and servants."

The plaintiff was paid by piecework. On July 20, 1903, the defendants, without giving notice to their workmen, shut down their works on the ground that they could not get remunerative orders. On Aug. 3 the defendants gave their workmen, including the plaintiff, a notice in writing putting an end to their contracts of employment at the end of twenty-eight days. The plaintiff stated that on July 20 he went to the works, but there was no work for him; nor was there any work for him from then up to Aug. 31, when his contract of employment would be determined by the twenty-eight days' notice. He claimed wages from July 20 to Aug. 31. In their statement of defence the defendants said that they would contend as a matter of law: (a) That there was no obligation on them to find or make work for the plaintiff, employed, as he was, on the terms of doing and being paid for piecework, if they had none on hand for him to do; and they said that in fact from July 20, 1903, to Aug. 31, 1903, the period complained of, they had no work at hand for the plaintiff or any of the rollermen at their works; (b) that, alternatively, they would contend that their obligation was not more than to take reasonable steps to find work, having regard to the state of the market and the chances of profit, and they said that from July 20 to Aug. 31 they endeavoured to find work that would be remunerative, but failed to do so. In the further alternative the defendants said that one of the customs or usages of the tinplate trade, to which the plaintiff was subject, was the right of the defendants to close their works without notice in the event (among other causes) of (a) breakage of machinery, and (b) lack of orders or specifications for orders at remunerative prices. Evidence for and against the existence of the alleged custom was given at the trial; the plaintiff's witnesses, while admitting a custom entitling the masters to shut down the works on the grounds of breakage, repairs, want of water and coal, and such grounds, denied the existence of any custom entitling the masters to shut down the works for want of remunerative orders. At the trial of the action without a jury JELF, J., held that it was an implied term of the contract that the defendants should provide the plaintiff with a reasonable amount of work and wages until the termination of the contract by notice; that the existence of the custom alleged by the defendants had not been established; and that, even if it had been established, it would not be a reasonable custom. The learned judge therefore gave judgment for the plaintiff for £14, being the equivalent of six weeks' work at the weekly wages of £2 6*s.* 8*d.* The defendants appealed.

Eldon Bankes, K.C., and *Bailhache* (*Davis Williams* with them) for the defendants.
Samuel Evans, K.C., and *Meager*, for the plaintiff, were not called on to argue.

LORD ALVERSTONE, C.J.—This case has been admirably argued, and all the criticisms that could properly be directed against the judgment of my brother JELF have been clearly brought to the mind of the court. I am of opinion, however, that my brother JELF has come to a perfectly right conclusion, and I should have been content, if I had been sitting with him when he delivered that judgment, to have concurred with him, as having nothing to add to it. But I think that, in deference to the able arguments that have been presented to us, it is right that I should add a few observations of my own.

We have to decide whether or not the contract between the plaintiff and the defendants involves the implication necessary to enable the plaintiff to recover in this action, and I agree that any such implication can only be raised from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that, at all events, it should have. What the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended, at all events, by both parties, who are business men. We have the fact that the plaintiff was in regular employment by the defendants at piecework. The only written term in his contract of employment which throws any light upon the question that we have to decide is the term as to notice—viz.:

> "No person regularly employed shall quit or be discharged from these works without giving or receiving twenty-eight days' notice in writing, such notice to be given on the first Monday of any calendar month before twelve o'clock at noon."

For the purpose of my judgment I put out of consideration r. 11, but I do not want it to be thought that I think that clause affords no support to the view which I am taking of the plaintiff's claim. Rule 11 runs thus:

> "Every workman in the various departments of the works will, when required by the manager or agent, perform such duties as may be deemed necessary in case of emergency other than the special work he may be engaged in."

I do not rely upon that clause. I only call attention to it to show that there is nothing which contradicts the necessary implication which, I think, is involved in the plaintiff's contract of employment. The printed rules of which this rule forms a part apply to men who are employed at piecework as well as those who are paid wages by time. I think that no distinction in principle can be drawn between wages paid by time and wages paid by piecework. The method of paying wages according to the work done is only a method of ascertaining what are the wages that a workman is to be paid.

What are the obligations of the employers under such a contract as we have here? On the one hand, we must consider the position of the employers, who, under ordinary circumstances, desire to carry on their whole undertaking at a profit. They cannot expect always to make a profit each particular week. One knows that it has often happened that owners of mills have kept their mills running at a loss for weeks and months in order to secure trade or to keep their business together in the hope of better times, and, therefore, it is not to be supposed that the employers, when contracting with the plaintiff, made it a condition of his employment that their works should be run at a profit every week. On the other hand, we must consider the position of the workman. The effect of the argument put forward on behalf of the defendants is that the contract meant that, if the defendants should bona fide think on a Saturday night that for the next week or twenty-eight days the works could only be carried on at a loss, they might at once shut down the works and discharge their workmen without giving twenty-eight days' notice. In answer to that it was said that the workmen could not be said in such circumstances to be "discharged." There would be no intention on the part of the employers to "discharge" their workmen. It was said that the employers would not be entitled to close their works altogether without giving due notice to their workmen. But, if this argument is right, it is difficult to see why they could not do so, assuming that the works were being run at a loss without hope of profit in the future. The effect of the defendants' contention is that the plaintiff would be retained for twenty-eight days in the defendants' service, without being able to earn any wages. I agree with Jelf, J., that that would be an unreasonable position from the plaintiff's point of view.

What, then, is the implication to be drawn from this contract, such implication being a necessary one and one which ought to be held to have been in the minds of both the parties when entering into the contract? It seems to me that at least it must be that the defendants will find a reasonable amount of work for the plaintiff up to the expiration of a twenty-eight days' notice given in accordance with the contract. I do not mean that that obligation may not be subject to certain contingencies such as breakdowns, loss of water, want of materials, and accidents not occurring. The evidence in the case

shows that it is agreed between the parties that such matters may relieve the employers from their obligation to find work for the plaintiff, or to pay him wages during that period of twenty-eight days. All I wish to decide is that, whatever might under other circumstances, by custom or otherwise, excuse the employers for not finding work for the plaintiff during that period, the fact that they can no longer continue the manufacture of tinplates, either for stock or for current or future orders, at a profit will not excuse them from providing work until the employment has been duly terminated under the contract. I pause here for a moment to consider whether that is not in accordance with common sense as well as with the law. The way in which the works are going to be carried on; whether they are going to work at full time or not; whether they are going to work for stock or for orders; whether they are going to work on speculation or not, is a matter which rests entirely in the hands of the masters. The workmen have absolutely nothing to say to that. It seems to me that there is nothing unreasonable in holding that under this contract it is the duty of the employers to look ahead for at least twenty-eight days, while, on the other hand, it would be most unreasonable to take the contrary view and to hold that, during that period of twenty-eight days, the plaintiff is bound to his employers and yet that they need pay him nothing. Therefore, I come to the conclusion that the plaintiff has made out his case with regard to there being an obligation on the defendants to find work for him until the termination of his contract of employment by a twenty-eight days' notice, that obligation being subject to certain conditions as to breakdowns, etc., which do not arise in this particular case.

How do the authorities stand? *Williamson* v. *Taylor* (1) and *Aspdin* v. *Austin* (2) were each of them decided upon the terms of a written contract and not upon any implied obligation, but, except for that, they would, I think, if they are to be taken as enouncing a general proposition, have been authorities in favour of the defendants' contention in the present case that there was no obligation on them to find piecework for the plaintiff. But those two cases were decided in 1843 and 1844, and they are not consistent with the later cases of *Pilkington* v. *Scott* (3), *R.* v. *Welch* (4), and *Whittle* v. *Frankland* (5). I agree that the real point which was raised in those three cases was whether there was sufficient mutuality in the contracts in question to enable the contracts to be enforced, but, at the same time, it is clear to my mind that those cases prevent *Williamson* v. *Taylor* (1) and *Aspdin* v. *Austin* (2) from being cited as authorities for there being no obligation. That was the view taken by CROMPTON, J., in 1862 in *Whittle* v. *Frankland* (5). When *Williamson* v. *Taylor* (1) and *Aspdin* v. *Austin* (2) were cited in the argument, he said (2 B. & S. at p. 58):

> "*Emmens* v. *Elderton* (6) goes far to show that where the relation of master and servant exists between the parties, the master is bound to keep the servant in the service, otherwise the whole thing would be illusory."

And COCKBURN, C.J., after saying that the agreement between the parties was that the appellant should serve the employer, who, on the other part, undertook to pay him wages fortnightly and not to discharge him without twenty-eight days' notice, said (ibid. at p. 59):

> "From these two stipulations I think it arises by implication that the employer will find the appellant work and will not discharge him from the service before a certain time. It would be perfectly illusory to hold otherwise."

The passage in *Emmens* v. *Elderton* (6) which was referred to by CROMPTON, J., in *Whittle* v. *Frankland* (5) is taken from his own opinion given to the House of Lords (4 H.L. Cas. at p. 647):

> "The cases of *Aspdin* v. *Austin* (2) and *Dunn* v. *Sayles* (7) must, I think, be considered as decided upon the construction of the particular covenants and the peculiar circumstances appearing in those cases. If they are to be taken as deciding that there is no obligation on the part of the employer to continue the relation between the parties in cases like the present, or that, where there is an agreement to employ and serve for a specified time at a specified salary, an action is not maintainable against the employer immediately for a wrongful termination of the relation, but

that the party discharged, instead of suing for damages immediately, must wait, and remain idle till the end of the specified period, and then sue for the salary as a sum certain; I should think that they ought not to be supported in a court of error."

I only mention that for the purpose of showing that the view I take that *Williamson* v. *Taylor* (1) does not support the wide proposition for which the defendants here contended has been taken by far greater judges than I am, and their opinion is in accordance with the view that I have expressed. Therefore upon the question of the primâ facie obligation of the defendants I have no doubt.

I will only say a few words with regard to the alleged custom which the defendants have set up. To annex a custom to a contract of employment, I have always understood that, to quote the words used by LORD DENMAN, C.J., in *R.* v. *Inhabitants of Stoke-upon-Trent* (8) (5 Q.B. at p. 307) and referred to by JELF, J., in the court below, the custom must be shown to be

"so universal that no workman could be supposed to have entered into this service without looking to it as part of the contract."

In the same case COLERIDGE, J., said (ibid. at pp. 308, 309):

"I have always understood that general usage was evidence in a case of this kind, on the ground that its notoriety makes it virtually part of the contract."

The custom alleged here has no element of certainty about it. It depends upon the will of the employer—upon the view which he may happen to take of the prospects of trade and of the rise and fall of the market; upon his opinion whether at any particular time it is better to shut down his works or whether it is better to keep them open. Therefore, I am of opinion that the defendants have failed to establish the custom they set up. They have failed both as regards the terms which they have attempted to imply from the language of the contract and as regards the alleged custom, and I think that this appeal must be dismissed.

SIR GORELL BARNES, P.—I agree that the judgment of JELF, J., was correct. First I will deal with the custom alleged by the defendants. There was a great body of evidence on both sides as to the existence of this custom, and the conclusion to which JELF, J., came after hearing that evidence was this:

"On the whole, the defendants have not satisfied me of the existence of a custom that they may shut down without notice for want of remunerative orders or specifications—so universal as to be practically incorporated in the contract."

The evidence has been gone through and considered before us, and I feel sure that we should not be justified in coming to a different conclusion with regard to the alleged custom from that which was arrived at by JELF, J.

That leaves the question to be determined: What is the implication which ought to be adopted with regard to this contract? The contract is one by which the plaintiff is obliged to remain at work until the expiration of a notice such as that provided for in the contract. Neither he nor his employers can put an end to the contract except in accordance with the terms provided as to notice in r. 1. There is a binding obligation on him to work, and, applying the principles laid down by BOWEN, L.J., in *The Moorcock* (9), I think there is necessarily implied an obligation on the employers, unless it is restricted by something else, that they must find the work necessary to enable the plaintiff to perform his part of the bargain. It seems to me, therefore, that the question which has to be considered is, how far that general and necessary implication is qualified by considerations, having regard to what was proved by the evidence, as to which of the parties to the contract takes any particular risk which may affect the actual continuance of the work. I can quite understand that, having regard to a certain set of circumstances, such as breakdowns, it may be reasonable to hold that it was the intention of the parties that those risks should be shared between them, and that, therefore, risks of that character, which are known to both parties and prevent both of them from doing what is contemplated, should create exceptions from the general obligation of the employers to find work for the plaintiff. But those considerations do not appear

to me to be applicable to a case like the present, where the want of continuity in the work found by the defendants for the plaintiff was caused simply by lack of orders or specifications at remunerative prices. That is a matter which cannot in any way be said to be within the knowledge or control of the plaintiff. It rests with employers who ought to know what is the probable future of the trade sufficiently to give their workmen twenty-eight days' notice of dismissal if they should think that it would be advisable to shut down their works. It does not seem to me to be a reasonable implication to say that it was in contemplation of both parties to the contract that such risks of trade should be taken by the workmen.

Therefore, the general implication to be made from the terms of this contract that the employers shall find work for their workmen does not seem to me to be cut down in any way so as to relieve the employers from that obligation in cases where the only cause hindering the employers from finding work is their lack of remunerative orders. For these reasons I think that the judgment of JELF, J., ought to be affirmed.

FARWELL, L.J.—I agree. A custom to be good must be reasonable, certain, and notorious. JELF, J., has found as a fact that the custom set up by the defendants was not notorious, and I should certainly not disagree with that finding. In my opinion, the alleged custom is neither reasonable nor certain, because it is what lawyers call "precarious," depending on the will of the employers. To say that the custom pleaded is that the employers may close their works without notice in case of lack of orders or specifications for orders at remunerative prices, is to say that it is left entirely at their discretion what is remunerative and what is not. Such a custom, to my mind, cannot be good.

The second point depends on the question what implication the court is to make from the terms of this contract, which is not fully expressed in writing, so as to make the bargain between the masters and the servant a reasonable contract to be entered into by two business men. We have to bear in mind that we are regarding the matter from the point of view not only of the masters, but of the workman. The masters and the workman both have the same object in view—viz., to make their living. The masters make their living by the profits made from running these works. The workman makes his living by his wages. The masters' profits are ascertained, as an ordinary rule, de anno in annum. A master does not stop suddenly and say: "I am not making a profit at this moment, although last month I was making a profit and may do so again next month." He has to calculate his earning for the year. But a workman has to live de die in diem. In the case before us the plaintiff's wages were put as being on an average £2 6s. 8d. a week, which would not leave him much scope for saving money with a view to a future day when no employment would be forthcoming. Taking the parties in that position relatively, what are we to infer would be a reasonable bargain which as business men they must have intended to make? As was said by BOWEN, L.J., in *The Moorcock* (9) (14 P.D. at p. 68), we are

> "not to impose on one side all the perils of the transaction or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

My own view certainly would be that it would be eminently unreasonable for the defendants to claim the right to say that because they consider that such and such prices are not sufficiently remunerative, they are entitled to decline to find any further work for their workman.

This view is not novel, and, on the question of reasonableness, I think that it is not unworthy of consideration that judges of former days have said the same thing. In *R.* v. *Welch* (4) COLERIDGE, J., said (2 E. & B. at p. 363):

> "The agreement contemplates that the relation of employer and employed shall continue for twelve months and until the expiration of three months' notice—that is, for fifteen months at least. It would be strange if the relation were to continue and the workman not to be paid. If there were a stipulation for paying a salary,

> one could understand it; but here the stipulation is only for payment for the articles manufactured, at certain prices. . . . The necessary implication is that the master is to find work."

CROMPTON, J., in his judgment, said the same. LORD CAMPBELL, C.J., put it in rather less general terms. He said the obligation on the employer was "to find reasonable employment according to the state of the trade." I am not sure that I altogether follow that qualification, but I do not think that it has any bearing in the present case, because I do not think that he could have intended it to mean that what the master thinks is reasonable and proper, apart from any consideration of the workman. The suggested difficulty with regard to reasonable wages or a reasonable amount of work was found to be no difficulty in *Whittle* v. *Frankland* (5), and I do not myself see that there is any such difficulty here. In that case COCKBURN, C.J., is reported in 31 L.J.M.C. at p. 85 to have said:

> "There is no express agreement that they will find him work, but that arises by necessary implication from the above two stipulations. The agreement would be perfectly illusory on the part of the employers, if they could say that, though they were obliged to keep him in their employ, they were yet not bound to supply work."

In the present case the contract contains a clause which, although my Lord thinks that it has no particular bearing on the question for our decision, appears to my mind, I confess, to be to some extent in the workman's favour. The printed rules which form part of the contract contain no reference to piecework or any particular form of work. The obligation on the part of the employers to employ may be found by implication from the words "regularly employed" in r. 1, or in order to prevent the contract being unilateral. The work which the plaintiff is bound to do may be piecework or it may be under r. 11 which provides that every workman will, when required by the manager or agent, perform such duties as may be deemed necessary in case of emergency other than the special work he may be engaged in. It appears to me that there is one other consideration which may fairly be put forward. The rules are drawn up by the employers, and if they desired to put upon their workmen any such burden as that of holding themselves at their employers' orders for twenty-eight days without work and without pay, they ought to have said so in express terms.

One or two cases were relied upon as authorities in favour of the employers. I confess that *Williamson* v. *Taylor* (1), which was decided in 1843 and was a case of assumpsit upon a special agreement, appears to me to be simply a decision on the pleading. In the report in 13 L.J.Q.B. at p. 82, WIGHTMAN, J., is reported to have said:

> "The declaration sets out all the material clauses in the agreement; but it did not appear to me to support the promise laid in the declaration."

In answer to that remark the argument goes on to say that the promise would be implied from the relation of the parties; and then LORD DENMAN, C.J., in giving judgment said (ibid.):

> "In this case the question is whether, upon a true construction of the agreement, the defendants were bound to keep the pit at work so as to give the plaintiff an opportunity of working and earning wages."

I think that the proper view to be taken of that case is that the court was construing the agreement and considered that there was no room for any further implication to be raised. Very much the same rule was applied in *Aspdin* v. *Austin* (2), which was an action for breach of covenant. There LORD DENMAN, C.J., said (5 Q.B. at p. 683):

> "But it is a manifest extension of that principle to hold that, where parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of their express covenants. Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument."

In the House of Lords in *Rhodes* v. *Forwood* (10) LORD CAIRNS, L.C., said (1 App. Cas. at p. 265):

"That is the protection which the parties have provided for themselves with reference to the duration or the continuance of this agreement. Now I ask, the parties having provided this kind of protection for themselves, upon what principle is it that your Lordships are to introduce into and to imply in the agreement what, it is admitted, is not found expressly there . . ."

LORD CAIRNS is there obviously dealing with an agreement which, on the face of it, apparently contained all the terms that the parties agreed upon, and it is a very strong thing to ask the court to imply anything fresh in a case of that sort. In my opinion the judgment of JELF, J., was perfectly right.

Appeal dismissed.

Solicitors: *Lloyd-George, Roberts & Co.*, for *David Randell & Saunders*, Swansea; *J. T. Lewis*, for *T. W. James & Thomas*, Swansea.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

EDMONDSON *v.* BIRCH & CO., LTD.

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Cozens-Hardy and Fletcher Moulton, L.JJ.), January 14, 1907]

[Reported [1907] 1 K.B. 371; 76 L.J.K.B. 346; 96 L.T. 415; 23 T.L.R. 234; 51 Sol. Jo. 207]

Libel—Privilege—Qualified privilege—Privileged occasion—Libel in business communication—Publication to clerks and other persons—Ordinary and reasonable business methods employed.

Where there is a duty, whether of perfect or imperfect obligation, existing between two persons, in the performance of which one person makes a communication to the other, and the occasion is privileged, the person entitled to the privilege is justified in using all reasonable means of availing himself of the privilege, and those reasonable means may include the employment of third persons if they are employed in the reasonable and ordinary course of business. The use of reasonable and ordinary methods for giving effect to the privilege does not destroy the privilege.

Where, therefore, the plaintiff entered into a contract of service with a company abroad upon the terms that the contract was to be subject to the approval of the defendants who, in reply to a letter from the company abroad, sent to that company a letter and a cablegram containing matter defamatory of the plaintiff, the letter being dictated by the defendants' manager to a clerk and when typewritten copied into a letter-book by another clerk, and the cablegram being in a public code and copied by a clerk with its "translation" into the defendants' cable book,

Held: the occasion of the sending the letter and cablegram was privileged; the correspondence between the defendants and the company abroad was conducted and transmitted in the reasonable and ordinary way of conducting the business of a mercantile company; and, therefore, the publication of the defamatory matter to the defendants' clerks and the clerks employed by the telegraph company did not destroy the privilege of the occasion.

Pullman v. *Hill & Co.* (1), [1891] 1 Q.B. 524, distinguished.

Notes. Applied: *Roff* v. *British and French Chemical Manufacturing Co. and Gibson*, [1918] 2 K.B. 677; *Isaacs* v. *Cook*, [1925] 2 K.B. 391; *Osborn* v. *Thomas Boulter & Son*, [1930] All E.R. Rep. 154.

A As to qualified privilege, see 24 HALSBURY'S LAWS (3rd Edn.) 54 et seq., and for cases see 32 DIGEST 112 et seq.

Cases referred to:

(1) *Pullman* v. *Hill & Co.*, [1891] 1 Q.B. 524; 60 L.J.Q.B. 299; 64 L.T. 691; 39 W.R. 263; 7 T.L.R. 173, C.A.; 32 Digest 76, *1069*.

B (2) *Boxsius* v. *Goblet Frères*, [1894] 1 Q.B. 842; 63 L.J.Q.B. 401; 70 L.T. 368; 58 J.P. 670; 42 W.R. 392; 10 T.L.R. 324; 38 Sol. Jo. 311; 9 R. 224, C.A.; 32 Digest 116, *1485*.

(3) *Baker* v. *Carrick*, [1894] 1 Q.B. 838; 63 L.J.Q.B. 399; 70 L.T. 366; 58 J.P. 669; 42 W.R. 338; 38 Sol. Jo. 286; 9 R. 283, C.A.; 32 Digest 126, *1580*.

(4) *Lawless* v. *Anglo-Egyptian Cotton Co.* (1869), L.R. 4 Q.B. 262; 10 B. & S. 226; 38 L.J.Q.B. 129; 33 J.P. 693; 17 W.R. 498; 32 Digest 116, *1481*.

C Also referred to in argument:

Williamson v. *Freer* (1874), L.R. 9 C.P. 393; 43 L.J.C.P. 161; 30 L.T. 332; 22 W.R. 878; 32 Digest 116, *1482*.

Jenoure v. *Delmege*, [1891] A.C. 73; 60 L.J.P.C. 11; 63 L.T. 814; 55 J.P. 500; 39 W.R. 388, P.C.; 32 Digest 156, *1887*.

D *Fryer* v. *Kinnersley* (1863), 15 C.B.N.S. 422; 3 New Rep. 125; 33 L.J.C.P. 96; 9 L.T. 415; 10 Jur. N.S. 441; 12 W.R. 155; 143 E.R. 849; 32 Digest 122, *1537*.

Tuson v. *Evans* (1840), 12 Ad. & El. 733; 4 Per. & Dav. 396; 5 J.P. 209; 113 E.R. 991; 32 Digest 133, *1641*.

Spill v. *Maule* (1869), L.R. 4 Exch. 232; 38 L.J. Ex. 138; 20 L.T. 675; 17 W.R. 805, Ex. Ch.; 32 Digest 161, *1946*.

E **Application** by the defendants for judgment or a new trial in an action tried before LAWRANCE, J., with a jury, and **cross-appeal** by the plaintiffs.

On March 19, 1904, the plaintiff, a mining engineer, entered into a verbal contract with Birch, Kirby & Co., of Kobe, Japan, to serve them on trial as their mineral manager and adviser for three months at a monthly salary, it being further agreed that, subject to the approval of the defendant company, John Birch & Co., Ltd., of London, whose F agents Birch, Kirby & Co. were, Birch, Kirby & Co. would take the plaintiff into their permanent employ after the three months' trial, if they were satisfied with him. The company in Japan communicated this arrangement to the defendants in London, and asked if the defendants approved of it. In reply the defendants wrote to the company on May 7 a letter which contained the following:

G "We have your letter of April 6 referring to your arrangements with Mr. Cressy S. Edmondson. . . . We are writing to a friend of ours who knew him some time ago, and as soon as we get his reply we shall communicate it to you. We are much afraid that he may acquire valuable information at your expense and use it, not for your benefit, but his own. We, however, hope it may be otherwise."

This letter was dictated by the manager of the defendants to a shorthand clerk in their H employ, it was then typewritten, and a copy made in the letter-book. The typewritten letter was signed by the manager, and it was then posted to the company in Japan. On June 22, 1904, the manager of the defendants sent to the company in Japan a cablegram containing three words: "Eereplaats Edmondson epulotico," which meant "Have no dealings with Edmondson; give notice of dismissal." The code words in this cablegram were taken from a public code, and were the best that the manager could find to I express his meaning. There was a private code used for communications passing between the defendants and the company in Japan, but it contained no words suitable to the requirements of the manager. This cablegram, like the letter, was dictated by the defendants' manager to a clerk, and it was copied, with a "translation," into the defendants' cable-book.

The plaintiff brought this action for slander, complaining of the publication of the letter and cablegram to the company in Japan, to the shorthand and copying clerks in the defendants' employ, and to the clerks of the telegraph company. At the trial before LAWRANCE, J., with a jury the defendants' manager gave evidence that the letter and

cablegram were dictated, typewritten, and copied into the letter-book and cable-book respectively in the usual and ordinary course of business, and that it was practically necessary as a business matter to treat correspondence in that way. The learned judge held that the occasion of sending the letter and the cablegram to the defendant company in Japan was privileged, and that there was no evidence of malice on the part of the defendants. But he also held that he was bound by the decision of the Court of Appeal in *Pullman* v. *Hill & Co.* (1) to hold that the publication of the letter and the cablegram to the clerks in the defendants' employ and to the clerks of the telegraph company was not covered by the privilege, and he, therefore, let the case go to the jury, who returned a verdict in favour of the plaintiff for £80 damages. The defendants applied to this court for judgment or a new trial, and there was a cross-appeal by the plaintiff on the ground that there was evidence of malice to go to the jury.

Montague Lush, K.C., and *Atkin, K.C.*, for the defendants.
Marshall-Hall, K.C., and *A. S. Poyser* for the plaintiff.

SIR RICHARD HENN COLLINS, M.R.—This is an application for judgment or a new trial in an action tried before LAWRANCE, J., with a jury. The action is for libel, and the defence in substance is a plea of privilege. When once the facts have been ascertained, the case seems to me to be clear. The action is founded upon a telegram and also upon a letter sent by the defendants, but there is no difference in the law which is applicable to the two things.

The matter arose in this way. The defendants are a mercantile firm carrying on business in England, and having a company called Birch, Kirby & Co., Ltd., as their agents in Japan. The company in Japan had some thoughts of employing the plaintiff as their mineral manager and adviser, and what occurred is thus stated in the statement of claim:

> "On March 19, 1904, the plaintiff was by verbal agreement engaged by Messrs. Birch, Kirby & Co., Ltd., of Kobe, Japan, on trial as their mineral manager and adviser at a monthly salary of 150 yen (£15 English money). At the same time it was further verbally arranged that Messrs. Birch, Kirby & Co., Ltd., should immediately communicate with the defendant company to ascertain if they approved the engagement, and, subject to such approval, they agreed that, if after three months' trial they were satisfied with the conduct and ability of the plaintiff, they would continue him in their permanent employ at an increased salary to be subsequently agreed upon, in addition to which the plaintiff was to have a share of profits arising from the mineral department of their business."

Thus it is alleged by the plaintiff himself that his employment by the company in Japan was to be subject to the defendants' approval.

That being so, a letter of April 23 was written by the defendants to the company in Japan. That letter is not complained of in this action, but it was followed by another letter on May 7 which the plaintiff complains of as libellous. [HIS LORDSHIP read the letter.] Then comes the code cablegram of June 22 from the defendants to the company in Japan which when decoded runs: "Have no dealings with Edmondson; give notice of dismissal." The letter of May 7 was copied into the defendants' letter-book, and the cablegram, with its translation, was copied into the cable-book, and upon that the action is founded. At the trial LAWRANCE, J., held that the occasion of sending these communications to the company in Japan was privileged, and that there was no evidence of express malice; but he also held, upon the authority of the decision of this court in *Pullman* v. *Hill & Co.* (1), that the publication to the intermediaries between the defendants and the company in Japan—namely, to the clerks in the defendants' office and to the clerks of the telegraph company—did not fall within the privileged occasion because they were persons who had no interest in the matter. The learned judge, therefore, left the case to the jury, and the jury returned a verdict in favour of the plaintiff. From that arises the present application by the defendants, who say that the publication to the clerks was privileged, and the cross-appeal by the plaintiff on the ground that there was evidence of malice to go to the jury.

With regard to the defendants' application, it seems to me that the learned judge took rather too high a view of the decision in *Pullman* v. *Hill & Co.* (1). In that case the managing director of the defendant company dictated to a shorthand clerk a letter, addressed to a firm with whom the company had dealings, which contained defamatory matter regarding the plaintiffs. The shorthand clerk afterwards transcribed the letter and typed it, and it was then press-copied by an office boy. It was opened by a clerk of the plaintiff's firm in the ordinary course of business, and was read by two other clerks. The Court of Appeal held that the letter must be taken to have been published both to the plaintiff's clerks and the defendants' clerks, and that neither occasion was privileged.

The question is whether that case is decisive of the question here adversely to the defendants. The case was explained and distinguished by the Court of Appeal in *Boxsius* v. *Goblet Frères* (2). In that case Lord Esher, M.R., who was a party also to the decision of the Court of Appeal in *Pullman* v. *Hill & Co.* (1), said ([1894] 1 Q.B. at pp. 844–846):

"In the case of *Pullman* v. *Hill & Co.* (1) this court held that if a merchant dictates to a clerk a libellous statement about a customer, which that clerk takes down and gives to another clerk in the office to copy, that is a publication to the clerks, and the occasion of such publication is not privileged. We so held on the ground that it does not fall within the ordinary business of a merchant to write such defamatory statements, and that if he does so it is not reasonably necessary, as he is doing a thing not in the ordinary course of his business, that he should cause the statement to be copied by a clerk in his office. The question here arises in the case of a solicitor instructed by a client to obtain payment of a bill, and to press the person who is charged with payment of the bill to the extent of asserting that he has been trying to evade payment by at the least a shabby trick, and possibly by a criminal action. The first point taken is that that is not a matter within the ordinary business of a solicitor. This is an argument which a few days ago we overruled in another case (*Baker* v. *Carrick* (3)), where it was said that the business of a solicitor was to conduct actions; but the court pointed out that it was also a part of the ordinary business of a solicitor to endeavour to secure the money due to his client by taking steps not necessarily arising in an action. . . . Then it is said that the solicitors cannot claim privilege as between themselves and the typewriting clerk who took down the letter and the copying clerk who copied it into the letter-book. Such an argument requires consideration, but it seems to me to come to this: It is the duty of the solicitor to write and send this letter, and it is his duty to do that in the ordinary and reasonable way. The duties of a solicitor are not to one client only, but to all his clients, and he has to take measures to perform them with due diligence and according to the necessary and reasonable method of conducting business in a solicitor's office. If a solicitor is instructed to write defamatory matter on a privileged occasion on behalf of a client, he must do this business as he does other business of the office, in the ordinary way, and that involves his having the communication taken down or copied by a clerk in his office and copied into the letter-book. It is necessary to keep a record of the transaction, one reason being that there may be a check on the bill of costs. Such a case seems to me to be distinguishable from that of a merchant who is writing a libel out of the course of his ordinary business, who, if he has the letter copied by a clerk, does this at his own risk."

Lopes, L.J., who was also a party to the decision in *Pullman* v. *Hill & Co.* (1), was of the same opinion. He said (ibid. at pp. 846, 847):

"In the present case, if the communication had been made direct to the plaintiff, it would have been made on a privileged occasion; and though not so made, but made to a clerk in the office, the occasion was also, in my opinion, privileged. It was reasonably necessary that the solicitor should make such a communication; it was usual to do so in the course of business, and it was in the interest of the client that it should be made. The decision in *Pullman* v. *Hill & Co.* (1) was pressed upon us,

but to my mind that case is distinguishable. The ground of the decision was that it was not the usual course in a merchant's business to write letters containing defamatory statements and to communicate them to a clerk in the office. I adhere to what I said in that case as to there being neither a duty nor an interest in a merchant to make such a communication as was there made."

DAVEY, L.J., agreed that *Pullman* v. *Hill & Co.* (1) was distinguishable upon the grounds that had been stated.

That being the state of the authorities, it seems to me clear that *Pullman* v. *Hill & Co.* (1) does not govern the case now before us. That case and *Boxsius* v. *Goblet Frères* (2) decide that where there is a duty, whether of perfect or imperfect obligation, existing between two persons and the occasion is privileged, the person entitled to the privilege is justified in using all reasonable means of availing himself of the privilege, and those reasonable means may include the employment of third persons if they are employed in the reasonable and ordinary course of business. Whether the duty to make the communication be one of perfect or imperfect obligation, it seems to me that the occasion is privileged provided that it is made use of in a reasonable and ordinary manner. I will only refer to one of the earlier authorities. In *Lawless* v. *Anglo-Egyptian Cotton Co.* (4) a resolution was passed at a general meeting of the company that the directors' report which was submitted to the meeting and contained a statement by the auditors as to the mode in which the plaintiff, who was the manager of the company, kept his accounts should be printed and circulated among the shareholders. This resolution involved a communication of the auditors' statement to the printers and persons outside the company, but the court held that such a communication was protected by the privilege of the occasion, because it was part of the ordinary and reasonable manner of carrying out the circulation of the report among the shareholders.

That seems to me to be an express decision upon the very point involved in the present case. The use of reasonable and ordinary methods for giving effect to the privilege does not destroy the privilege. In the present case the plaintiff admits by his statement of claim that, with regard to the subject-matter of the letter and cablegram that he complains of, a special relation existed between the defendants and the company in Japan, because he says that his engagement by the company in Japan was to be subject to the defendants' approval. That necessarily involved the passing of communications between the defendants and the company in Japan, and, if the engagement of the plaintiff was disapproved of by the defendants, it would be right that notice of the disapproval should be conveyed to Japan as speedily as possible. That involved the sending of a cablegram. The evidence adduced on behalf of the defendants to show that they took the only reasonable course in a matter of urgency is uncontradicted. The evidence is all one way as to the reasonableness of the method adopted. The case comes within the rule laid down in the authorities referred to, and the defendants are entitled to succeed in the action. As to the cross-appeal, I agree with LAWRANCE, J., that there was no evidence of express malice. The application must, therefore, be allowed and the cross-application dismissed.

COZENS-HARDY, L.J.—I am of the same opinion. I will only add one thing. It seems to me that if we were to accede to the argument put forward on behalf of the plaintiff, we should practically destroy the defence of privilege in the case of actions for libel brought against companies and large mercantile firms, because it is idle to suppose that a business document, although alleged to contain defamatory matter, can be written by and pass through the hands of one person only. Letters sent by a company or a business firm must in the ordinary mode of carrying on business be copied into a letter-book. If the occasion be privileged, I do not think that the privilege will be lost if the occasion was made use of reasonably and in the ordinary way.

FLETCHER MOULTON, L.J.—I am of the same opinion, and for the same reasons. I think that the rule of law applicable to this case may be stated thus: If the occasion

for conducting a business correspondence is privileged, the privilege extends to and includes all the incidents of the transmission and treatment of that correspondence in the ordinary and reasonable course of business.

Application allowed.

Solicitors: *Jacksons & Elwell*; *Greenip, Snell & Co.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law*].

HOWE *v.* NEWINGTON LICENSING JUSTICES

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Phillimore, JJ.), April 25, 1907]

[Reported [1907] 2 K.B. 340; 76 L.J.K.B. 718; 96 L.T. 701; 71 J.P. 242; 23 T.L.R. 474]

Licensing—Licence—Renewal of—Reference to quarter sessions—Evidence receivable by quarter sessions—Matters not mentioned in report of licensing justices—Licensing Act, 1904 (4 Edw. 7, *c.* 23), *s.* 1(2).

Where the question of the renewal of an old on-licence is referred to quarter sessions, quarter sessions are entitled to receive evidence of matters not mentioned in the report made to them by the licensing justices, e.g., evidence of the structure and state of repair of the premises, where such evidence is material to the issues before them.

Notes. The Licensing Act, 1904, was repealed by the Licensing (Consolidation) Act, 1910, Sched. 7, itself repealed and replaced by the Licensing Act, 1953, (33 HALSBURY'S STATUTES (2nd Edn.) 142) as amended by the Licensing Act, 1961, (ibid., vol. 41, p. 556). As to the reference of questions on the renewal of on-licences to quarter sessions, in this respect referred to as the compensation authority, see s. 15 of the Act of 1953 (ibid., vol. 33, p. 163.).

Considered: *Colchester Brewing Co.* v. *Tendring (Essex) Licensing Justices*, [1916–17] All E.R.Rep. 836.

As to evidence admissible by the compensation authority, see 22 HALSBURY'S LAWS (3rd Edn.) 587 para 1202; and for cases see 30 DIGEST (Repl.) 56.

Cases referred to:

(1) *R.* v. *Drinkwater, etc., Coventry Justices, Ex parte Conway* (1905), 70 J.P. 1; 22 T.L.R. 12, C.A.; 30 Digest (Repl.) 56, *421*.

(2) *Dartford Brewery Co.* v. *London County Quarter Sessions*, [1906] 1 K.B. 695; 75 L.J.K.B. 597; 94 L.T. 782; 70 J.P. 197; 22 T.L.R. 491; 50 Sol. Jo. 441, D.C.; 30 Digest (Repl.) 57, *428*.

(3) *R.* v. *Tolhurst, Ex parte Farrell, R.* v. *Cox, Ex parte West*, ante, p. 964; [1905] 2 K.B. 478; 74 L.J.K.B. 652; 93 L.T. 76; 69 J.P. 308; 53 W.R. 619; 21 T.L.R. 533; 49 Sol. Jo. 515, D.C.; 30 Digest (Repl.) 16, *88*.

Case Stated by quarter sessions.

On Feb. 12, 1906, notice was served on the appellant, J. W. Howe, requiring his attendance before Newington licensing justices on the ground that his licence in respect of the Duke of Edinburgh beerhouse was not required having regard to the character and necessities of the neighbourhood. The justices, having heard evidence regarding the beerhouse, were of opinion that the question of the licence required consideration on the

ground that the licence was not required, and they provisionally renewed the licence and referred the matter of renewal to quarter sessions together with their report thereon, pursuant to s. 1(2) of the Licensing Act, 1904. The appellant in due course obtained from the clerk to the county licensing committee, under r. 16 of the Licensing Rules, 1904, a copy of the part of the report of the licensing justices (hereafter referred to as "the renewal authority") which related to the Duke of Edinburgh beerhouse. The report stated that: This beerhouse was originally two cottages, the bar being built upon the forecourt, and there has been four transfers in the last four years. There are twenty-three on-licences within the quarter-mile radius, and a fully licensed house, which is now being re-built within 100 yards.

At a principal meeting of the county licensing committee appointed by quarter sessions, held on July 3, 1906, the renewal authority tendered evidence as to the structural condition and state of repair of the premises, for the purpose of showing why the licence was not required. Objection was taken on behalf of the appellant that such evidence was not admissible, on the following grounds: (i) That as the committee had previously ruled in law in a former case heard by them, as was the fact, that evidence could not be given by the renewal authority of convictions appearing in the register of licences, which had not been mentioned in the report of the renewal authority, and that as no complaint was made in the report of the renewal authority as to the structure of the premises, or their state of repair, and of which consequently notice had not been given to the appellant, no evidence could be tendered in respect thereof; and (ii) that evidence ought not to be admitted for the purpose of showing the difference in construction and repair between the on-licensed beerhouse and the off-licence near by on the ground (a) that they were not comparable, and (b) that no reference was made to the off-licence in the report of the justices, or for the purpose of showing the difference between the appellant's beerhouse and the Duke of Sussex public-house, which house at the time had not in fact been built and was in a state of being re-built.

It was contended on behalf of the renewal authority: (i) That the words of the report sufficiently indicated that the state of the licensed premises was one of the issues to be raised, and clearly showed that the character and condition of the house would be dealt with; (ii) that there were no words in the Licensing Act, 1904, or Licensing Rules, 1904, to limit the discretion of the renewal authority in the preparation of their report, nor was it in any way laid down that the report should be exhaustive and contain all the questions that were to be raised if the case was to be proceeded with at the principal meeting; (iii) that at the hearing before the renewal authority the evidence objected to was given, and therefore the appellant had had notice of it; (iv) that the ground of objection given in the notice served by the renewal authority on the appellant, was a broad and general ground of objection, and that the compensation authority for the purpose of deciding which of a number of licences should be refused, were entitled to hear evidence on matters other than those stated as the grounds of objection to the renewal of the licence before the renewal authority (see *R.* v. *Drinkwater, Ex parte Conway* (1)); (v) that the report was not evidence on which the compensation authority was entitled to act in dealing with an application and therefore its contents, so far as the application was concerned, were immaterial (see *Dartford Brewery Co.* v. *London County Quarter Sessions* (2)); (vi) that although the renewal authority could only "refer" "on" licences to quarter sessions they had free and unqualified discretion as to the grant and renewal of "off" licences, and were entitled to take them into consideration when exercising their powers under the Licensing Act, 1904, and also in this case were right in treating the Duke of Sussex public-house as a house that had been re-built in accordance with the plans approved by them; and (vii) that any entries in the register of licences relating to the licence on the premises licensed were evidence before the renewal and compensation authorities on any application for the renewal of a licence: see Licensing Act, 1902, s. 9 (2). The majority of the committee were of opinion that the evidence was admissible and that the question of structure and repair could be gone into for the purpose of differentiating the house both from the off-licensed beerhouse and the Duke of Sussex, when it should be re-built.

On behalf of the renewal authority evidence was given as to the structure and state of repair of the licensed premises; as to the number of beerhouses in the area, and as to the character of the neighbourhood. The committee then ruled in law that there was a case to answer, and after hearing evidence for the appellant as to the trade done in the house and the character of the neighbourhood, refused the renewal of the licence subject to the payment of compensation.

The questions for the opinion of the court were whether the majority of the committee were right in holding: (i) That the evidence objected to was admissible; (ii) that there was evidence on which they could hold that the Duke of Edinburgh beerhouse was not required having regard to the character and necessities of the neighbourhood; (iii) that having regard to the answers to the foregoing questions, they were legally entitled under the circumstances to refuse the renewal of the licence.

Low, K.C. (*Wootten* with him), for the appellant.

Avory, K.C., and *Whiteley*, for the respondents, were not called on to argue.

LORD ALVERSTONE, C.J.—It is perfectly true, as counsel for the appellant has said in his clear argument, that this point has never been the subject of an express decision, but it is practically involved in several decisions of this court. I think what has been overlooked in his argument is that the report is made by the licensing authority upon the view that the licence requires to be considered on grounds other than those on which the licence can be refused by them, and the report is only to lead the quarter sessions to the consideration of the matter whether or not the licence is to be renewed or there is to be compensation. One must not forget that this is not confiscation of property, it is the working out of a new Act of Parliament whereby certain licences are to be got rid of on payment of compensation. In *R. v. Tolhurst* (3) I said (ante, p. 967):

> "The amount of evidence . . . which may be sufficient for the purpose of enabling the justices to form the opinion indicated in the section may, in our judgment, be properly treated as different from the amount which could be regarded as sufficient if they had to decide judicially whether or not the particular licence should be renewed or refused,"

and that was a judgment of the court in which my brothers Kennedy and Ridley concurred. It came up again indirectly in *Dartford Brewery Co.* v. *London County Quarter Sessions* (2) where my brothers Ridley and Darling decided that the report was not evidence upon which the court could act, but that fresh evidence was required to be given. All these rules to which reference has been made are rules for the purpose of carrying out those two main views, one of giving notice that in the opinion of the licensing justices the licence requires to be considered on other grounds and the other dealing with that.

I will assume for this purpose that the structure of the premises, and their state of repair were not mentioned, but there was overwhelming evidence of a very large number of public-houses within a very small area, overwhelming evidence that there must be some reduction. The question of which house should be shut up and get its compensation and which should not, depends upon, as has been pointed out several times, the comparison between its position, the trade, the facilities, the accommodation, and the many other things that I daresay the justices are familiar with. That matter can only be gone into in detail by the authority which has to say whether they will refuse the licence or whether they will grant it. In my judgment, it is impossible to say that the report is to be treated as a document within the four corners of which you must find every matter which the justices are to have evidence upon before they can decide it, if the evidence which is tendered to them is material to the real issues which they have to decide. I think, therefore, there is no ground for thinking whatever that the evidence received by these justices was improperly received, and I think that this appeal must be dismissed.

DARLING, J.—I am of the same opinion. I think it becomes perfectly plain if you consider this: The first meeting of justices may make a number of reports about various

public-houses, and they may desire and may recommend the suppression of one of those public-houses. The reports that they make are not evidence; although they are to be considered by the quarter sessions they are not evidence, and the facts require to be proved. If you look at the reports and only at what is contained in them, it may perfectly well appear that, although they desire to suppress the public-house there is nothing in the reports, considered altogether, to differentiate any public-house from any of the others. The quarter sessions, in order to suppress one of the public-houses, must have evidence, and if they are to differentiate one of the public-houses from the others, it follows that of necessity they must look beyond the points appearing in the reports. Unless they do that it is plain that the two inquiries become merely an impasse, and therefore that which the statute contemplates as being likely to happen never could happen. It seems to me that these considerations are enough to show by themselves that this appeal must fail.

PHILLIMORE, J.—I agree. The point seems very plain.

Appeal dismissed.

Solicitors: *Maitlands, Peckham & Co.; Sir Richard Nicholson.*

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*]

This case was affirmed by the Court of Appeal (THE EARL OF HALSBURY, SIR GORELL BARNES, P., and BIGHAM, J.), [1908] 1 K.B. 260, without the renewal authority being called on to argue.

JOHNSON *v.* PICKERING. NORTON, CLAIMANT

[COURT OF APPEAL (Fletcher Moulton, Farwell and Buckley, L.JJ.), October 16, 1907]

[Reported [1908] 1 K.B. 1; 77 L.J.K.B. 13; 98 L.T. 68; 24 T.L.R. 1; 51 Sol. Jo. 810; 14 Mans. 263]

Execution—Property of debtor liable to seizure—Money and banknotes—Death of debtor before seizure—Judgments Act, 1838 (1 *&* 2 *Vict., c.* 110), *s.* 12.

Under s. 12 of the Judgments Act, 1838, the sheriff has no power to seize, by virtue of a writ of fieri facias, money or banknotes belonging to the judgment debtor after the death of the judgment debtor.

A sheriff, in execution of a writ of fieri facias, went into possession of the judgment debtor's house and seized his goods. While the sheriff was in possession, but without his knowledge, the judgment debtor placed a sum of money which he had received in a drawer in his bedroom. Shortly after this he died, and his widow, having found the money, deposited it with her solicitors. An order was subsequently made under s. 125 of the Bankruptcy Act, 1883, for the administration of the judgment debtor's estate in bankruptcy, and a trustee was appointed. The sheriff, having become aware of the existence of the money, claimed it from the solicitors, as did the trustee. On the trial of an issue in interpleader proceedings whether the trustee was entitled to the money as against the execution creditor,

Held: since the judgment debtor had died, the sheriff could not seize the money and, accordingly, it belonged to the trustee as against the execution creditor.

Decision of LAWRANCE, J., [1907] 2 K.B. 437, reversed.

Notes. The Bankruptcy Act, 1883, has been repealed. For s. 125 of that Act, see now s. 130 of the Bankruptcy Act, 1914.

As to writ of fieri facias, see 16 HALSBURY'S LAWS (3rd Edn.) 40 et seq.; and for cases see 21 DIGEST 470 et seq. For the Judgments Act, 1838, s. 12, see 13 HALSBURY'S

STATUTES (2nd Edn.) 365, and for the Bankruptcy Act, 1914, s. 130, see 2 HALSBURY'S STATUTES (2nd Edn.) 425.

Cases referred to:

(1) *Hasluck* v. *Clark*, [1899] 1 Q.B. 699; 68 L.J.Q.B. 486; 80 L.T. 454; 47 W.R. 471; 15 T.L.R. 277; 43 Sol. Jo. 352; 6 Mans. 146, C.A.; 24 Digest (Repl.) 880, *8787*.

(2) *Woodland* v. *Fuller* (1840), 11 Ad. & El. 859; 3 Per. & Dav. 570; 9 L.J.Q.B. 181; 4 Jur. 743; 113 E.R. 641; 21 Digest 441, *240*.

Also referred to in argument:

South Staffordshire Water Co. v. *Sharman*, [1896] 2 Q.B. 44; 65 L.J.Q.B. 460; 74 L.T. 761; 44 W.R. 653; 12 T.L.R. 402; 40 Sol. Jo. 532, D.C.; 37 Digest 159, *38*.

Collingridge v. *Paxton* (1851), 11 C.B. 683; 2 L.M. & P. 654; 21 L.J.C.P. 39; 18 L.T.O.S. 140; 16 Jur. 18; 138 E.R. 643; 21 Digest 486, *649*.

Gladstone v. *Padwick* (1871), L.R. 6 Exch. 203; 40 L.J.Ex. 154; 25 L.T. 96; 19 W.R. 1064; 21 Digest 476, *564*.

Re Davies, Ex parte Williams (1872), 7 Ch. App. 314; 41 L.J.Bcy. 38; 26 L.T. 303; 36 J.P. 484; 20 W.R. 430, L.JJ.; 21 Digest 434, *169*.

Appeal by the claimant from a decision of LAWRANCE, J., reported [1907] 2 K.B. 437, on the trial of an interpleader issue.

The following was an agreed statement of the facts. On Sept. 19, 1906, Johnson obtained judgment against Pickering for £9,542 and costs. On Nov. 12, 1906, a writ of fieri facias was delivered to the sheriff of Yorkshire, and on Nov. 13 the sheriff, in execution of that writ, went into possession and seized all the goods of the judgment debtor in his residence at Heathfield, Garforth. On Nov. 14, 1906, the judgment debtor received at Wakefield certain sums of money, being the price of sheep sold by him on that day at Wakefield and also the proceeds of a cheque drawn by him on his banking account on that day. After making certain payments, the judgment debtor took the balance, amounting to £395, in notes to his house, and placed them in a drawer in his bedroom without the knowledge of the sheriff or his officers. On Nov. 21, 1906, the judgment debtor died suddenly. After his death, his widow found the money in the drawer, and on Nov. 22 took it to her solicitors and deposited it with them without the knowledge of the sheriff or his officers. On Dec. 12, 1906, the sheriff, having sold and realised the goods and effects in the judgment debtor's house, went out of possession. On Dec. 14, 1906, an order was made under s. 125 of the Bankruptcy Act, 1883, for the administration of the estate of the judgment debtor in bankruptcy, on a petition presented by a creditor on Nov. 22. On Dec. 27, 1906, the claimant Norton was appointed trustee under the administration order, and his appointment was duly certified on Dec. 31. On Dec. 27, 1906, the sheriff first became aware of the existence of the £395, which was still in the hands of the solicitors, and claimed it from them. Norton also claimed the money. Interpleader proceedings having been taken, an order was made, on Jan. 24, 1907, for the trial of an issue in the High Court, in which the claimant Norton should be the plaintiff, and the execution creditor Johnson the defendant, the question to be tried being whether the sum of £395, which the solicitors agreed to hold in their hands until further order, was the property of the claimant as against the execution creditor. At the trial of the issue LAWRANCE, J., gave judgment in favour of the execution creditor.

E. Tindal Atkinson, K.C., and *Longstaffe* for the claimant.

H. T. Kemp, K.C., and *E. Shortt* for the execution creditor.

FLETCHER MOULTON, L.J.—The circumstances out of which this case has arisen are peculiar. The first point made on behalf of the execution creditor was that there had been an actual seizure by the sheriff of the money which had been placed by the judgment debtor in a drawer on the premises and had been subsequently removed by his widow. In my opinion, if an actual seizure of the money is the critical point in this case, there was no actual seizure by the sheriff. At the time of the seizure in execution by the sheriff of the goods, this money was not on the premises at all; the sheriff never knew that it was on the premises; and he never did anything in respect of it which was equivalent to a legal seizure.

But the decision of this case does not, in my opinion, turn on these special circumstances at all. It turns on broader considerations based on the statutes which regulate executions by writ of fieri facias. The statutes regulating execution by fieri facias fall into two lines. The first line relates to executions on goods, and contains modifications of the common law as to execution by fieri facias. By the common law, the issuing of a writ of fieri facias bound all the goods of the judgment debtor within the bailiwick of the sheriff to whom it was addressed from the date of the teste of the writ. It bound them so that the judgment debtor could not dispose of them so as to defeat the execution creditor. This being found to cause inconvenience, the rule was altered by the Statute of Frauds, and it was provided that the binding of the goods should date only from the delivery of the writ of fieri facias to the sheriff—Statute of Frauds, s. 16. Subsequently, this was modified by s. 1 of the Mercantile Law Amendment Act, 1856; and, finally, s. 26 of the Sale of Goods Act, 1893, fixed the rule as to goods taken in execution, and made the writ of fieri facias binding on the goods as from the time when the writ is delivered to the sheriff to be executed, and provided that the writ, while unexecuted, should not prejudice the title of a bona fide purchaser for value without notice. But neither by the common law nor by any statute before 1838 were money or choses in action seizable by the sheriff under a writ of fieri facias.

The Judgments Act, 1838, by s. 12, enacted that:

> "By virtue of any writ of fieri facias to be sued out in any superior or inferior court . . . the sheriff or other officer having the execution thereof may and shall seize and take any money or banknotes . . . belonging to the person against whose effects such writ shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or banknotes which shall be so seized, or a sufficient part thereof. . . ."

It will be observed that there is nothing in the language of s. 12 which refers to the rules then in force applicable to goods seized in execution. A new and distinct duty and power was imposed on and given to the sheriff to seize money and banknotes, and to satisfy the judgment debt thereout. Giving the best consideration I am able to the terms of s. 12, I have come to the conclusion that the object of the Act is to be gathered from the words used, and that is that the sheriff may seize these things, and that from and after the seizure, he is to follow the remedial procedure given by the Act. I find nothing in that section as to the date from which these things are to be bound. It seems to me that the legislature treated money and choses in action by itself in this enactment which has never been altered. Therefore, I am of opinion that, until the sheriff has actually seized the money or chose in action, there is no right, claim or lien, whatever is the proper term to use, binding them as in the case of goods.

In this case, the sheriff did not even know of the existence of this money until after the death of the judgment debtor. When he did get to know of its existence, he made a claim to it. If the judgment debtor had still been alive, I have no doubt but that the money would have had to be given up to the sheriff. But the judgment debtor was dead. I am satisfied by the judgment in *Hasluck* v. *Clark* (1) that the property to be divided among creditors under an administration order under s. 125 of the Bankruptcy Act, 1883, is the property of the deceased as affected by any liabilities, rights and charges. If I thought that there was any actual right or charge in respect of this money by reason of the writ of fieri facias, then I should be of opinion that the contention of the execution creditor was right, and that the property of the debtor to be administered under the order would not include this £395. In my opinion, however, the right is only a right to seize the money, and I think that that right to seize dies with the life of the judgment debtor. By s. 12, the sheriff is authorised to seize money belonging to the execution debtor. When the debtor is dead, I do not think that money belonging to his executor answers that description. Therefore, I think that it was too late for the sheriff to do any act of seizure after the death of the debtor, and that this money belongs to the estate to be administered under the order. For these reasons, I think that this appeal must be allowed.

FARWELL, L.J.—I entirely agree. From *Hasluck* v. *Clark* (1) it is clear that the property of a deceased debtor to be administered under s. 125 of the Bankruptcy Act, 1883, is the property which belonged to that debtor subject to all subsisting charges and rights which attached to it. The sole question, then, is whether the right given by s. 12 of the Judgments Act, 1838, constitutes a subsisting right. I agree with the opinion of FLETCHER MOULTON, L.J., that the words in s. 12, "belonging to the person against whose effects such writ of fieri facias shall be sued out," are quite inapplicable to property of a person who is dead. If the contention of the execution creditor were right, I do not see why the sheriff might not seize all the assets collected by the administrator. In my opinion, s. 12 refers only to a living person. For these reasons, I think that the appeal must succeed.

BUCKLEY, L.J.—I agree that this appeal must be allowed, although I have felt much hesitation and difficulty. I decide this case, not on any point which has been put forward by the claimant, but on a point which has been suggested by the court. The point is a difficult one, but I have come to the conclusion that the appeal ought to succeed. The facts of the case are short and simple. The sheriff, on Nov. 13, 1906, went into possession and seized all the goods of the judgment debtor at his residence. On the following day, the judgment debtor brought £395 on the premises, and placed it in a drawer. It is admitted that, if the sheriff had known that this money was there, it would have been his right and duty to seize it. But he did not know anything about it. On Nov. 21, the judgment debtor died, and on the next day his widow, who had found the money, took it to the solicitors, in whose hands it now is. The sheriff sold the goods which he had seized, and went out of possession on Dec. 12, being still in ignorance as to the existence of the £395. On Dec. 27 the sheriff discovered the facts about this money and made a claim to it.

But for the death of the judgment debtor, the position would have been that the sheriff would have had a right to seize this money. But the judgment debtor was dead, and an order had been made to administer his estate under s. 125 of the Bankruptcy Act, 1883. The fact that that order was made would not, in my opinion, have affected any right of the sheriff to seize. The decision in *Hasluck* v. *Clark* (1) is directly in point on that question. The property of a deceased debtor affected by an administration order under s. 125 is subject to all rights of other persons. That is well illustrated by *Woodland* v. *Fuller* (2), where it was held that a vesting order in respect of an insolvent's estate was subject to the rights of an execution creditor who had issued and delivered a writ of fieri facias. The question, then, is whether, the judgment debtor being dead, the language of s. 12 is sufficient to enable the sheriff to seize money which is no longer the property of the deceased man, but of his personal representatives. The words of s. 12 are, "belonging to the person against whose effects such writ of fieri facias shall be sued out." Forming the best judgment which I can as to the meaning of the section, I think that we must say that the words "belonging to" mean belonging to a living person, and not to a deceased debtor. On that ground, and on that ground only, I agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *Ward, Bowie & Co.*, for *W. & E. H. Foster*, Leeds; *Burton, Yeates & Hart*, for *Luke White*, Driffield.

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

DE JAGER *v.* ATTORNEY-GENERAL OF NATAL

[PRIVY COUNCIL (Lord Loreburn, L.C., Lord Macnaghten, Lord Atkinson and Sir Arthur Wilson), March 22, May 9, 1907]

[Reported [1907] A.C. 326; 76 L.J.P.C. 62; 96 L.T. 857; 23 T.L.R. 516]

Criminal Law—Treason—Alien resident in British territory—Occupation by hostile force —Assistance given to enemy by alien.

An alien residing in British territory is not absolved from his allegiance to the Crown by the fact that the forces of the Crown are withdrawn from the district in which he resides, and such district is occupied by a hostile force. Therefore, he is guilty of high treason if he assists such hostile force.

Notes. Referred to: *Johnstone* v. *Pedler*, [1921] All E.R. Rep. 176.

As to the rights and duties of an alien, see 1 HALSBURY'S LAWS (3rd Edn.) 500 et seq., and for cases see 2 DIGEST (Repl.) 169 et seq.

Petition by Mr. Lodewyk Johannes De Jager for special leave to appeal from a judgment pronounced on Mar. 14, 1901, reported [1901] N.L.R. 65, of a special court constituted under Act No. 14 (1900) of the Colony of Natal for the trial of cases of treason, by which he was sentenced to five years' imprisonment and a fine of £5,000 for high treason.

The petition stated that the petitioner, who was born a British subject, had been a naturalised subject and a burgher of the South African Republic, owning considerable property there, but, when the war between England and the South African Republic broke out in 1899, he had for ten years been a permanent and peaceful resident in Natal. On Oct. 21, 1899, the British forces evacuated the part of Natal in which Waschbank where the petitioner resided, was situated, and the South African forces from then to March, 1900, were in occupation. The petitioner was bound and compelled to join the forces of the South African Republic on losing the protection of Her late Majesty, and he admitted that he did aid them in different capacities—as commandant and as commissioner and justice of the peace—from Oct. 24, 1899, to March, 1900. Early in March, 1900, he went to the Transvaal, lived there peaceably, and gave no further aid to the Boer forces. On Mar. 9, 1901, he was tried before the special court for high treason and theft, and on Mar. 14 was acquitted of theft, but found guilty of high treason and sentenced to five years' imprisonment and a fine of £5,000, or, failing payment thereof, to another term of three years' imprisonment. He had undergone the five years' imprisonment and paid the fine. The special court was dissolved by proclamation in March, 1903. The delay in lodging the petition was due to financial difficulties, owing to the fine and to his imprisonment.

The petition sought special leave to appeal on the ground that the court failed to distinguish (i) between the allegiance, while under Her late Majesty's protection, he owed to her and that which he owed to the South African Republic; and (ii) between his rights and duties, with regard to hostilities, when he was under such protection and when he ceased to be. It further contended that the special court was wrong in holding that the fact of his aid to the Boer forces, having been given after the obligation to give such aid, did not legally justify the acts which the court held were treasonable.

Sir R. Finlay, K.C., and *A. R. Kennedy* for the petitioner.

Colefax for the respondent.

May 9, 1907. **LORD LOREBURN, L.C.**—The petitioner, Lodewyk Johannes De Jager, was adjudged guilty of high treason by the special court constituted by Act No. 14 of 1900 of the Colony of Natal, and now seeks special leave to appeal to His Majesty in Council from that judgment and the sentence which followed. The circumstances and the questions of law raised are fully set out in the petition and need not be repeated here. Their Lordships have not to consider any facts or features of this case, except the points of law on which counsel for the petitioner insisted.

It is old law that an alien resident within British territory owes allegiance to the Crown, and may be indicted for high treason, though not a subject. Some authorities

affirm that this duty and liability arise from the fact that, while in British territory, he receives the King's protection. Hence counsel for the petitioner argued that, when the protection ceased, its counterpart ceased also, and that, as the British forces evacuated Waschbank on Oct. 21, 1899, the petitioner was lawfully entitled to assist the invaders on and after Oct. 24 without incurring the penalty of high treason. Their Lordships are of opinion that there is no ground for this contention. The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful sovereign, wrongs done during the foreign occupation are cognisable by the ordinary courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy's forces have been expelled. Their Lordships consider that the duty of a resident alien is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the hospitality extended to him against the Sovereign who extended it. In modern times, great numbers of aliens reside in this and in most other countries, and in modern usage it is regarded as a hardship if they are compelled to quit, as they rarely are, even in the event of war between their own Sovereign and the country where they so reside. It would be intolerable, and must inevitably end in a restriction of the international facilities now universally granted, if, as soon as an enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could with impunity take up arms for the invaders. A small invading force might thus be swollen into a considerable army, while the risks of transport (which in the case of oversea expeditions are the main risks of invasion), would be entirely evaded by those who, instead of embarking from their own country, awaited the expedition under the protection of the country against which it was directed. These considerations would not justify a British court in deciding any case contrary to the law, but they offer an illustration of consequences which would follow if the law were as the petitioner maintains. There is no authority which compels their Lordships to arrive at so strange a conclusion. The questions raised are, no doubt, of general importance, but their Lordships, after hearing the arguments of counsel in support of the petition, do not consider the case to be attended with doubt, and they will, therefore, humbly advise His Majesty to dismiss this petition. There will be no order as to costs.

Petition dismissed.

Solicitors: *Tatham & Procter; Sutton, Ommaney & Rendall.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

GREAVES *v.* WHITMARSH, WATSON & CO., LTD.

[KING'S BENCH DIVISION (Lord Alverstone, C.J., and Darling, J.), May 30, 1906]

[Reported [1906] 2 K.B. 340; 75 L.J.K.B. 633; 95 L.T. 425; 70 J.P. 415; 4 L.G.R. 718]

B

Landlord and Tenant—Covenant—Covenant by lessee to pay all outgoings in respect of the demised premises—Expenses incurred in making good a road abutting on premises—Public Health Act, 1875, (38 & 39 *Vict., c.* 55), *s.* 150.

A lessee who covenanted to pay "all rates, taxes, and outgoings now payable or hereafter to become payable in respect of the premises" **held** to be liable for expenses incurred under the Public Health Act, 1875, s. 150 [repealed] in levelling, paving and making good a road abutting the demised premises. C

Notes. Section 150 of the Public Health Act, 1875, has been repealed and replaced by the Highways Act, 1959, ss. 189 (1), (3), (4) and 190 (1), (2), (39 HALSBURY'S STATUTES (2nd Edn.) 612 et seq.).

As to covenants for the payment of rates, taxes and outgoings, see 23 HALSBURY'S LAWS (3rd Edn.) 610 et seq.; and for cases see 31 DIGEST (Repl.) 331–332. D

Cases referred to:

(1) *Foulger* v. *Arding*, [1901] 2 K.B. 151; 70 L.J.K.B. 580; 84 L.T. 467; on appeal, [1902] 1 K.B. 700; 71 L.J.K.B. 499; 86 L.T. 488; 50 W.R. 417; 18 T.L.R. 422; 46 Sol. Jo. 356, C.A.; 31 Digest (Repl.) 330, *4644*.

(2) *Antil* v. *Godwin* (1899), 63 J.P. 441; 15 T.L.R. 462; 31 Digest (Repl.) 336, *4696*.

(3) *Stockdale* v. *Ascherberg*, ante, p. 153 [1904] 1 K.B. 447; 73 L.J.K.B. 206; 90 L.T. 111; 68 J.P 241; 52 W.R. 289; 20 T.L.R. 235; 48 Sol. Jo. 244; 2 L.G.R. 529, C.A.; 31 Digest (Repl.) 333, *4667*. E

Also referred to in argument:

Hill v. *Edward* (1885), 1 Cab. & El. 481; 1 T.L.R. 253; 31 Digest (Repl.) 336, *4705*.

Tidswell v. *Whitworth* (1867), L.R. 2 C.P. 326; 36 L.J.C.P. 103; 15 L.T. 574; 15 W.R. 427; 31 Digest (Repl.) 337, *4708*. F

Aldridge v. *Ferne* (1886), 17 Q.B.D. 212; 55 L.J.Q.B. 587; 34 W.R. 578, D.C.; 31 Digest (Repl.) 332, *4655*.

Thompson v. *Lapworth* (1868), L.R. 3 C.P. 149; 37 L.J.C.P. 74; 17 L.T. 507; 32 J.P. 184; 16 W.R. 312; 31 Digest (Repl.) 328, *4635*.

Brett v. *Rogers*, [1897] 1 Q.B. 525; 66 L.J.Q.B. 287; 76 L.T. 26; 45 W.R. 334; 13 T.L.R. 175; 41 Sol. Jo. 258, D.C.; 31 Digest (Repl.) 330, *4643*. G

Farlow v. *Stevenson*, [1900] 1 Ch. 128; 69 L.J.Ch. 106; 81 L.T. 589; 48 W.R. 213; 16 T.L.R. 57; 44 Sol. Jo. 73, C.A.; 31 Digest (Repl.) 334, *4677*.

Appeal from His Honour Judge MANSEL JONES, sitting at the Sheffield County Court.

The action was brought by the plaintiff to recover the sum of £22 13s. 3d. which she had paid to the corporation of Sheffield, being payment for expenses incurred under s. 150 of the Public Health Act, 1875, in levelling, paving, and making good a road abutting on premises of which the plaintiff was lessor and the defendants lessees. By the lease, which was for twenty-one years, and was dated Oct. 16, 1894, the lessees covenanted to pay the rent which was £105 16s. per annum. There were further covenants by the lessees to pay H

"all rates, taxes, and outgoings now payable or hereafter to become payable in respect of the said premises," I

and

"to keep the inside and outside of the said premises in good condition and repair,"

and,

"when necessary during the said term, to paint with two coats at least of good oil colours in a proper and workmanlike manner such parts of the said premises as have been usually painted."

The county court judge held that the lessor could not recover from the lessees the sum paid in respect of the charge on the premises. The lessor appealed.

E. Foà for the lessor.

T. E. Ellison for the lessees.

LORD ALVERSTONE, C.J.—An attempt has been made to distinguish this case from decisions in the Court of Appeal. Had such a case as this arisen some years ago, before those cases were decided there would be much to say in favour of the learned counsel's argument that a covenant to pay "all rates, taxes, and outgoings now payable, or hereafter to become payable," does not include a burden originally imposed on the landlord, which the lessee has not expressly agreed to take on himself. When *Foulger* v. *Arding* (1) was before us in this court where the word in the covenant was "impositions," I thought that a distinction should be drawn between the cases relating to money payments and those where duties were referred to, so as to shift the burden from the landlord to his lessee; but I had to distinguish that case, in which the word was "impositions," from a case where Wright, J., thought "outgoings" would throw on the lessee a liability of this character. In the Court of Appeal, Sir Richard Henn Collins, M.R., in *Foulger* v. *Arding* (1), was of the opinion that one could not discriminate by merely referring to the words of a particular covenant to show that one covenant was more on one side than on another, if words existed which indicated a general intention to impose burdens in respect of the property on the lessee and not on the landlord. In the present case the question is whether this covenant is within that principle. *Antil* v. *Godwin* (2) is a distinct authority in favour of the contention of counsel for the lessor. In that case Bruce, J., held that the word "outgoings" was sufficient to impose on the tenant the obligation to pay a charge in respect of the reconstruction of drainage; and, although some distinction might have been drawn as to the character of the work done, that was not the ground of the decision. Both Sir Richard Henn Collins, M.R., and Romer, L.J., in *Foulger* v. *Arding* (1) refused to follow the distinction I tried to draw. In *Stockdale* v. *Ascherberg* (3) a case also relating to sanitary works, the Court of Appeal held, affirming Wright, J., that a covenant to pay "all outgoings in respect of the premises" imposed a liability on the lessee simply by reason of the use of the word "outgoings." At the present time if any distinction is to be drawn between a payment in respect of making up a street in front of a house, and in respect of making up a drain which leads up to the house, it will have to be done by the Court of Appeal. In face of *Foulger* v. *Arding* (1) and *Stockdale* v. *Ascherberg* (3) we cannot hold that there is any distinction because the payment is under s. 150 of the Public Health Act, 1875. It is an outgoing in respect of the premises. The appeal must be allowed.

DARLING, J.—I am of the same opinion. It is apparent from the observations of Romer, L.J., in *Foulger* v. *Arding* (1) that the distinction counsel for the lessee contended for, that one is not only to regard the words of the covenant, but also to see whether the work, in respect of which the payment is made, is for the benefit of the landlord or of the lessee, cannot now be taken to be a good one. At one time some such distinction might have been accepted. Romer, L.J., was of opinion that it was impossible to reconcile all these decisions, but he declined to follow this distinction.

Appeal allowed.

Solicitors: *T. H. Aldous*, for *J. E. Wing*, Sheffield; *Bell, Brodrick, & Gray*, for *Rodgers & Co.*, Sheffield.

[*Reported by* W. de B. Herbert, Esq., *Barrister-at-Law.*]

A

Re GUEDALLA. LEE *v.* GUEDALLA'S TRUSTEE

[CHANCERY DIVISION (Warrington, J.), June 20, 1905]

[Reported [1905] 2 Ch. 331; 75 L.J. Ch. 52; 94 L.T. 94; 54 W.R. 77; 12 Mans. 392]

B

Bankruptcy—Property available for distribution—Power of appointment exercised by bankrupt's will—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *ss.* 9, 44.

Under a settlement the testator had a general power of appointment by will over a certain fund. By his will, made in 1892, he appointed the fund to the plaintiff and appointed him executor. In 1900 a receiving order was made against the testator, and on Oct. 1, 1900, he was adjudicated bankrupt. In 1904 he died without having C obtained his discharge, and also indebted to various persons for debts incurred since the date of the bankruptcy and not provable thereunder.

Held: the appointed fund was not part of the bankrupt's property divisible among the creditors in bankruptcy and the only creditors with a right to be paid out of the fund were those who had become creditors subsequently to the bankruptcy; the money should, therefore, be paid to the plaintiff as executor for their D benefit.

Notes. Sections 9 and 44 of the Bankruptcy Act, 1883, have been repealed and replaced by the Bankruptcy Act, 1914, ss. 7 and 38 respectively.

Considered: *Re Benzon, Bower* v. *Chetwynd*, [1914] 2 Ch. 68. Referred to: *Re Mathieson*, [1927] 1 Ch. 283.

E

As to property available for distribution, see 2 HALSBURY'S LAWS (3rd Edn.) 409 et seq.; and for cases see 5 DIGEST (Repl.) 798 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Lord Townshend* v. *Windham* (1750), 2 Ves. Sen. 1; 28 E.R. 1, L.C.; 37 Digest 474, *726*.

F

(2) *Jenney* v. *Andrews* (1822), 6 Madd. 264; 56 E.R. 1091; 5 Digest (Repl.) 798, *6751*.

Also referred to in argument:

Kirkpatrick v. *Tattersall* (1845), 13 M. & W. 766; 14 L.J. Ex. 209; 4 L.T.O.S. 398; 9 Jur. 214; 153 E.R. 321; 4 Digest (Repl.) 640, *5686*.

Heather & Son v. *Webb* (1876), 2 C.P.D. 1; 46 L.J.Q.B. 89; 25 W.R. 253; 4 Digest G (Repl.) 638, *5668*.

Jakeman v. *Cook* (1878), 4 Ex. D. 26; 48 L.J.Q.B. 165; 43 J.P. 255; 27 W.R. 171, D.C.; 4 Digest (Repl.) 639, *5672*.

Re Dixon, Penfold v. *Dixon*, [1902] 1 Ch. 248; 71 L.J. Ch. 96; 85 L.T. 622; 50 W.R. 203; 18 T.L.R. 155; 46 Sol. Jo. 137; 21 Digest 34, *211*.

Re Peacock's Settlement, Kelcey v. *Harrison*, [1902] 1 Ch. 552; 71 L.J. Ch. 325; 86 L.T. H 414; 50 W.R. 473; 46 Sol. Jo. 297; 37 Digest 479, *769*.

Re Treasure, Wild v. *Stanham*, [1900] 2 Ch. 648; 69 L.J. Ch. 751; 83 L.T. 142; 48 W.R. 696; 16 T.L.R. 542; 44 Sol. Jo. 675; 21 Digest 30, *177*.

Stamp Duties Comr. v. *Stephen*, [1904] A.C. 137; 89 L.T. 511; sub nom. *New South Wales Stamp Duties Comrs. v. Stephen*, 73 L.J.P.C. 9; 20 T.L.R. 63, P.C.; 37 Digest 388, *31*.

I

Bain v. *Sadler* (1871), L.R. 12 Eq. 570; 40 L.J. Ch. 791; 25 L.T. 202; 19 W.R. 1077; 23 Digest (Repl.) 344, *4107*.

Beyfus v. *Lawley*, [1903] A.C. 411; 72 L.J. Ch. 781; 89 L.T. 309, H.L.; 37 Digest 475, *734*.

Action by the executor of a deceased bankrupt for a declaration that the trustee in bankruptcy was not entitled to funds appointed under the bankrupt's will.

Under and by virtue of an indenture dated Nov. 3, 1840, being a settlement on the marriage of Haim Guedalla, a sum of £2,000 Three and a Half per Cent. Bank Annuities

A was settled upon certain trusts under which, in the events which had happened, he became entitled to a testamentary power of appointment over this fund. By his will, dated Sept. 5, 1892, Haim Guedalla, after reciting the power of appointment, appointed the annuities to the plaintiff, Edward Lee, absolutely, and appointed him sole trustee and executor of his will. On July 12, 1900, a petition was presented in the High Court of Justice in Bankruptcy against Haim Guedalla, a receiving order was made on such B petition on Aug. 17, 1900, and on Oct. 1, 1900, he was adjudicated bankrupt. Haim Guedalla died on Oct. 2, 1904, and his will was duly proved on Oct. 26, 1904. No order of discharge was ever made in the bankruptcy. The total amount of debts proved in the bankruptcy exceeded £3834, on which a dividend of 2d. in the pound was paid. The plaintiff, Edward Lee, proved in the bankruptcy for the sum of £1131 9s. 11d. At the time of his death the bankrupt was indebted to various persons in sums amounting to C £170 incurred since the commencement of the bankruptcy and not provable thereunder. After probate of the will, the plaintiff requested the trustees of the settlement to transfer and pay to the plaintiff the funds and cash then representing the sum of annuities, and the trustees were about to comply with such request when the defendants intervened and claimed that the appointed fund ought to be transferred to the trustee in bankruptcy for administration by him as part of the bankrupt's estate, and that such fund was assets D for payment of debts provable in bankruptcy, and not for payment of debts not so provable, and not liable to right of retainer by the plaintiff as creditor as well as executor of Guedalla.

This action was brought by the plaintiff Lee against the trustee and against Wolfe Levy, representing the creditors whose debts were provable in the bankruptcy, claiming a declaration that the plaintiff was entitled to receive and give a valid discharge for the E funds and to administer them, a declaration that neither the trustee in bankruptcy nor any of the creditors whose debts were provable in the bankruptcy was or were entitled to prove in respect of such debts or claims in the administration by the plaintiff of the estate of Guedalla, and a declaration that the appointed fund was assets out of which the plaintiff would be entitled to retain any sum claimable by him against the estate of the deceased.

F *Norton, K.C.*, and *Ribton* for the plaintiff.
R. J. Parker for the trustee in bankruptcy and the creditor.

WARRINGTON, J.—This is an action in the matter of the estate of Haim Guedalla. The question arises whether property over which Haim Guedalla had a testamentary power of appointment, which he exercised by his will, is to be distributed in such a way G that the creditors in the bankruptcy of the testator are either to take the power or rank pari passu with other creditors since his death. The facts are very short. [HIS LORDSHIP stated the facts, and continued:] The real question which I have to decide is whether, under the circumstances I have mentioned, this fund is one which is to be administered and dealt with in all respects as if it had been properly vested in the trustee in bankruptcy. It is not contended that it did vest in the trustee, but it is said, apply- H ing the equitable doctrine relating to funds subject to powers of appointment which have been exercised by the donee, that the fund should be treated in all respects in a court of equity as if it had been the property of the donee; that if it had been the property of the donee it would have vested in the trustee in bankruptcy, and, that being so, it must be administered and dealt with as if it had been so vested. That seems to me to be the real question. There is a subsidiary question, which is this—whether, assuming the answer I to what I consider the real question to be in the negative, then should the fund be distributed amongst the two classes of creditors pari passu?

I will consider the real question first. For that it is necessary to look at the provisions of the existing Bankruptcy Act of 1883. First, I think it is desirable to look at s. 44, which provides what property shall be divisible among the creditors. That section, it will be observed, enumerates, not the classes of property which are vested in trustees, but the property of the bankrupt divisible among his creditors, and it plainly does not include property over which in terms the testator has a power, not for his own benefit, but a testamentary power which he may exercise in any way he pleases. The only other

section which it is necessary to refer to is s. 9. That is the section which enacts what shall be the effect of a receiving order made under the Act.

The first question is, What is the position of property over which a person has a testamentary power which he exercises? Is it to all intents and purposes his property, or does it only constitute assets which, subject to certain restrictions, are applicable by the executor, in due course of the administration of the estate, to the payment of such debts of the testator as his own property is not sufficient to pay? It is admitted that it does not go further than that. To a certain extent there is no doubt, according to the doctrine of the court of equity, that funds under those circumstances are treated as the property of the donee of the power. For that, reference has been made to *Lord Townshend* v. *Windham* (1), which is a very peculiar case; but I think that in all the cases in which those expressions have been used, the judges who made use of those expressions had nothing to consider except the relative position of the volunteers under the exercise of the testamentary power and the creditors of the testator. I think that is shown quite clearly in *Lord Townshend* v. *Windham* (1) by the comparison which LORD HARDWICKE, L.C., makes in that case between the position of creditors under the statute of Elizabeth and the position of creditors under the execution of such a power as the present; and when the Lord Chancellor in that case said that the fund must be treated as regards the creditors as if it had been the property of the testator, I think he meant nothing more than that the disposition which he had made by his will in favour of volunteers could not have effect given it with regard to that any more than it could have effect given to it with regard to property of his own; but there is no authority which goes so far as to say that you must treat such a fund—to this extent the property of the debtor—so as to divide it amongst the creditors in a preceding bankruptcy.

So far as any authority is concerned, there is authority to the contrary. It is true that is under an old Bankruptcy Act, and it might be necessary to carefully analyse the distinction between the law of bankruptcy at the time of that decision and the law at the present time; but I do not think in this case any such analysis is required. The case I am referring to is *Jenney* v. *Andrews* (2), which has been so much discussed in argument. In that case the donee of the power had become bankrupt, and had obtained a certificate. Meanwhile, the bankrupt before his bankruptcy had made his will, as in the present case, and he died without having revoked his will. It was held there that the fund was not available for payment of the creditors in the bankruptcy, and SIR JOHN LEACH, V.-C., said (6 Madd. at pp. 265, 266):

> "Where there is a general power of appointment by will, and an appointment is made, the appointee is a trustee for creditors; but it is not for creditors at the time of the execution of the will, but at the death of the testator. The certificate of the bankrupt deprives the assignees of all claim for the benefit of the creditors under the commission."

In the present case one does not have to go so far as that. I think in the present case it is enough to say that the property divisible amongst the creditors does not include this particular fund. If that is so, the trustee is not entitled to have this fund (for that, I think *Jenney* v. *Andrews* (2) is also an authority), but it is through the trustee in bankruptcy that the creditors in bankruptcy are entitled to a dividend on their debt. It seems to me that on the true construction of the Bankruptcy Act, 1883, notwithstanding the doctrine of equity with regard to testamentary powers which have been exercised, it is impossible to bring this fund within the definition of property divisible in the bankruptcy, and, further, it seems to me that it is impossible to say that this is property which in equity, independent of the express statutory provisions which plainly would not apply, ought to be administered as if it had been property divisible amongst the creditors in bankruptcy.

Then there is the further question. Is this a fund which is divisible amongst all creditors pari passu, including those who were creditors in the bankruptcy? There the question is rather a different one. I am assuming now, for the purpose of deciding this case, that the executor is the person on whom devolves, according to the ordinary doctrines of equity in this matter, the duty of distributing the fund among the creditors. Are the

creditors in the bankruptcy creditors whom the executor is to include in making the distribution. I think not. The general effect of the provision of the Bankruptcy Act appears to me to be this: that it substitutes for the personal relief against a debtor which the creditor possesses, certain rights given by the Act, of resorting to his property and having that property divided amongst the creditors. In this case there had been no order of discharge. The debtor is therefore not actually released from his debt, but it seems to me, by the effect of s. 9, that as from the receiving order, the order never having been discharged, and it having been followed by an order of adjudication, the creditors were deprived of their right of action. I do not see how it is possible for the creditors in the bankruptcy by any process whatever to get at the executor. It seems to me that the executor has nothing to do with the creditors in the bankruptcy, who were entitled to have divided amongst themselves the assets divisible in the bankruptcy, and to have those assets divisible amongst them to the exclusion of subsequent creditors. It seems to me they had to look to the trustee in bankruptcy and to the property which under the Bankruptcy Act was divisible, and have nothing to do with the executor or the property which is divisible by the executor in that capacity. In the view I take, therefore, I conceive that as to the fund in question, so far as creditors are concerned, the only creditors who can have any right to be paid out of this fund are the creditors who have become such subsequently to the bankruptcy, and who therefore have the executor to look to and not the trustee in bankruptcy.

A further question was raised or suggested by counsel for the plaintiff with regard to the right of the executor to retain, but if the only creditors to be paid are those whose debts have been incurred since the bankruptcy, the right of retainer becomes immaterial inasmuch as the fund is solvent. I need say nothing about that, except, so far as I form any opinion on the subject, I think the right of retainer would not have existed against such a fund.

Solicitors: *Lee, Davis, & Lee*; *Solicitor to the Board of Trade.*

[*Reported by* E. L. HOPKINS, ESQ., *Barrister-at-Law.*]

OPPENHEIMER *v.* ATTENBOROUGH & SON

[COURT OF APPEAL (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.), November 21, 1907]

[Reported [1908] 1 K.B. 221; 77 L.J.K.B. 209; 98 L.T. 94; 24 T.L.R. 115; 52 Sol. Jo. 76; 13 Com. Cas. 125]

Agent—Mercantile agent—Goods entrusted to mercantile agent for sale—Consent of owner to agent's possession—Protection to pledgee—Custom of trade that mercantile agents could not pledge goods—Factors Act, 1889 (52 & 53 *Vict.*, *c.* 45), *s.* 2 (1).

By s. 2 (1) of the Factors Act, 1889, where a mercantile agent is, with the consent of the owner, in possession of goods, any sale, pledge, or other disposition of the goods, made by him "when acting in the ordinary course of business of a mercantile agent", shall, subject to the provisions of the Act, be as valid as if he were expressly authorised by the owner of the goods to make the same.

The plaintiff, a diamond merchant, intrusted diamonds to S., a diamond broker, who was to sell them to certain named merchants. S., however, pledged the diamonds with the defendants who took them in good faith. In an action brought by the plaintiff for recovery of the diamonds evidence was tendered that it was the custom of the trade that diamond brokers were never given authority to pledge diamonds on behalf of their principals.

Held: S. was in possession of the diamonds as a mercantile agent with the consent of the owner within the meaning of s. 2 (1) of the Factors Act, 1889, and the protection given by that section to a pledgee could not be cut down by evidence of a custom of the trade that mercantile agents could not pledge goods.

Per LORD ALVERSTONE, C.J., and BUCKLEY, L. J.: The expression "when acting in the ordinary course of business as a mercantile agent" in s. 2 (1) of the Factors Act, 1889, means "acting in such a way as a mercantile agent in the ordinary course of business as a mercantile agent would act"—that is, within business hours, at a proper place of business and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the pledgee to suppose that anything is being done wrong, or to give him notice that the disposition is one which the mercantile agent has no authority to make.

Notes. Distinguished: *Janesich* v. *Attenborough* (1910), 102 L.T. 605; *Mehta* v. *Sutton* (1913), 29 T.L.R. 185. Referred to: *Weiner* v. *Harris*, [1908–10] All E.R. Rep. 405; *Whitehorn Brothers* v. *Davison* (1910), 80 L.J.K.B. 425.

As to the disposition of goods by a buyer in possession, see 34 HALSBURY'S LAWS (3rd Edn.) 86 et seq.; and for cases see 1 DIGEST (Repl.) 383 et seq. For the Factors Act, 1889, s. 2 (1), see 1 HALSBURY'S STATUTES (2nd Edn.) 30.

Cases referred to:

(1) *Lamb* v. *Attenborough* (1862), 1 B. & S. 831; 31 L.J.Q.B. 41; 8 Jur. N.S. 280; 10 W.R. 211; 121 E.R. 922; 1 Digest (Repl.) 386, *510*

(2) *Hastings, Ltd.* v. *Pearson*, [1893] 1 Q.B. 62; 62 L.J.Q.B. 75; 67 L.T. 553; 57 J.P. 70; 41 W.R. 127; 9 T.L.R. 18; 36 Sol. Jo. 866; 5 R. 26, C.A.; 1 Digest (Repl.) 387, *515*.

(3) *Oppenheimer* v. *Frazer and Wyatt*, ante, p. 143; [1907] 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 3; 23 T.L.R. 410; 51 Sol. Jo. 373; 12 Com. Cas. 147, 280, C.A.; 1 Digest (Repl.) 390, *530*.

Also referred to in argument:

Cole v. *North Western Bank* (1875), L.R. 10 C.P. 354; 44 L.J.C.P. 233; 32 L.T. 733, Ex. Ch.; 1 Digest (Repl.) 385, *501*.

Waddington & Sons v. *Neale & Sons* (1907), 96 L.T. 786; 23 T.L.R. 464, D.C.; 1 Digest (Repl.) 392, *542*.

Sheppard (*Shephard*) v. *Union Bank of London* (1862), 7 H. & N. 661; 31 L.J. Ex. 154; 5 L.T. 757; 8 Jur. N.S. 265; 10 W.R. 299; 158 E.R. 635; 1 Digest (Repl.) 312, *19*.

Biggs v. *Evans*, [1894] 1 Q.B. 88; 69 L.T. 723; 58 J.P. 84; 10 T.L.R. 59; 1 Digest (Repl.) 386, *511.*

De Gorter v. *Attenborough & Son* (1904), 21 T.L.R. 19; 1 Digest (Repl.) 392, *540.*

Cahn v. *Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q.B. 643; 68 L.J.Q.B. 515; 80 L.T. 269; 47 W.R. 422; 15 T.L.R. 247; 43 Sol. Jo. 331; 8 Asp. M.L.C. 517; 4 Com. Cas. 168, C.A.; 39 Digest 519, *1352.*

R. v. *Buckmaster* (1887), 20 Q.B.D. 182; 57 L.J.M.C. 25; 57 L.T. 720; 52 J.P. 358; 36 W.R. 701; 4 T.L.R. 149; 16 Cox, C.C. 339, C.C.R.; 15 Digest (Repl.) 1037, *10,195.*

Appeal by the plaintiff from a decision of CHANNELL, J., reported [1907] 1 K.B. 510, at the trial of the action without a jury.

The plaintiff was a diamond merchant in London and the defendants were pawnbrokers. The action was brought to recover certain parcels of diamonds which had been pawned with the defendants by one Schwabacher.

In April, 1906, Schwabacher, who carried on business as a diamond broker and was known to the plaintiff, came to the plaintiff and told him that he thought he could sell some diamonds to two firms of diamond merchants whose names he gave to the plaintiff. The plaintiff thereupon intrusted him with some diamonds for that purpose, but Schwabacher, instead of offering them to the diamond merchants whose names he had mentioned to the plaintiff, took them to the defendants and pawned them there for an advance of money to himself. When the plaintiff discovered the fraud he asked the defendants to give him back his diamonds, and on the refusal of the defendants to do so, he brought the present action.

At the trial the plaintiff offered evidence, which was practically uncontradicted, that in the diamond trade it was the custom that diamond merchants desirous of obtaining advances on diamonds, always themselves carried out the transaction of pledging them, and that diamond brokers employed to sell diamonds never had authority to pledge them on behalf of their principals. CHANNELL, J., found on the facts that Schwabacher was in possession of the diamonds as a mercantile agent, with the consent of the owner, and that the defendants had not been guilty of any want of good faith in advancing money on the diamonds to Schwabacher. He also held that evidence of the alleged custom in the diamond trade was not admissible for the purpose of depriving the defendants of the protection given by the Factors Act, 1889; and he gave judgment for the defendants. The plaintiff appealed.

The Factors Act, 1889, provides:

> "Section 1 (1). The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.
>
> Section 2 (1). Where a mercantile agent is, with the consent of the owner, in possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

Rawlinson, K.C., and *Harry Dobb* (*Dunkels* with them) for the plaintiff.

J. A. Hamilton, K.C., and *C. L. Attenborough* for the defendants.

LORD ALVERSTONE, C.J.—In this case my brother CHANNELL has decided in favour of the defendants, whom he has held to be protected by the Factors Act, 1889. It has been strenuously contended before us that the insertion of the words "when acting in the ordinary course of business as a mercantile agent" in sub-s. (1) of s. 2 was intended to impose some limit upon the generality of the previous Act. I think, after carefully considering the argument of counsel for the defendants, who pointed out the change from the expression in sub-s. (1) of s. 1, "course of his business" to the expression in sub-s. (1)

of s. 2, "course of business of a mercantile agent," that there is a good deal to be said in favour of the view which he presented, that we ought not, at any rate unless we see clearly the argument in favour of such a view, to hold that the words "the ordinary course of business of a mercantile agent" were meant to deprive the pledgee of the protection given by former legislation, solely on the ground that the mercantile agent has acted in a way contrary to the custom of the particular trade and contrary to the way in which his principal in the particular case intended he should act.

In this case evidence was tendered before CHANNELL, J., and, I understand, not seriously disputed, that it was very unusual indeed, if not without exception, for diamond merchants ever to get advances on diamonds through agents. It was said that they always did this business themselves. For the purpose of this case therefore I will assume that counsel for the plaintiff has satisfied us, on evidence that was practically uncontradicted, that diamond merchants, as a matter of the custom of the trade, did not employ agents to obtain advances on diamonds. It seems to be conceded by the plaintiff's argument that an express prohibition by a principal to his agent would not be sufficient to prevent a pledge made by the agent in the course of business being protected in favour of the pledgee. I think that my brother CHANNELL has taken a right view in this case, and that the protection given by the Act to a pledgee cannot be cut down by evidence of a custom of a particular trade, that merchants in that trade always themselves conduct their business of obtaining advances on goods which were the subject of that trade. However I think my brother CHANNELL has taken the right view, that evidence of this custom was not admissible for the purpose of defeating the protection which otherwise would be given to the pledgee.

It is quite plain when you are dealing with a person who is a mercantile agent, you have got to find out whether in the ordinary and customary course of his business as such agent he has authority to sell goods or consign them for sale or buy or raise money on them. I think one can clearly see, therefore, why the words "the customary course of his business as such agent" were inserted in sub-s. (1) of s. 1. There are many agents, such as carriers of goods, who receive goods, and yet it is not part of the customary course of the business of such agents to sell or consign them for the purpose of sale or to buy or raise money on them. Therefore, when you are dealing with an agent in possession of goods you have, no doubt, to consider what the condition of the agent is, and what his habits and customs would be when he is acting in the capacity of agent. Undoubtedly the case of an auctioneer intrusted with goods for sale, which counsel for the plaintiff pressed us with, is one of difficulty. He suggested that under sub-s. (1) of s. 2, if that sub-section is not construed in the way he maintains it should be, an auctioneer would have power to pledge. But it seems to me that there may be particular agents, such for instance as auctioneers, by whom a pledge would be such a departure from the ordinary course of their business as to put the pledgee upon notice. No question of that kind arises here. Having therefore got the class of mercantile agent whose transactions are to be protected in the interest of the pledgee you now get to sub-s. (1) of s. 2 as to the circumstances under which the transaction must be carried out. [HIS LORDSHIP read the sub-section.] I think the expression in question means "acting in the transaction as a mercantile agent." There is no doubt that includes the limits suggested, such as that the sale must not take place outside business hours, or under circumstances under which no agent in the trade would transact business.

I think that this view of the law is that which was really in two cases cited before us. The first case was that of *Lamb* v. *Attenborough* (1), where a clerk was authorised by his employer to sign delivery orders per procuration, and by so doing obtained possession of dock warrants, and it was held in that case that he was not an agent intrusted with the possession of documents of title to goods within the meaning of the Factors Act, 1842, [repealed]. BLACKBURN, J., in that case said (31 L.J.Q.B. at pp. 42, 43):

> "The agent contemplated by the statute is an agent having mercantile possession, so as to be within the mercantile usage of getting advances made. In this case Bryant's possession was that of servant, not of agent; and when the documents were

created by the dock company, they belonged to the plaintiff, and he had a right to demand them back from the defendant."

In *Hastings, Ltd.* v. *Pearson* (2), upon which counsel for the plaintiff relied, MATHEW, J., when dealing with the case of a person who was employed at a small salary—viz., 30s. a week and commission—to take small articles of jewellery to private houses for sale and who pawned them for his own benefit, says ([1893] 1 Q.B. at p. 64):

> "There is no such business as that of an agent to pledge with pawnbrokers small articles of jewellery for the purpose of raising money for the employer of the agent. The Factors Act, therefore, does not apply."

So it seems that MATHEW, J., was dealing with the case on the basis that it could not be fairly said that the agent was "acting in the ordinary course of business of a mercantile agent." He seemed to consider that the particular servant who was employed only to sell small articles of jewellery could not be said to be a person who, in the ordinary course of business of a mercantile agent, was carrying out the transaction that he was carrying out. I admit it would be quite possible to take another view of the facts, but that seems to me to be the way in which the case was decided by MATHEW, J., and it does not seem to me to go far enough for counsel for the plaintiff's argument. In my opinion, these words "acting in the ordinary course of business of a mercantile agent" means that he shall be acting in the transaction as a mercantile agent would act who was carrying out a transaction which his master authorised him to carry out.

Then counsel took the point that in a case where the pledgee is told that the goods are the pledgor's own property, that is to say, that the pledgor does not purport to be an agent for somebody, the pledgee gets no protection under the Act. I cannot think it was intended to exclude from the protection of the Factors Act the case of a mercantile agent, who has got possession of goods with the consent of the true owner, but tells a lie to the pledgee in order to obtain an advance on them. This view is supported by implication. The preamble of the Factors Act, 1842, says that it is expedient and necessary that owners intrusting agents with the possession of goods and merchandise should be bound by any contract of pledge in like manner as they would be bound by a contract of sale—that is to say, notwithstanding that the pledgee has a notice that the pledgor is an agent. It seems to me that it would be very strange that the legislature should intend to protect a pledge made by a pledgor whom the pledgee knew to be an agent, but that the pledgee should not be protected where the agent does not communicate his real position to the pledgee. I am therefore of opinion that in this case Schwabacher was acting in the ordinary course of business of a mercantile agent, and that my brother CHANNELL has rightly ruled that the words of the later Act had not cut down the protection given by the former ones.

A further point was taken on behalf of the plaintiff—namely, that the evidence showed that Schwabacher had in his mind a fraud upon Oppenheimer when he got possession of the diamonds, that therefore he obtained them by larceny by a trick, and therefore he was not in possession of them with the consent of the owner. My brother CHANNELL said there was not sufficient evidence to establish larceny by a trick. I agree with that, and the point still remains open, whether assuming the evidence to establish larceny by a trick, there can be any "consent of the owner" within sub-s. (2) of s. 1, to the possession by the agent. I think the decision, therefore, of CHANNELL, J., was right, and on both grounds the appeal fails, and must be dismissed.

BUCKLEY, L.J.—Counsel for the plaintiff says that the defendants did not deal with Schwabacher on the footing of his being a mercantile agent, and that therefore the Factors Act does not apply. I do not think that is sound. The question whether the person with whom the agent was dealing believed him to be an agent or believed him to be the owner of the goods is not a question material for the purposes of the Factors Act. The object of the Act was, as regards sale and also as regards pledges, that a person who, with the consent of the true owner, is in possession of goods as mercantile agent and goes and deals with them, shall have the same rights when dealing with them as if he were the owner. That was the purpose of the Act of Parliament, and the question whether the

pledgee believed the man who was dealing with him had the character of a mercantile agent is irrelevant. He deals with him because he has got possession of the goods. Section 4 of the Act of 1889 gives some indication whether the mercantile agent spoken of in the Act must be a person whom the pledgee believes to be an agent, and who purports to act with the pledgee as an agent. That section provides that,

> "where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge."

It is a section which contemplates the case of a mercantile agent going in fraud of his principal to pledge the goods for his own debt. Under those circumstances is the pledgee to get a title or not? Yes, he is to get a title, but a limited title only as provided by the section. That is to say, it contemplates that if the pledgor has, between himself and the true owner of the goods, some qualified right, the pledgee is to get that right, and no more than that right. Of course that must include the case where the agent is pretending to be the real owner of the goods, when he is not; and shows that the Factors Act applies when the pledgee believes himself to be dealing with the real owner.

The next question is, What does that mean for the present purpose? It is admitted that if the plaintiff had expressly forbidden Schwabacher to pledge the diamonds the pledgee would have been protected, because the very purpose of the Factors Act is that a mercantile agent should be entitled to pledge goods with an innocent pledgee. But the argument is that if there be a custom in any particular trade that an agent cannot pledge goods, that that has some higher authority than an express veto given by the principal to the agent not to pledge. For the present purpose we have to assume that the defendants acted in good faith—that is, to assume that they did not know of this custom in the diamond trade. Supposing a custom to be so notorious as that everybody must be taken to know it, then, under the words of sub-s. (1) of s. 2, a pledge by the agent would not give a good title, because the pledgee would not be a person who

> "has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

That may cover the case of an auctioneer, I do not say whether it does or not. It would, however, be an extraordinary thing if an unknown custom should have a higher effect than an express veto given by the principal to his agent. There is a difference between the expression in s. 1 (1) and that used in s. 2 (1), one being "in the course of his business," and the other "course of business of a mercantile agent," and I think I see the reason. Section 1 (1) says:

> "A mercantile agent having, in the customary course of his business as such agent, authority either to sell,"

and so on. That is speaking of the arrangement made between the true owner of the goods and the mercantile agent. It contemplates that the principal has given possession of the goods to the agent in the customary course of the business which the principal knows, or believes, the mercantile agent carries on as such. That has to do with the circumstances under which the agent gets possession of the goods, and to satisfy the definition he must get them in the customary course of his business as a mercantile agent. Section 2 (1) deals with another matter. It deals with the stage at which the agent is going to deal with the goods in his possession with reference to some other person, and then the form of expression is altered thus: "when acting in the ordinary course of business of a mercantile agent."

The plaintiff's argument involves that we should read that as "of such mercantile agent," or, "of a mercantile agent in such trade as that in which he carries on business." I do not think it means that. I think it means "acting in such a way as a mercantile agent in the ordinary course of business as a mercantile agent would act"; that is to say, within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the pledgee to suppose that anything is being done wrong, or to give him notice that the disposition

is one which the mercantile agent had not authority for. Dealing with it in that way, it seems to me there is no great difficulty in the Act of Parliament. That being so, it seems to me that the judgment in the court below was right, and that the appeal should be dismissed.

KENNEDY, L.J.—I am of the same opinion. I do not feel quite sure as to the exact effect of the words in s. 2 (1) "when acting in the ordinary course of business of a mercantile agent," and I reserve to myself the right to consider further what these words mean. But I am sure of this, that CHANNELL, J., was right in saying that they ought not to be taken to exclude a case in which a mercantile agent would not, as agent, have authority according to the custom of a particular trade to pledge goods which are the subject of that trade, on the ground that the pledging of such goods is a transaction which, in accordance with the custom of the particular trade, merchants prefer to do for themselves. I think that what has been already said by my Lord and by BUCKLEY, L.J., affords admirable reasons for that view, and the learned judge himself has pointed out that it would be a very strange thing if the members of any particular trade could take themselves out of the operation of the Factors Act by saying that they only authorised their agents to sell, and never gave them authority to pledge. If, as it has been said, it is notorious in any business that the person who is in the position of an agent does not have authority in the ordinary course of business to pledge, then the proviso at the conclusion of the sub-section protects the real owner of the goods whose property has been improperly dealt with by the agent. What is exactly meant by the words, "made by him when acting in the ordinary course of business of a mercantile agent," I am not quite sure. I am inclined to think that it is meant to apply to a person who, being a mercantile agent, is acting in time, and manner, and other circumstances when he pledges as a mercantile agent, as if he had authority to do it, and might reasonably do it. It is said that the expression means that the pledgor must be known by the pledgee to be an agent. I do not think that is well founded. It seems on the face of it a strange contention because a pledgee ought to be more protected if he does not know that the pledgor is an agent than if he knows that his business is that of an agent; and in the absence of any words in the sub-section such as "purporting to act" as a mercantile agent, I cannot accept counsel for the plaintiff's suggestion on that account. It seems to me, therefore, whatever meaning may be given to this expression in some other case, that on the question which CHANNELL, J., called the difficult question he has decided rightly, and this appeal cannot succeed.

With regard to the question of larceny by a trick, we had to consider the point recently in a similar case in the Court of Appeal—viz., *Oppenheimer* v. *Fraser and Wyatt* (3). I expressed my view in that case and it is not necessary to decide in the present case whether an agent who has been found guilty by a jury of the kind of larceny which is termed, I think inconveniently, larceny by a trick, can be said to be in possession of the goods "with the consent of the owner" within this enactment. I think it would be impossible to hold that the legislature intended that a man who has been convicted of stealing goods should be considered to be in possession of them with the consent of the owner. I agree with the opinion of CHANNELL, J., who thought that on the facts larceny by a trick had not been made out, although certainly Schwabacher when he received possession of the goods was a dishonest and unscrupulous man. In my opinion the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Julius A. White*; *Stanley J. Attenborough.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

LARNER *v.* LARNER

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Phillimore and Jelf, JJ.), June 29, 1905]

[Reported [1905] 2 K.B. 539; 74 L.J.K.B. 797; 93 L.T. 537; 54 W.R. 62; 21 T.L.R. 637; 49 Sol. Jo. 725]

Husband and Wife—Action by wife against husband—Action in detinue—Recovery of property detained by husband—Married Women's Property Act, 1882 (45 & 46 *Vict.*, *c.* 75), *ss.* 12, 17.

A married woman can bring an action in detinue against her husband to recover personal property detained by him.

Notes. Considered: *Healey* v. *Healey*, [1915] 1 K.B. 938; *Gottliffe* v. *Edelston*, [1930] 2 K.B. 378.

As to a wife's remedies for the security of her property, see 19 HALSBURY'S LAWS (3rd Edn.) 897 et seq.; and for cases see 27 DIGEST (Repl.) 258 et seq. For the Married Women's Property Act, 1882, see 11 HALSBURY'S STATUTES (2nd Edn.) 799.

Case referred to:

(1) *Bashall* v. *Bashall* (1894), 11 T.L.R. 152, C.A.; 27 Digest (Repl.) 259, *2096*.

Appeal from the deputy judge of the Brompton County Court.

The action was brought by the plaintiff, a married woman, against the defendant, her husband, to recover certain goods. She claimed the return of the goods or their value. The learned deputy judge gave judgment for the wife. The husband appealed.

Cox-Sinclair and *Lampard* for the husband.

Symmons for the wife.

LORD ALVERSTONE, C.J.—The important point in this case is whether the action can be maintained, and, on consideration of the best construction of s. 12, I think that it can. By that section every woman, whether married before or after the Act, shall have in her own name, against all persons whomsoever, including her husband, the same civil remedies for the protection and security of her own separate property as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. That section, to my mind, seems to contemplate some torts by the husband in respect of the wife's property on which she is allowed to sue. That being so, does the fact that the husband disputes the right of the wife to the chattel prevent the action being brought? I think not. It is said that we should not so construe s. 12, because of s. 17. Section 17 provides that in any question between husband and wife as to the title to, or possession of, property, either party may apply by summons or otherwise in a summary way to a judge of the High Court or of the county court, and he may make such order as to the property in question as he thinks fit. It is not unimportant to remember that s. 17 is an amendment of s. 9 of the Married Women's Property Act, 1870 [repealed], whereas s. 12 is new. I do not think that s. 17 gives a direct remedy for damages, and s. 17, an enabling section, is not sufficient to limit the construction of s. 12. In *Bashall* v. *Bashall* (1), the case to which we have been referred, so much was admitted on behalf of the defendant that it cannot be taken as a clear judgment on the point, but as a fact COLLINS, J., did give judgment for the wife. On the whole, I think this action lies, and this appeal must be dismissed.

PHILLIMORE, J.—I agree. As to the construction of the Married Women's Property Act, 1882, I was at first inclined to think that s. 17 barred any proceedings by way of action, or rather that s. 17 showed that s. 12 had a limited operation, that latter section being the enabling one. However, I do not think that is right. This Act of 1882 is not a complete code of the law relating to married women; it is only an Act affecting married women's property. If s. 12 is limited quoad the husband, it is also limited quoad third parties, and in that case the married woman would have no remedy for the recovery of

her property. That is a strong point against limiting the construction of s. 12, for s. 17 only applies as between husband and wife. Again, s. 17 only applies as to the title to or possession of property, and there is no power under that section to give damages where the property is injured or detained. On the whole, therefore, I think the language of s. 12 is large enough to include an action of detinue or an action to recover anything except perhaps real property.

JELF, J.—I have a clear opinion that an action will lie by the wife for detinue against the husband under s. 12. The Act of 1882 was intended to put a married woman as regards her separate property in a very different position to that which she previously occupied. Having established her right of holding separate property as if she were a feme sole, the language of the Act shows that it was considered logical to give her the same remedy with regard to that property as other people would have with regard to theirs. We ought not to read the words in s. 12 as a limitation of those rights, and I think it gives a married woman a right to bring an action of this kind, and other rights as well. Under its provisions she has a right to prosecute her husband under certain circumstances, and yet it is suggested that s. 17 cuts down the right to bring an action to recover her property. All I think s. 17 does is to enable certain disputes between husband and wife to be dealt with in a summary way, and to say that that permissive right cuts down s. 12 is quite inadmissible. Actions of detinue and of conversion have, since the passing of the Act, been successfully brought by married women both against their husbands and third parties.

Appeal dismissed.

Solicitors: *Oswald Hanson & Co.*; *F. Fitz-Payne.*

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*]

ANDREWS *v.* WAITE

[CHANCERY DIVISION (Neville, J.), June 11, 12, 13, 18, 19, 1907]

[Reported [1907] 2 Ch. 500; 76 L.J. Ch. 676; 97 L.T. 428]

Easement—Light—Alteration of dominant tenement—Right to identical light—Alteration in manner of receiving light during statutory period of acquisition—Amount of light to which dominant tenement entitled—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

The question whether the right to light which has been acquired by the dominant tenement is preserved when the building is altered depends on the identity of the light and not on the identity or position of the aperture.

Alteration in the manner of receiving and using light in a building may be made during the statutory period of acquisition under s. 3 of the Prescription Act, 1832, but the amount of light which the owner of the dominant tenement can acquire during the statutory period is the minimum amount which he has enjoyed during the whole of that period.

Scott v. *Pape* (1) (1886), 31 Ch. D. 554, not overruled by *Colls* v. *Home and Colonial Stores* (2), ante p. 5, so far as it relates to loss of right by alteration of buildings.

Notes. As to extinguishment of an easement, see 12 HALSBURY'S LAWS (3rd Edn.) 562 et seq.; and for cases, see 19 DIGEST (Repl.) 154 et seq. For the Prescription Act, 1832, s. 3, see 6 HALSBURY'S STATUTES (2nd Edn.) 672.

Cases referred to:

(1) *Scott* v. *Pape* (1886), 31 Ch. D. 554; 55 L.J. Ch. 426; 54 L.T. 399; 50 J.P. 645; 34 W.R. 465; 2 T.L.R. 310, C.A.; 19 Digest (Repl.) 138, *892*.

(2) *Colls* v. *Home and Colonial Stores, Ltd.*, ante, p. 5; [1904] A.C. 179; 73 L.J. Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 19 Digest (Repl.) 135, *872*.

Also referred to in argument:

National Provincial Plate Glass Insurance Co. v. *Prudential Assurance Co.* (1877), 6 Ch. D. 757; 46 L. J.Ch. 871; 37 L.T. 91; 26 W.R. 26; 19 Digest (Repl.) 155, *1020*.

Ankerson v. *Connelly*, [1907] 1 Ch. 678; 76 L.J. Ch. 402; 96 L.T. 681; 23 T.L.R. 486, C.A.; 19 Digest (Repl.) 158, *1037*.

Bullers v. *Dickinson* (1885), 29 Ch. D. 155; 54 L.J. Ch. 776; 52 L.T. 400; 33 W.R. 540; 1 T.L.R. 242; 19 Digest (Repl.) 156, *1022*.

Ecclesiastical Comrs. for England v. *Kino* (1880), 14 Ch. D. 213; 49 L.J. Ch. 529; 42 L.T. 201; 28 W.R. 544, C.A.; 19 Digest (Repl.) 152, *992*.

Greenwood v. *Hornsey* (1886), 33 Ch. D. 471; 55 L.J. Ch. 917; 55 L.T. 135; 35 W.R. 163; 19 Digest (Repl.) 154, *1011*.

Smith v. *Baxter*, [1900] 2 Ch. 138; 69 L.J. Ch. 437; 82 L.T. 650; 48 W.R. 458; 44 Sol. Jo. 393; 19 Digest (Repl.) 84, *492*.

Blanchard v. *Bridges* (1835), 4 Ad. & El. 176; 1 Har. & W. 630; 5 Nev. & M.K.B. 567; 5 L.J.K.B. 78; 111 E.R. 753; 19 Digest (Repl.) 158, *1042*.

Tapling v. *Jones* (1865), 20 C.B.N.S. 166; 11 H.L. Cas. 290; 5 New Rep. 493; 34 L.J.C.P. 342; 12 L.T. 555; 29 J.P. 611; 11 Jur. N.S. 309; 13 W.R. 617; 144 E. R. 1067, H.L.; 19 Digest (Repl.) 137, *886*.

Witness Action.

The plaintiff was the occupier of premises known as No. 5, St. John's Square, Cardiff, the ground floor of these premises being used as a shop with a storeroom at the back, and the upper floors for offices. The defendant was the occupier of the adjoining premises known as No. 4, St. John's Square. The light considered in this action was the light at the back of the plaintiff's premises coming to the storeroom and to an office immediately above the storeroom on the first floor, and it was found that the only right to light that he had acquired had been acquired since 1879. At that date there was a small area at the back of the plaintiff's premises about 10 ft. long from north to south, and about 7 ft. wide from east to west. The premises adjoined this area on its east, south and west sides, the north side being left open except for a boundary wall about 10 ft. high, having an open area on its other side belonging to the defendant, and which the defendant's buildings partly surrounded. The plaintiff's storeroom adjoined the south side of his area, and in 1879 its outside wall was in the same plane as the outside wall of the office above it, each wall containing an ordinary window for lighting the storeroom and office respectively. The light which penetrated these windows was two oblique cones of light which came from the north over the top of some building beyond the defendant's premises, and which crossed the areas belonging respectively to the plaintiff and defendant. In 1887, the plaintiff took in a part of his area for his storeroom by advancing its outside wall 5 ft. in a northerly direction; he placed a window in the advanced wall with a sloping skylight above it, which extended from the window up to the floor of the office above, and it was found that the oblique cone of light which penetrated the window in its altered position and the skylight above substantially reached the place in the storeroom where the window was situated before the alteration. In 1895, the plaintiff rebuilt his premises, and in doing so again enlarged his storeroom by taking in the whole of his area, which he did by advancing its outside wall as far as the boundary wall; he then lighted his storeroom by means of a sloping skylight alone, which extended from the top of this advanced wall up to the floor of the office above. It was also found that the cone of light which penetrated this new skylight substantially reached the place where the old window was situated before the alteration in 1887. The plaintiff also enlarged his office above the storeroom by advancing its outside wall 5 ft. in a northerly direction. He placed a new window in this advanced wall at a higher altitude than the old one was placed, which allowed the oblique cone of light that penetrated it to reach substantially

the place in the office where the old window was situated. The defendant having commenced to inclose his area by building a wall some 50 ft. high adjoining the boundary wall, the plaintiff brought an action for an injunction to restrain him from infringing his right to light.

By the Prescription Act, 1832, s. 3, it is provided:

"... when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible."

Peterson, K.C., and *E. G. Waddilove* for the plaintiff.
Jenkins, K.C., and *Alfred Adams* for the defendant.

NEVILLE, J.—This is one of those difficult cases relating to light and the diminution of it; and especially is this so since the decision in the House of Lords in cases where there has been any alteration in the manner of receiving and using light over your neighbour's premises.

The plaintiff and the defendant are the proprietors of adjoining premises in St. John's Square, Cardiff, No. 5 being the plaintiff's, and No. 4 the defendant's. The models show what has been done already in the way of building on the defendant's land, and the effect which that must have on the plaintiff's land, and I do not think, although I do not put it as an admission, that it could be seriously contested that the buildings proposed to be erected would not create an undoubted nuisance to the plaintiff's premises, supposing that he were entitled to the access of light to the windows as they stand. I think that, if it were so, this would be one of the unusual cases in which not only would the right to light be infringed, but probably also the right to air, so high and so close to the plaintiff's premises are the buildings proposed to be erected by the defendant. But that is not a question which the court in the present case has to consider, and for this reason: Whatever right of light the plaintiff has acquired has, so far as the evidence is concerned, been acquired since the year 1879, and, during that time, the plaintiff has more than once altered his premises so far as relates to the windows in question, which are a skylight in the ground floor and a window on the first floor. Those are the only apertures for securing light which are at present in question.

I think, after hearing the evidence, that the facts of the case are shown with sufficient accuracy by the diagram prepared in connection with the section A B of the plaintiff's premises, a plan showing the surroundings, and a plan showing the position of the existing area in relation to the position of the old window on the ground floor as shown on the plan which has been put in, the measurements of which I think have been proved. In my opinion, assuming that the position of the old windows shown on the section in question is in accordance with the evidence, those plans, taken in connection with it, show what the deprivation of light occasioned by the defendant's building will be, and the conclusion I have come to on the evidence is that, in that section, the position of the old windows is shown with substantial accuracy. The chief difficulty is, I think, in regard to the window on the ground floor, because it is said, and I think truly said, that no specific evidence as to the height of the window, which I think is proved to have been about 3 ft. 1 in. in breadth, has been given. But I think that it is clear from the plan and from the evidence of the witnesses that there was a window existing in the external wall of that part of the plaintiff's premises in 1879 or 1880, and having regard to the character of the building, to the height of the floor, and to the use to which this particular part of the building has been put, I think I should not be giving a reasonable effect to the evidence if I did not assume that that window was a window of ordinary and not exceptional character, and I take it that it was a window 3 ft. 1 in. in width and between 5 ft. and 6 ft. in length. That being so, the conclusion which I have come to is this, that a substantial amount of light which comes in through the present skylight and the window on the first floor reaches the places where the old windows on the ground and first floors were situated, and I think that the buildings proposed by the defendant would occasion a nuisance to the plaintiff's building as it exists, and to a building lighted, as

to its first and ground floors, as the old building was both before and after the alteration was made by the plaintiff. It is obvious that all the light that the plaintiff has succeeded in acquiring during the twenty years of user has been the minimum amount which he has received continuously for the lighting of his premises, and that I think is what is shown by the plans to which I have referred. I think, therefore, that he acquired an easement to that extent over the defendant's land.

The question then arises: On those findings of fact, is the plaintiff entitled to the relief which he claims? It has been argued that there has been such an alteration of his premises, both in 1887 and again still more conspicuously in 1895, as to prevent his acquisition of any right to light over the defendant's premises at all. That I think must depend on the proper construction to be put on s. 3 of the Prescription Act, 1832, which refers to acquisition of rights of light, taken in connection with the decision of the courts in respect of the matter. It is said that, except with regard to the term necessary for the acquisition of the right, the Prescription Act did not alter the law as it existed at the time the Act was passed. I do not think that any distinction can be drawn between what is necessary to lose the right when once indefeasibly acquired, in the way of alteration, and what is sufficient to prevent the acquisition of the light during the twenty years. I say that, because it seems to me from the wording of s. 3 that the provision with regard to the enjoyment of the right indefeasibly expressly refers to the earlier part of the section, which refers to the access of the light. It is on that, I think, that the decisions of the courts proceed with regard to the loss of the easement resulting from alterations of the dominant tenement; the reasoning of them is, I think, equally applicable to the question whether or no any right has been acquired during the currency, or at the expiration, of the twenty years. I am confirmed in this view by the judgment of BOWEN, L.J., in *Scott* v. *Pape* (1), in which the question of alteration was considered, but it was considered in connection with alteration made after the right had been indefeasibly acquired. I do not think the main decision in *Scott* v. *Pape* (1) has been affected by the decision of the House of Lords in *Colls* v. *Home and Colonial Stores* (2), so far as it relates to the question of loss of right by alteration of buildings.

It seems to me that the question that has to be determined is whether proof is necessary of identity of window or aperture through which the light over which an easement is claimed has been admitted to the dominant building, or whether the true matter for investigation is the identity of the light which has been admitted into the dominant building. How far a complete alteration of the character and structure of a building may serve to prevent the acquisition of light, or the enjoyment of it after it has been indefeasibly acquired, is a matter which I think I need not consider here, because, although the plaintiff's premises have undoubtedly been considerably altered by his various improvements, the character of the building remains substantially unchanged, and the use to which the light is put in the present case is to light a storeroom which has been in existence from 1879 or 1880 up to the present time. But it has been argued that the question must be determined by consideration of whether the window is in the same horizontal plane, and how and to what extent its position in the angle of incidence of the light has been altered. I do not accept that view of the case. In my opinion, that is immaterial. It seems to me that, when once you have a decision, as you have in *Scott* v. *Pape* (1), to the effect that the alteration of the window does not interfere with the enjoyment of the light, always bearing in mind that the light which you are entitled to enjoy is the same light that you have enjoyed for the twenty years, or in the case of acquisition that you must throughout the whole of the twenty years enjoy the same light, the real test is, as I said before, identity of light, and not identity of aperture, or entrance for the light.

If that is so, then, in the present case it is obvious that the plaintiff is entitled to an injunction, because I have come to the conclusion that not only do the defendant's buildings occasion a nuisance to the plaintiff's premises as they exist at the present time, but that they would have caused a nuisance to the plaintiff's premises had they remained simply in the enjoyment of the amount of light which has been enjoyed throughout the term from 1880 onwards. I think that undoubtedly the interference with that light occasioned by the defendant's buildings would have amounted to a nuisance, and that

seems to me to be conclusive of the case. It is obvious that, having regard to the standard laid down in *Colls* v. *Home and Colonial Stores* (2), it may be a matter of extreme difficulty in many cases to show, where lights have been altered, that the interference is capable of legal remedy, having regard to the great difficulty of showing whether what is existing under the present conditions would have been a nuisance under the conditions formerly existing. I am relieved from any real difficulty with regard to that, owing to the character of the obstruction which the defendant himself has raised, because it is a wall of very considerable height, raised quite close to the plaintiff's buildings. I think, therefore, that the plaintiff succeeds, and that an injunction must be granted.

Solicitors: *Martyn & Martyn*, for *Edward Horley*, Cardiff; *Bell, Brodrick, & Gray*, for *Mackintosh, Dixon, & Co.*, Cardiff.

[*Reported by* A. J. B. TAPLING, ESQ., *Barrister-at-Law.*]

Re BRINDLEY. Ex Parte TAYLOR, SONS & CO.

[COURT OF APPEAL (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.), December 15, 1905]

[Reported [1906] 1 K.B. 377; 75 L.J.K.B. 46; 94 L.T. 116; 22 T.L.R. 115; 12 Mans. 387]

Bankruptcy—Deed of assignment—Subsequent petition—Acquiescence in deed by petitioning creditors—Transaction with trustee under deed—Acceptance of payment—Request for advantage under deed.—Estoppel—Refusal of receiving order.

On Sept. 7, 1905, a debtor executed a deed of assignment to a trustee for the benefit of his creditors. One of the clauses in the deed authorised the committee of inspection to pay the debt of any non-assenting creditor in full if they thought it expedient to do so. In answer to a circular convening a meeting of creditors, the petitioning creditors wrote to the trustee and the debtor's solicitors, refusing to consider any arrangement which did not provide for the payment of two items in their account and intimating they would not be present at the meeting. Subsequently, the petitioning creditors accepted an order from the trustee under the deed for a supply of timber required by him in connexion with the realisation of the debtor's estate, for which they received payment from the trustee. On Sept. 25 the petitioning creditors suggested that the committee of inspection should exercise their discretion in their (the petitioning creditors') favour under the clause in the deed above referred to. This was refused and the petitioning creditors presented a petition relying on the execution of the deed of assignment as the act of bankruptcy.

Held: by accepting the order from the trustee for the supply of timber and payment from the trustee after the alleged act of bankruptcy and asking the committee of inspection to act in their favour under the deed in their letter of Sept. 25, the petitioning creditors had acquiesced in the deed of arrangement and had recognised the title of the trustee thereunder; therefore, they were estopped from saying that the deed was not binding and a receiving order could not be made on their petition.

Per VAUGHAN WILLIAMS, L.J.: If a man treats a deed as being an honest deed which cannot be impeached, and, so treating it, takes an advantage under it, it is impossible to allow him afterwards to say that a person taking under the deed has no title.

Bankruptcy—Deed of assignment—Clause empowering trustee to pay in full non-assenting creditor—Effect on validity of deed.

Per COZENS-HARDY, L.J.: A clause in a deed of assignment for the benefit of creditors empowering the trustee either at his own discretion, or on the direction of a majority of the committee of inspection, to pay in full, or otherwise than by dividends, any creditor or creditors who should decline to execute an assent to the deed is an improper one and might go far to invalidate the deed.

Notes. Applied: *Re A Debtor, Ex parte Newburys* (1926), 95 L.J. Ch. 199. Referred to: *Victor Weston (Fabrics), Ltd.* v. *Morgensterns*, [1937] 3 All E.R. 769; *Re Debtor (No. 23 of 1939), Debtor* v. *Petitioning Creditor and Official Receiver*, [1939] 2 All E.R. 338.

As to the conduct of a creditor in general, see 2 HALSBURY'S LAWS (3rd Edn.) 318; and for cases, see 4 DIGEST (Repl.) 175 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Re Wood* (1872), 7 Ch. App. 302; 41 L.J. Bcy. 21; 26 L.T. 113; 20 W.R. 403, L.JJ.; 4 Digest (Repl.) 60, *519*.

(2) *Re Rees, Ex parte Alsop* (1859), 1 De G.F. & J. 289; 29 L.J. Bcy. 7; 1 L.T. 285; 6 Jur. N.S. 282; 8 W.R. 106; 45 E.R. 370, L.JJ.; 4 Digest (Repl.) 142, *1277*.

(3) *Re Stray, Ex parte Stray* (1867), 2 Ch. App. 374; 36 L.J. Bcy. 7; 16 L.T. 250; 15 W.R. 600, L.JJ.; 4 Digest (Repl.) 141, *1271*.

Also referred to in argument:

Re A Debtor (No. 20 of 1904), Ex parte The Debtor (1904), 91 L.T. 664; 53 W.R. 223; sub nom. *Re Goldberg*, 21 T.L.R. 2, D.C.; affirmed 21 T.L.R. 139, C.A.; 4 Digest (Repl.) 176, *1611*.

Re Hawley, Ex parte Ridgway (1897), 76 L.T. 501; 4 Mans. 41, D.C.; 4 Digest (Repl.) 140, *1263*.

Re Woodroff, Ex parte Woodroff (1897), 76 L.T. 502; 4 Mans. 46, D.C.; 4 Digest (Repl.) 142, *1278*.

Re Michael, Ex parte Michael (1891), 8 Morr. 305, D.C.; 4 Digest (Repl.) 143, *1286*.

Appeal by a debtor from a decision of the Divisional Court making a receiving order against him.

The registrar of the County Court of Staffordshire, holden at Hanley, refused to make a receiving order on the grounds that (i) the conduct of the petitioning creditors afforded sufficient cause for declining to make a receiving order under s. 7 (3) of the Bankruptcy Act, 1883, [now repealed]; and (ii) that the petitioning creditors by supplying goods to the trustee for the purpose of the business after the execution of the deed of assignment had acquiesced in the deed.

The Divisional Court allowed an appeal from the registrar's order and held that (i) there was no sufficient cause for declining to make a receiving order and (ii) the petitioning creditors had not acquiesced in the deed.

H. Reed, K.C., and *B. C. Brough* for the debtor.

F. E. Smith for the petitioning creditors.

VAUGHAN WILLIAMS, L.J.—I will make a very short statement of the law which, in my opinion, is conclusive of this case. A deed of assignment for the benefit of his creditors was executed by a debtor. That deed is by law an act of bankruptcy, and in old days it was called a "fraudulent" assignment or conveyance; but in modern times that expression has not been recognised as applicable to assignments for the benefit of creditors. In *Re Wood* (1) there is a plain statement by MELLISH, J., that the omission of the word "fraudulent" does not make any difference. The truth of the matter is that it was not necessary to use the word "fraudulent," or any word of that sort, in the earlier Acts of Parliament, because an assignment of his property by an insolvent debtor must necessarily be a fraud on creditors.

There being such a deed of assignment in the present case, the question is whether as against the petitioning creditors, Messrs. Taylor & Co., the deed can be regarded as void and as a good foundation for the petition. With regard to the first point dealt with by

A the Divisional Court, I shall say nothing, for it is not necessary on this appeal that I should say there was any conscious intent on the part of Messrs. Taylor & Co. to obtain a preference over the other creditors, but I see no reason to differ from the conclusion at which the court arrived on this point. Another point, however, must be dealt with—namely, whether there is an estoppel as against the petitioning creditors based on acquiescence. It is said that there is an estoppel, and one based upon a proposition so B plain that no one who recognised that this proposition had to be dealt with would dispute the result for one moment. If a man treats a deed as being an honest deed which cannot be impeached and, so treating it, takes an advantage under it, it is impossible to allow him afterwards to say that a person taking under the deed has no title. That is the principle on which all the cases proceed, beginning with *Re Rees, Ex parte Alsop* (2) and going on with *Re Stray, Ex parte Stray* (3).

C In the present case what did Messrs. Taylor & Co. do which amounted to a recognition that this deed conferred a good title upon the trustee so as to disentitle them to say that the deed was a fraud on creditors? In the first place, they accepted an order from the trustee under that deed for a supply of timber which they executed and received payment for it from the trustee by cheque; and in doing that they plainly recognised the title of the trustee under the deed. They had no right to accept that money if their in- D tention was afterwards to dispute the trustee's title. Then their position is by no means improved when it is recollected that they were creditors who up to this time had said they would not assent to the deed unless they got an advantage over the other creditors. Their next act of acquiescence was this. Having become fully aware of the circumstances with regard to their position—that is to say, having become aware that there was an act of bankruptcy and that this deed had been accepted on the part of the majority of E the creditors—Messrs. Taylor's position was such that they could not properly receive payment of that part of the debt due to them from the debtor which they claimed unless the deed was a good deed, because it is quite plain that, there having been an act of bankruptcy on Sept. 8, 1905, of which they were aware, any payment they received after that date was a payment which they ought not to have received, and especially when there had been another act of bankruptcy—namely, the calling together of the creditors F as the result of a notice that the debtor was unable to pay his debts. That this was an act of bankruptcy is clear from s. 4 (1) (*h*) of the Bankruptcy Act, 1883, [see now s. 1 (1) (*h*) of the Bankruptcy Act, 1914] which provides that a debtor commits an act of bankruptcy if the debtor gives notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts. In this case, especially when an act of bankruptcy had been committed by the execution of an assignment, every creditor ought to have G known apart from the fact that there had been an antecedent act of bankruptcy, and particularly from the nature of that act of bankruptcy, that he had no right to obtain any part of his debt from the debtor, not only because the title of the trustee related back to the earlier act of bankruptcy, but also, because, the debtor having given notice of suspension of payment, he could not, after he had called his creditors together, make an honest payment to one of those creditors. What happened here? There was one way H in which it was possible that Messrs. Taylor & Co. could get the money they claimed and keep it, and that is under the last clause in the deed of assignment, which empowers the trustee or the committee of inspection to give a preference to and pay any creditor who does not assent to the deed. In my judgment, the very fact that Messrs. Taylor & Co., the non-assenting creditors, by their letter of Sept. 25, 1905, attempted to secure this sum for themselves by means of that clause was itself an acquiescence in the deed which estopped them from saying afterwards that the deed was not binding. Accordingly we have two recognitions of the deed by Messrs. Taylor & Co., one in accepting payment for the timber supplied by them to the trustee, and the other in their attempting to obtain under the last clause of the deed payment of a sum of money which they could obtain effectively only under the deed.

Under the circumstances I do not consider it is necessary for me to go through all the cases that have been cited to us, but I will refer to two of them. One is *Re Rees, Ex parte Alsop* (2) and I need only read a passage from the judgment of TURNER, L.J., who says (1 De G. F. & J. at. p. 298):

"The only remaining question is, whether the petitioning creditor has so far assented to this deed as to have lost the right of availing himself of it as an act of bankruptcy. Upon the result of the evidence, I have come to the conclusion that the petitioner must be considered as having so far assented to the deed as to have precluded himself, notwithstanding his refusal to sign it, from disputing it. I am wholly unable to account for his letter of Nov. 8 to the trustee, upon the assumption that at the time he was not an assenting party to the deed as a deed to be executed by the requisite number of creditors."

The letter of Nov. 8 there referred to was simply a letter in which the petitioning creditor asked that he might be supplied with the particulars of a sale which was about to take place of part of the property subject to the assignment, undoubtedly that he might have a chance of attending the sale about to be made by the trustee under the trusts of the deed. In *Re Stray, Ex parte Stray* (3) LORD CAIRNS said (2 Ch. App. at p. 381):

"I have no doubt at all that the facts I have thus stated bring the case entirely within the principle of the cases to which I have referred, and I cannot look on Mr. Goody otherwise than as a person who assented to the execution of this deed, was taking advantage of the deed for the purpose of shielding the estate for a certain length of time, and was willing, if certain other arrangements such as were contemplated could have been made, to take still further advantage from the deed."

That is followed by a passage which shows LORD CAIRNS did not for a moment intend to say that Goody must be taken to have assented to being bound by the deed, but only that he had by his conduct put himself in such a position that he was estopped from saying that the deed on which he proposed to found his bankruptcy petition was a fraudulent deed.

I have only to add that it is pure estoppel which prevents the would-be petitioning creditors here from resiling from the deed of assignment. It is not a case of what they said, but what they did—whether they did not in fact recognise the title of the trustee under this deed. They have no right to say that the trustee had no title when at the same moment they were recognising the title of the trustee. Even though in words they may have been disputing his title all along, they cannot get rid of the effect of their own acts. The result, in my opinion, is that the proper course is to allow this appeal, and to say that the receiving order ought not to have been made, because the petitioning creditors by their acts so recognised the title of the trustee under the assignment that they could not afterwards be heard to say that the deed was not a valid deed. The appeal must be allowed with costs.

STIRLING, L.J.—I am of the same opinion. On Sept. 8, 1905, the debtor executed a deed of assignment for the benefit of his creditors. On Sept. 26 the trustee under that deed wrote to the petitioning creditors saying that he would be obliged by their supplying him with certain quantities of timber which were required in connection with the realisation of the debtor's estate. Upon that the petitioning creditors, on Sept. 28, invoiced a certain amount of timber to the trustee of the creditors' deed, the invoice describing him as such; and then the trustee sends his cheque to the petitioning creditors for the goods, which cheque the petitioning creditors cash, putting the money in their own pockets. Now they present a petition based upon the execution by the debtor of this deed of assignment being an act of bankruptcy, and they say that this deed is void as against themselves. The answer is, "That is impossible; you, the petitioning creditors, have dealt with the trustee acting in the administration of the debtor's estate to which, according to your view, the trustee has no right at all." It was no answer to that to say, "We do not assent to the deed." By this act it is clear that the petitioning creditors have treated the deed as a good deed, and they cannot now both approbate and reprobate by treating this deed as good for one purpose and not for another. The case in my opinion, falls entirely within *Re Rees, Ex parte Alsop* (2) and *Re Stray, Ex parte Stray* (3). I do not know that we are really differing from what was decided in the Divisional Court, for, looking at the judgment of that court, I do not think that this view of the case was

presented to that court. For these reasons, and for the other reasons stated by the Lord Justice, I think this appeal ought to be allowed.

COZENS-HARDY, L.J.—I am of the same opinion, and for the same reasons. There is only one point upon which I wish to make a remark. The last clause of the deed of assignment is as follows:

> "And it is hereby agreed and declared that if the trustee in his own discretion shall think it expedient to do so, or if a committee of inspection shall be appointed by the creditors, then if a majority of such committee shall so direct, it shall be lawful for the trustee to pay in full, or otherwise than by dividends under these presents, any creditor or creditors who shall decline to execute or assent to these presents."

In plain English this clause enables the trustee or the committee of inspection to directly offer a bribe to any creditor to induce him to assent to the deed. It is, in my opinion, a most improper clause, and would go far to invalidate a deed though otherwise free from objection.

Solicitors: *M. A. Orgill*, for *Alcock & Abberley*, Burslem; *Norris, Allens, & Chapman* for *Quiggin & Son*, Liverpool.

[*Reported by* J. ANWYL THOMAS, ESQ., *Barrister-at-Law.*]

EVANS *v.* EVANS AND BLYTH

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Gorell Barnes, J.), June 15, 21, 27, 1905]

[Reported [1904] P. 378; 73 L.J.P. 114; 91 L.T. 600; 20 T.L.R. 612]

Variation of Settlement—Legitimacy of child—"Proceeding instituted in consequence of adultery"—Co-respondent in divorce suit called as witness—Liability to answer questions as to adultery—Evidence Further Amendment Act, 1869 (32 & 33 *Vict.*, *c.* 68), *s.* 3.

On the trial of an issue as to the legitimacy of a child directed in the course of a petition to vary a marriage settlement, the co-respondent in the suit, called to prove his adultery, such adultery being relevant to the issue, is not protected from answering questions tending to show such adultery either by statute or by the general rule of law that a witness is not bound to incriminate himself.

On the trial of an issue directed as to legitimacy upon a petition to vary a marriage settlement, the co-respondent in the former divorce suit was called as a witness by the petitioner to prove his adultery with the respondent.

Held: the witness was not protected from answering questions as to his adultery with the respondent as the petition to vary the settlement was a separate proceeding from the divorce suit and was not a "proceeding instituted in consequence of adultery" within s. 3 of the Evidence Further Amendment Act, 1869.

Notes. Section 3 of the Evidence Further Amendment Act, 1869, has been repealed so far as it relates to the High Court and has been replaced by s. 32 (3) of the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 417). The Matrimonial Causes Act, 1859, has been repealed and s. 5 of that Act has been replaced by s. 25 of the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 412).

Considered: *Hensley* v. *Hensley and Nevin* (1920), 122 L.T. 814. Applied: *Elliott* v. *Albert*, [1934] All E.R. Rep. 291. Considered: *C.* v. *C.*, [1947] 2 All E.R. 50. Referred

to: *Blunt* v. *Park Lane Hotel, Ltd., and Briscoe*, [1942] 2 All E.R. 187; *Sims* v. *Sims*, [1949] W.N. 208; *Galloway* v. *Galloway*, [1954] 2 All E.R. 143; *Haynes* v. *Haynes*, [1960] 2 All E.R. 401.

As to evidence and protection of witnesses in proceedings instituted in consequence of adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 372, 373; and for cases see 27 DIGEST (Repl.) 519 et seq.

Cases referred to:

(1) *M.* (*otherwise D.*) v. *D.* (1885), 10 P.D. 175; 34 W.R. 48; 27 Digest (Repl.) 519, *4618*.

(2) *Stanhope* v. *Stanhope* (1886), 11 P.D. 103; 55 L.J.P. 36; 54 L.T. 906; 50 J.P. 276; 34 W.R. 446; 2 T.L.R. 447, C.A.; 27 Digest (Repl.) 535, *4818*.

(3) *Nottingham Guardians* v. *Tomkinson* (1879), 4 C.P.D. 343; 48 L.J.M.C. 171; 43 J.P. 735; 28 W.R. 151; 3 Digest (Repl.) 412, *120*.

(4) *Redfern* v. *Redfern*, [1891] P. 139; 60 L.J.P. 9; 64 L.T. 68; 55 J.P. 37; 39 W.R. 212; 7 T.L.R. 157, C.A.; 27 Digest (Repl.) 267, *2147*.

(5) *R.* v. *Orton* (1873), cited in 14 Q.B.D. 170; 18 Digest (Repl.) 116, *979*.

(6) *R.* v. *Boyes* (1861), 1 B. & S. 311; 30 L.J.Q.B. 301; 5 L.T. 147; 25 J.P. 789; 7 Jur. N.S. 1158; 9 W.R. 690; 9 Cox, C.C. 32; 121 E.R. 730; 22 Digest (Repl.) 391, *4191*.

Also referred to in argument:

Brownsword v. *Edwards* (1751), 2 Ves. Sen. 243; 28 E.R. 157, L.C.; 27 Digest (Repl.) 535, *4815*.

Harvey v. *Lovekin* (*otherwise Harvey*) (1884), 10 P.D. 122; 54 L.J.P. 1; 33 W.R. 188; 1 T.L.R. 136, C.A.; 27 Digest (Repl.) 512, *4542*.

Burnaby v. *Baillie* (1889), 42 Ch. D. 282; 58 L.J. Ch. 842; 61 L.T. 634; 38 W.R. 125; 5 T.L.R. 556; 3 Digest (Repl.) 407, *76*.

Harrison v. *Southcote and Moreland* (1751), 1 Atk. 528; 2 Ves. Sen. 389; 26 E.R. 333, L.C.; 18 Digest (Repl.) 158, *1398*.

Chetwynd v. *Lindon* (1752), 2 Ves. Sen. 450; 28 E.R. 288, L.C.; 18 Digest (Repl.) 136, *1213*.

Trial of issue directed by the court in the course of a petition for the variation of a marriage settlement for the purpose of determining the status of a child born during wedlock (see ante, p. 110).

During the course of the trial of the issue the co-respondent in the divorce suit, Blyth, was called as a witness by the petitioner, he having attended upon subpœna, to prove the adulterous intercourse which had taken place between himself and the respondent to the suit. A question was put to him asking him whether he had not lived with the respondent as man and wife at a time when it was shown that the husband and wife, the petitioner and the respondent in the divorce suit, had been living apart, and when it was possible that he, Blyth, might have been the father of the child. It was objected that the witness was not bound to answer such a question by reason of the provisions of s. 3 of the Evidence Further Amendment Act, 1869, which provided:

> "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to a suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

Barnard and *Lawless* for the husband.

Rawlinson, K.C., and *Willock* for the official solicitor, the guardian ad litem of the infant whose legitimacy was in question.

Le Bas for the wife.

GORELL BARNES, J.—The first point to be decided in the present case is the meaning to be attached to s. 3 of the Evidence Further Amendment Act, 1869. The material part of the section, as far as I am at present concerned, is the following:

"Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery."

In my view, the suggestion of the learned author of STEPHEN'S DIGEST OF THE LAW OF EVIDENCE (6th Edn.) is the correct one—viz., that the word "such" ought to be read into it, and in that view I am following the authority of LORD HANNEN in *M.* (*otherwise D.*) v. *D.* (1). The further wording of the section is also consistent with this construction. If my decision had to rest entirely upon the operation of that section, I must hold that the words do apply and apply only to proceedings which are instituted in consequence of adultery. But then the further question arises as to whether the present proceedings are proceedings instituted in consequence of adultery. The petition is for the variation of a marriage settlement. In the course of the proceedings connected with that petition the question of the paternity of a child born during wedlock has had to be determined, and for the purpose of that determination the present issue has been directed. I do not think it can be said that this is a proceeding instituted in consequence of adultery. It arises entirely out of a petition for the variation of settlements. It is objected, of course, that such a petition is part and parcel of the divorce proceedings. It is quite true that no petition to vary a settlement would have been presented unless a divorce suit had preceded it and a decree been obtained; but that does not of necessity make the petition to vary a proceeding instituted in consequence of adultery. It is a separate proceeding upon a separate petition. The jurisdiction of the court depends upon s. 5 of the Matrimonial Causes Act, 1859, which applies to suits for nullity as well as those for dissolution of marriage. It is clear, therefore, that a petition to vary settlements is not a necessary consequence of adultery, since it might follow a suit for nullity of marriage. The manner in which the jurisdiction conferred by the section is to be exercised is provided for in the rules, and according to them the application to vary is to be made by a separate petition. It will be noticed, moreover, that r. 103 refers specifically to the "final decree in the principal cause," and this shows that the petition to vary is a distinct matter.

That is my view, quite apart from authority. But in *Stanhope* v. *Stanhope* (2) there is the following passage in the judgment of BOWEN, L.J. (11 P.D. at p. 109):

"The appellant's counsel tried to show that the lis still continues, and they referred to the 22 & 23 Vict., c. 61 [the Matrimonial Causes Act, 1859] s. 5, which enables the court, after a final decree, to inquire into settlements and deal with the settled property. But to assume that the lis still exists because the legislature has given this power is begging the question, for it is consistent with the language of the enactment to hold it to mean that, even though the suit is at an end, the court shall have power to vary settlements, and that seems to me to be the true view. The legislature is giving, over and above relief in the suit, a relief outside the suit—a relief which is the creature of the statute."

There is also a passage in the judgment of GROVE, J., in *Nottingham Guardians* v. *Tomkinson* (3) (4 C.P.D. at p. 349), to which reference should be made:

"My opinion is that the words, 'proceeding instituted in consequence of adultery,' apply to proceedings which are really instituted to produce the result of divorce as a consequence of adultery—there may be possibly other proceedings to which the words apply—but they do not apply to such proceedings as those in the present case, which are not instituted in consequence of adultery and to bastardise, but to legitimatise the child."

The general result, therefore, is that the petition to vary is a separate proceeding from the original divorce suit, and that it is not a proceeding instituted in consequence of the adultery within the meaning of s. 3 of the Evidence Further Amendment Act, 1869.

It has been contended by counsel on behalf of the child that general considerations of law forbid the putting of the question to the witness, and reliance was placed upon certain dicta in *Redfern* v. *Redfern* (4). But there are two authorities which I think to be conclusive against this contention. One is *R.* v. *Orton* (5), the effect of the decision there

being given in art. 129 of STEPHEN'S DIGEST OF THE LAW OF EVIDENCE (6th Edn.), at p. 147, which is as follows:

> "The question was, whether A. committed perjury in swearing that he was R.T. B. deposed that he made tattoo marks on the arm of R.T., which at the time of the trial were not and never had been on the arm of A. B. was asked and was compelled to answer the question whether, many years after the alleged tattooing, and many years before the occasion on which he was examined, he committed adultery with the wife of one of his friends."

The other case is that of *R.* v. *Boyes* (6), in which COCKBURN, C.J., makes the following very pertinent remarks (1 B. & S. at pp. 330, 331):

> "Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. Now, in the present case, no one seriously supposes that the witness runs the slightest risk . . . it was, therefore, the duty of the presiding judge to compel him to answer."

Quite apart from my own view as to the construction of s. 3 of the Evidence Further Amendment Act, 1869, I cannot imagine how the witness can be subjecting himself to anything more than a mere imaginary possibility of danger by answering the questions put to him. I think, therefore, that it is my duty to require Major Blyth to answer, and that he has no valid ground for refusing to do so.

[The question having been answered by the co-respondent in the affirmative, and other evidence having been given, it was held that the petitioner was not the father of the child.]

Solicitors: *Beale & Payne*; *Young, Jackson, Beard, & King*; *The Official Solicitor.*

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

Re EARL OF EGMONT'S SETTLED ESTATES. LEFROY *v.* EARL OF EGMONT

[CHANCERY DIVISION (Warrington, J.), March 31, April 3, 1906]

[Reported [1906] 2 Ch. 151; 75 L.J. Ch. 649; 95 L.T. 187; 54 W.R. 504; 22 T.L.R. 430]

Settled Land—Improvement—Scheme for the execution of improvements—Discretion of trustees—Settled Land Act, 1882 (45 & 46 *Vict.*, *c.* 38), *ss.* 26, 53.

Where under the Settled Land Act, 1882, s. 26, a tenant for life submits to the trustees of the settlement for approval a scheme for the execution of an improvement, the discretion of the trustees is limited to considering (i) whether the scheme is for the benefit of the settled land, (ii) whether the scheme for the execution of the improvement is a proper scheme for carrying out the particular improvement, and (iii) whether in proposing the scheme the tenant for life is acting within the restrictions imposed on him by s. 53.

The trustees are not bound to take into consideration the number of previous schemes and the amount of capital moneys already expended, and are not concerned with the general policy of the tenant for life in improving the property, or the amount of capital moneys in their hands and the relation between such amount and the value of the estate.

Notes. Sections 26 and 53 of the Settled Land Act, 1882, have been repealed and replaced by the Settled Land Act, 1925, ss. 84 and 107 (1) respectively. Under s. 84 of the 1925 Act the power of the tenant for life to execute improvements is no longer dependent upon his submitting a scheme of the proposed work for the approval of the trustees or the court. The duties of trustees are now reduced to seeing that the improvements were authorised by the Act and that they have the certificate certifying that the work has been properly executed and the amount payable in respect thereof which is required by s. 84 (2) (i) of the Act of 1925. A certificate of the Land Commissioners is no longer required.

Section 25 of the 1882 Act has been repealed and replaced by s. 83 and Third Sched. of the 1925 Act.

As to the statutory powers of the tenant for life, see 34 HALSBURY'S LAWS (3rd Edn.) 528 et seq.; and for cases see 40 DIGEST (Repl.) 808 et seq. For the Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12 et seq.

Cases referred to:

(1) *Re Keck's Settlement*, [1904] 2 Ch. 22; 73 L.J.Ch. 262; 90 L.T. 113; 52 W.R. 362; 20 T.L.R. 156; 30 Digest (Repl.) 330, *204.*

(2) *Re Millard's Settled Estates*, [1893] 3 Ch. 116; 62 L.J.Ch. 761; 69 L.T. 202.

(3) *Re Duke of Norfolk's Estates, Duke of Norfolk* v. *Lord Herries*, [1900] 1 Ch. 461; 69 L.J.Ch. 236; 82 L.T. 613; 48 W.R. 328; 16 T.L.R. 150.

(4) *Re Marquis of Bristol's Settled Estates*, [1893] 3 Ch. 161; 62 L.J.Ch. 901; 69 L.T. 304; 42 W.R. 46; 37 Sol. Jo. 716; 3 R. 689; 30 Digest (Repl.) 331, *219.*

Also referred to in argument:

Clarke v. *Thornton* (1887), 35 Ch.D. 307; 56 L.J.Ch. 302; 56 L.T. 294; 35 W.R. 603; 3 T.L.R. 299; 40 Digest (Repl.) 841, *3181.*

Re Marquis of Ailesbury's Settled Estates, [1892] 1 Ch. 506; 61 L.J.Ch. 116; 65 L.T. 830; 8 T.L.R. 157; affirmed sub nom. *Lord Henry Bruce* v. *Marquess of Ailesbury*, [1892] A.C. 356; 62 L.J.Ch. 95; 97 L.T. 490; 57 J.P. 164; 41 W.R. 318; 8 T.L.R. 787; 36 Sol. Jo. 711; 1 R. 37, H.L.; 40 Digest (Repl.) 816, *2944.*

Summons by the trustees for the purposes of the Settled Land Acts, 1882 to 1890, of a settlement, dated Aug. 15, 1889, of the estates of the Earl of Egmont for the directions of the court as to the circumstances which they should take into account in considering schemes for improvement of the estates submitted to them for their approval by the tenant for life.

By the limitations declared by the settlement, and in the events which had happened, certain lands and hereditaments stood limited by way of legal limitations to the use of the Earl of Egmont during his life, or until he should become a bankrupt or do any act depriving himself of his right to receive the rents and profits, and after his death to the use of his brother C. J. Perceval as tenant for life, and after his death to the use of his first and other sons successively in tail male, with remainders over. By the said settlement it was agreed and declared that the trustees for the time being were to be the trustees of the settlement for the purposes of the Settled Land Act, 1882, and any amending Acts and for the purpose mentioned in s. 42 of the Conveyancing Act, 1881, [repealed] and

"(Fourthly) for the like purposes s. 25 of the Act last aforesaid [the Settled Land Act, 1882] shall be read and take effect as if in addition to the works or purposes of improvements therein enumerated there were inserted therein the words 'rebuilding, reparation, or permanent improvement or additions of or to buildings of any description, whether used or occupied for residential, farm, or other purposes.' (Fifthly) for the like purposes, s. 18 of the Act last aforesaid shall be read and acted upon as if the words 'or for improvements' were inserted in that section immediately after the word 'partition' therein."

The defendant, Lord Egmont, succeeded to the title and to the estates in 1897. Among other property, the estate subject to the settlement comprised a mansion-house, park, and land known as the Cowdray Park Estate, consisting of 16,000 acres, and capital moneys liable to be invested in land of more than £250,000 in amount. Various schemes for the improvement of the estate had been submitted to and approved by the trustees. Shortly before the summons, the earl submitted a further scheme for additional works of reparation and improvement, involving an estimated outlay of between £4,000 and £5,000, and similar schemes in reference to the Cowdray Park Estate were in contemplation. The persons entitled in remainder after the present earl were not able to be found. Under these circumstances the trustees desired to have the directions of the court as to the principles on which they were to approve or withhold their approval from the scheme submitted to them and future schemes which might be submitted to them; and they took out this summons asking whether they were to have regard to all or any of the following matters: (a) The number of previous schemes and the amount of capital already expended or liable to be called for thereunder; (b) the general connection between the improvements mentioned in a scheme proposed for their approval with improvements contained in schemes already sanctioned or a general policy which is being pursued by the tenant for life in improving the property; (c) the proportion between the probable cost of the improvements mentioned in the proposed scheme and the probable increased annual value of the estate; and (d) the amount of capital moneys in their hands and the relation between such amount and the value of the estate.

Rowden, K.C., and *R. J. Parker* for the trustees of the settlement.
H. Terrell, K.C., and *Peterson* for the tenant for life.

WARRINGTON, J.—The question which I have to decide has never arisen directly for decision, although the Settled Land Act, 1882, has been in operation for about twenty-three years. The question is what are the considerations which trustees for the purposes of the Settled Land Act are to take into account in determining whether or not they shall approve of a scheme submitted to them for their approval under s. 26 of the Act. [His Lordship read the summons, and continued:] Putting it very shortly, that may be summed up in this way. The trustees suggest that, in considering whether they are to approve or withhold their approval from schemes submitted to them under s. 26, they may properly inquire into the entire policy pursued by the tenant for life with reference to the improvement of the settled estate. Is that the true view? As I have said, the point seems to me to be entirely devoid of direct authority. The utmost that can be said about it is that there are remarks made by several judges in other cases, and on other questions arising under the Act, which throw some light on what, without having had that point argued, those particular judges thought was the proper construction of

this section. Before I go in detail to the provisions of the Act, I must refer to the settlement, because that is not without importance in this case, though what I am about to say will not be confined to this case merely by the fact that the settlement has some particular provisions. The settlement is that of the Egmont family estates, mainly consisting of the Cowdray Park Estate. It is settled in strict settlement, the defendant to this application being the present tenant for life. Towards the end of the settlement there are some special provisions which are material for the determination of the question I have to decide, and they are these: It is agreed, first, that the trustees of the settlement shall be trustees of the settlement for the purposes of the Settled Land Act, 1882, and the amending Acts. Then there are two other clauses which are immaterial, and then comes this:

> "(Fourthly) for the like purposes s. 25 of the Act last aforesaid [the Settled Land Act, 1882] shall be read and take effect as if in addition to the works or purposes of improvements therein enumerated there were inserted therein the words 'rebuilding, reparation, or permanent improvement or additions of or to buildings of any description, whether used or occupied for residential, farm, or other purposes.'"

That is to say, the clause adds an item to the enumeration in s. 25 of the Act of 1882, and the enlarging section of the subsequent Act (s. 13 of the Act of 1890), and an item of very wide application, especially having regard to the insertion therein of the word "reparation," which has been held, I understand, by BYRNE, J., to authorise the tenant for life to treat as an improvement any repairs which are not simply decorative repairs. There is this further clause:

> "(Fifthly) for the like purposes s. 18 of the Act last aforesaid shall be read and acted upon as if the words 'or for improvements' were inserted in that section immediately after the word 'partition' therein."

That will make s. 18 of the Settled Land Act, 1882 [see now s. 71 of the 1925 Act], read as follows:

> "Where money is required for enfranchisement, or for equality of exchange or partition or for improvements, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple. . . ."

The importance of that is that the tenant for life, therefore, in this settlement, can get improvements executed although there may be no capital money in the hands of the trustees, because he may determine under s. 18, and act on that determination, that moneys shall be raised by mortgage of the estate. So that, except in the case of it being no longer possible to raise money, there never under this settlement can be a case in which there is no capital money applicable for improvements.

There is nothing more in the settlement that I need read, and I now go back to the Act. In the first place, the definition of land in s. 2 (3) [now s. 2 of the 1925 Act] must be considered:

> "Land which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land."

I think that is very accurately drawn and means two separate things. Land which is the subject of the settlement is, for purposes of this Act, settled land, and when it is referred to in relation to the settlement, then it is the settled land. If one finds the word "land" used without reference to the settlement itself, then it is simply called "settled land." In other words, the particular settlement becomes itself immaterial when it is not used in relation to the trust settlement. Perhaps I ought to mention s. 21 [now s. 73 of the 1925 Act] which provides for the application of capital trust money:

> "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorised object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely) . . . (iii.) in payment for any improvement authorised by this Act."

In reading that section, payment for the improvement is an application of the capital money as distinct from an investment of the capital money. Then s. 22 [see now s. 75 of the 1925 Act] is as follows:

> "(1) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the court, as the case may be, accordingly. (2) The investment or other application by the trustees shall be made according to the direction of the tenant for life. . . ."

It is, therefore, the tenant for life who directs not only the investment, but the application of the fund—i.e., the dealing with the fund which under s. 21 is described as the application—in payment for any improvement. Section 25 [see now s. 83 and Third Sched. of the 1925 Act] defines what is meant by improvements, and the expression used is "Improvements authorised by this Act."

> "Improvements authorised by this Act are the making or execution on, or in connection with, or for the benefit of settled land, of any of the following works. . . ."

It is not, be it observed, for the benefit of the land the subject of the settlement, or the settled land, but it is for the benefit of settled land.

Therefore, it seems to me, if one turns back to the definition in s. 2, it is for the benefit of land the subject of the settlement. That is the definition of improvements authorised by this Act. The section on which the controversy turns is s. 26, which provides:

> "Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorised by this Act, he may submit for approval to the trustees of the settlement, or to the court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon."

First one finds the tenant for life exercising the power in s. 22 [now s. 75] of giving directions, and the direction he gives is that capital money arising under this Act shall be applied in or towards payment of improvements authorised by this Act. It is clear, therefore, that his direction is of no avail and would have no effect on the trustees if the application which he was directing was in payment for something which was not an improvement authorised by the Act. Therefore the tenant for life has to satisfy the trustees—or, if necessary, the court—that what he is proposing is an improvement authorised by the Act. Having got so far, what is it that the trustees have to approve? It is not the improvement itself. It is a scheme for the execution of the improvement; and it seems to me that, when the trustees have arrived at the conclusion and have been satisfied by the tenant for life that the object of the proposed expenditure is an improvement authorised by the Act, the scheme which they have to approve or withhold their approval from is a scheme for the execution of the improvement. It is for the tenant for life, putting it in other words, to select and decide on what he is going to have done. It is for the tenant for life to propose, and it is for the trustees to approve, the mode in which that shall be carried into effect.

Is there anything else in the Act which throws any further light on the meaning of that section? Section 26 goes on:

> "(2) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement on"

—first, a certificate of the Land Commissioners certifying that the work has been executed, and that a particular sum ought to be paid in consideration thereof; secondly, a like certificate of a competent engineer or able practical surveyor. Those are merely modes of ascertaining the fact—viz., that the scheme has been carried out and that the money is properly payable by the trustees. But it does not rest there. The third alternative is:

A "(iii) An order of the court directing or authorising the trustees to so apply a specified portion of the capital money."

Under that provision it has been held by FARWELL, J., in *Re Keck's Settlement* (1) that what the court has to do is not to perform the function of an able practical surveyor and merely see whether the work has been carried out, but to repeat over again what has, B and what in that case had been, done by the trustees—viz., to consider the scheme. A good deal of the controversy here has turned on the remarks made by FARWELL, J., in reference to what it is to which in considering the scheme the court will pay attention to. On that point I may have to come back to that case again. Then there is a provision in s. 26 (3):

C "Where the capital to be expended is in court, then, after a scheme [for the execution of the improvements] is approved by the court, the court may, if it thinks fit, on a report or certificate of the commissioners, or of a competent engineer or able practical surveyor, approved by the court, or on such other evidence as the court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement."

D It is to be observed that when the court is dealing with the scheme very wide powers are given to it of either allowing or disallowing expenditure—very much wider than those given to the trustees.

In my view, therefore, without referring to authority, the duty of the trustees is confined to seeing that the improvement proposed is really an improvement authorised by E the Act—i.e., that it is for the benefit of some land comprised in the settlement for the benefit of settled land—and, further, to see that the scheme for the execution of that improvement is a proper scheme for carrying out that improvement; and, I think incidentally, that they would be justified in seeing that, in preparing and submitting the scheme for their approval, the tenant for life was acting under competent skilled advice. The matter does not rest there, because one has also in every case, where one is considering F a proposition made by a tenant for life under the Settled Land Act, 1882, to consider s. 53 [now s. 107 (1) of the 1925 Act]. That section provides:

"A tenant for life shall in exercising any power under this Act have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

G It seems to me, therefore, that there is a further consideration which the trustees in considering a scheme must bear in mind—viz., Is the tenant for life proposing something which is outside his position as tenant for life acting in regard to the interests of all parties and deemed to be in the position of and to have the duties and liabilities of a trustee? My view, therefore, putting it concisely, is that the general policy of the ten- H ant for life as to the improvements he may propose is not a matter with which the trustees are concerned.

Now let us look at the summons and see whether every one of the details is not capable on that assumption of being excluded from the consideration of the trustees. Clause (a) is:

I "The number of previous schemes and the amount of capital moneys already expended or liable to be called for thereunder."

In this case, because of the unlimited power which the tenant for life has to provide money for improvements, it cannot be material, in considering whether the scheme is one authorised by the Act, for the trustees to consider the number of the previous schemes or the amount of the capital moneys already expended. If a scheme is submitted to the trustees for the performance of which there are no capital moneys in hand, then, of course, the questions would arise which were determined in *Re Millard's Settled Estates* (2) and *Re Duke of Norfolk's Estates* (3). But, except in such a case, it seems to me that

the trustees have nothing to do with the amount of money which has been expended, or the amount which they have in their hands. Then clause (b) is: A

> "The general connection between the improvements mentioned in the scheme proposed for their approval with improvements contained in schemes already sanctioned, or the general policy which is being pursued by the tenant for life in improving the property." B

There, again, it seems to me, that is not a matter which it is for the trustees to consider. That is a matter for the tenant for life who has the control, subject to the not very stringent limitations which are provided by the Act, and who is intended by the policy of the Act to have the control of the management of the settled estate. Clause (c) is:

> "The proportion between the probable cost of the improvements mentioned in the proposed scheme and the probable increased annual value of the estate." C

It is possible that, in some modified form, that might be taken into account in considering whether the scheme is or is not for the benefit of settled land. It is possible that the trustees might take that into account in performing that part of their duty, but, beyond that, I do not think they would have to consider that particular item. Clause (d) is: D

> "The amount of capital moneys in their hands and the relation between such amount and the value of the estate."

That, it seems to me, in this case at all events, the trustees have not to take into account because of the wide powers of raising money by mortgage which are given to the tenant for life.

Is there anything in any of the authorities which have been cited to me which prevents me from coming to the conclusion which I have expressed on the construction of the Act itself? I have already said there is no authority directly in point. The two earlier authorities of *Re Millard's Settled Estates* (2) and *Re Marquis of Bristol's Settled Estates* (4) I think really throw no light on the case at all. The case which throws most light on it is the decision of FARWELL, J., in *Re Keck's Settlement* (1). The decision there was that where an application is made under s. 26 (2) and (3), for an order directing the trustees to apply capital moneys in payment for improvements, the court is entitled and bound to consider if such expenditure is proper for the improvements, and has not only to see that the improvement is one authorised by the Act and that it has been carried into execution. In that case the scheme had been approved by the trustees and the work had been done. The trustees were attacked by the remaindermen, and in consequence refused to pay the money without an order of the court. The remaindermen contended that the improvement there was not an improvement authorised by the Act, because, being a road intended to form part of a scheme for the laying out of the estate for building purposes, it was premature, and therefore was not for the benefit of settled land. FARWELL, J., came to the conclusion that he must go into the question of the scheme itself, and he uses these expressions ([1904] 2 Ch. 25): E F G H

> "The tenant for life contends that the court has no further function than to make an order on being satisfied that the scheme has been approved and the money spent. The person next entitled in remainder opposes, and desires to go into evidence to show that the scheme is improvident, and that the general trend of the tenant for life's action in respect of the management of this estate has been a too speedy development, to the great detriment of the estate." I

One should observe that there he is not stating what he thinks is the question he has to decide. He is stating what the person next in remainder contends, and the evidence into which he desires to go. The learned judge says (ibid.):

> "That is the case he wishes to put forward; and, after a perusal of lengthy affidavits by surveyors on both sides, it seems to me that, in the conflict of testimony which they disclose, I can only arrive at a satisfactory determination of the facts by seeing the witnesses in the box."

Then I need read nothing until I come to the passage in which he is dealing with s. 26 (2). He says (ibid. at pp. 26, 27):

> "It will be observed that the first two clauses of s. 26 (2) deal with matters of fact—that is to say, that the work has been properly executed, which is a matter best proved by some able practical surveyor or a man of experience of that nature, and that the amount is properly payable by the trustees in respect thereof. Those are matters of fact, and not matters of law. With respect to those two, the trustees get a discharge for any payment made by them on the certificate. But then there is the third alternative of an order of the court. I cannot think that the intention was merely to substitute an order made on a formal application to the court for the certificate of the able practical surveyor, and nothing more. I cannot resist the conviction that inasmuch as these improvements may be of a very expensive nature, and require a very considerable amount of discretion, it has been thought advisable to insert a provision by which, although the trustees may have approved the scheme, and although the tenant for life may direct the money to be so employed, it is possible to bring the matter before the court for the exercise of its judicial discretion. If the trustees had chosen to obtain the certificate of the able practical surveyor, or other person, mentioned in sub-s. (2) the matter could only have been brought before the court by the remaindermen themselves challenging the proceeding as something which ought not to have been done. But if, as the case now is, the tenant for life and the trustees, acting in concert, although not concurring in the application, seek to obtain an order of the court to sanction the application of the money instead of themselves relying on any such certificate, then it appears to me that the court has cast upon it a discretion which, I think, is exceedingly difficult to discharge, namely, a discretion to see whether the remainderman is in fact well founded in saying that the improvements are, although honest, so utterly wrong-headed that they ought not to be sanctioned. I think the observations of BYRNE, J., in the case of *Re Duke of Norfolk's Estates* (3) throw some light upon this. His Lordship says ([1900] 1 Ch. at p. 467): 'The scheme of the Act is to give wide powers to the tenant for life, and to give power of consent to trustees, upon the footing that they will act fairly in the exercise of their respective powers, and that neither trustees nor the court will sanction schemes which are improvident, or which will unduly fetter any discretion which ought to be exercised at a later date, and there is always this safeguard, that tenants for life and trustees joining in improvident schemes, or not acting with a due regard to the interest of the remaindermen, are running the risk of the possible establishment of a personal liability against themselves.'"

That is a liability under s. 53.

That case and the *Duke of Norfolk's Case* (3) which is referred to therein are the only cases which seem to me to bear on this point at all, and they do not bear directly on it. But it has been said, on behalf of the trustees, that those expressions used by FARWELL, J., and by BYRNE, J.,—namely, "an improvident scheme," "consent of the trustees being required," "the tenant for life is putting forward improvements which, though honest, are so utterly wrong-headed that they ought not to be sanctioned"—show that those learned judges thought that the trustees had a discretion to exercise much wider than that which I have come to the conclusion is the discretion vested in them; but when considered in reference to the points which were alone argued before them, in my judgment those expressions cannot be carried to the extent which the trustees in the present case would have them carried. I think they are all capable of being satisfied if the discretion of the trustees is limited in the way I propose to limit it—viz., that their attention is to be confined to considering whether, first, the scheme is for the benefit of settled land; secondly, whether the scheme for the execution of the improvements is a proper scheme; and, thirdly, whether in proposing the scheme, the tenant for life is acting within the restrictions imposed on him by s. 53. I do not think I need go through the other case. I therefore propose to make an order in the following terms: "Declare that the trustees may properly approve any scheme where they are satisfied (i) that the improvement is within s. 25 of the Settled Land Act as enlarged by the settlement, and (ii) that

the tenant for life is acting bonâ fide, and on competent advice as to the improvement proposed, the amount to be expended thereon, and the method of execution thereof, and are not bound to take into consideration the various matters mentioned in the summons."

Judgment accordingly.

Solicitors: *Littledale & Lefroy*; *Nash, Field, & Co.*

[*Reported by* E. L. Hopkins, Esq., *Barrister-at-Law.*]

CROSSLEY BROS., LTD. *v.* LEE

[King's Bench Division (Phillimore and Walton, JJ.), October 29, 30, 1907]

[Reported [1908] 1 K.B. 86; 77 L.J.K.B. 199; 97 L.T. 850; 24 T.L.R. 35; 52 Sol. Jo. 30]

Distress—Fixture—Gas engine—Secured by bolts and screws into hole made for it in concrete floor.

No fixture, whether or not it is removable by the tenant, can be distrained.

A gas engine fixed by bolts and screws into a hole made for it in a concrete floor becomes a fixture. Consequently, if a landlord distrains such a gas engine on the tenant's premises when it is subject to a hire-purchase agreement, he is liable in trover to the owner.

Hellawell v. *Eastwood* (1) (1851), 6 Exch. 295, disapproved.

Hobson v. *Gorringe* (2), [1897] 1 Ch. 182, applied.

Notes. Approved: *Provincial Bill Posting Co.* v. *Low Moore Iron Co.*, [1909] 2 K.B. 344. Referred to: *Horwich* v. *Symond* (1914), 110 L.T. 1016.

As to fixtures, see 23 Halsbury's Laws (3rd Edn.) 489 et seq.; as to distress, see generally 12 Halsbury's Laws (3rd Edn.) 85 et seq., and as to distress in relation to fixtures, see ibid., 105. For cases, see 31 Digest (Repl.) 201 et seq.

Cases referred to:

(1) *Hellawell* v. *Eastwood* (1851), 6 Exch. 295; Cox, M. & H. 452; 20 L.J. Ex. 154; 15 J.P. 724; 155 E.R. 554; sub nom. *Halliwell* v. *Eastwood*, 17 L.T.O.S. 96; 31 Digest (Repl.) 205, *3361.*

(2) *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; 66 L.J.Ch. 114; 75 L.T. 610; 45 W.R. 356; 13 T.L.R. 139; 41 Sol. Jo. 154, C.A.; 31 Digest (Repl.) 206, *3375.*

(3) *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 20 W.R. 990, Ex. Ch.; 31 Digest (Repl.) 206, *3376.*

(4) *Poole's Case* (1703), Holt, K.B. 65; 1 Salk. 368; 90 E.R. 934; 31 Digest (Repl.) 212, *3449.*

(5) *Reynolds* v. *Ashby & Son*, ante, p. 401; [1904] A.C. 466; 73 L.J.K.B. 946; 91 L.T. 607; 53 W.R. 129; 20 T.L.R. 766, H.L.; 35 Digest 309, *565.*

(6) *Darby* v. *Harris* (1841), 1 Q.B. 895; 1 Gal. & Dav. 234; 10 L.J.Q.B. 294; 113 E.R. 1374; sub nom. *Danby* v. *Harris*, 5 Jur. 988; 31 Digest (Repl.) 218, *3530.*

Also referred to in argument:

Climie v. *Wood* (1868), L.R. 3 Exch. 257; 37 L.J. Ex. 158; 18 L.T. 609; 32 J.P. 712; affirmed (1869), L.R. 4 Exch. 328; 38 L.J. Ex. 223; 20 L.T. 1012, Ex. Ch.; 31 Digest (Repl.) 200, *3314.*

Mather v. *Fraser* (1856), 2 K. & J. 536; 25 L.J.Ch. 361; 27 L.T.O.S. 41; 2 Jur. N.S. 900; 4 W.R. 387; 69 E.R. 895; 31 Digest (Repl.) 201, *3320.*

Chamberlayne v. *Collins* (1894), 70 L.T. 217; 10 T.L.R. 233; 9 R. 311, C.A.; 31 Digest (Repl.) 209, *3401.*

Gaslight and Coke Co. v. *Hardy* (1886), 17 Q.B.D. 619; 56 L.J.Q.B. 168; 55 L.T. 585; 51 J.P. 6; 35 W.R. 50; 2 T.L.R. 851, C.A.; 18 Digest (Repl.) 298, *442.*
Elwes v. *Maw* (1802), 3 East, 38; 102 E.R. 510; 31 Digest (Repl.) 213, *3454.*
Longbottom v. *Berry* (1869), L.R. 5 Q.B. 123; 10 B. & S. 852; 39 L.J.Q.B. 37; 22 L.T. 385; 31 Digest (Repl.) 209, *3410.*
Turner v. *Cameron* (1870), L.R. 5 Q.B. 306; 10 B. & S. 931; 39 L.J.Q.B. 125; 22 L.T. 525; 18 W.R. 544; 31 Digest (Repl.) 212, *3448.*
Waterfall v. *Penistone* (1856), 6 E. & B. 876; 26 L.J.Q.B. 100; 27 L.T.O.S. 252; 3 Jur. N.S. 15; 4 W.R. 726; 119 E.R. 1090; 31 Digest (Repl.) 208, *3395.*

Appeal from the decision of His Honour JUDGE SMYLY, sitting at the Shoreditch County Court.

The plaintiffs, a firm of engineers, sued the defendant to recover damages for the unlawful seizure of a gas engine in the following circumstances. The defendant let certain premises in Hackney Road to one Jones, who was in possession on the premises of a gas engine supplied to him by the plaintiffs upon a hire-purchase agreement, by the terms of which the hirer was not to become the owner of the engine until all the instalments due from him were paid. Jones became in arrears with the rent due to the defendant, and, before all the instalments due from Jones to the plaintiffs for the hire of the engine had been paid off, the defendant distrained upon Jones's goods and took away the gas engine. The plaintiffs sued the defendant to recover the value of the engine on the ground that the seizure was illegal, the engine being a fixture. At the trial it was proved that the gas engine was affixed to the premises in the following way: A rectangular hole was excavated in the floor, and at each corner a spindle was set up, being made fast to the ground and projecting some 18in. The hole was then filled with concrete, and the gas engine, which had four holes in its base, was laid upon the floor, with the spindles passing through the holes in the corner of the base. When the engine had settled down nuts were placed upon the ends of the spindles and screwed down. The learned judge held that he was bound by the authority of *Hellawell* v. *Eastwood* (1), in which a machine similarly fixed had been held liable to distraint on the ground that it was not affixed to the freehold, and gave judgment for the defendant, provisionally assessing the value of the engine at £22. The plaintiffs appealed.

Hamilton, K.C., and *Schwabe* for the plaintiffs.
Beven for the defendant.

PHILLIMORE, J.—This appeal must be allowed. For my part I think the matter stands in a very small compass, and the real point of counsel for the defendant's able argument was to endeavour to persuade us that it did not lie within a small compass.

From my point of view there are two classes of fixtures, putting aside such special things as gas fittings, which are regulated by Act of Parliament. There are those fixtures which, once implanted in the soil become a part of the freehold and irremovable except with the consent of all parties concerned, and there are those fixtures which a tenant can sever during his tenancy, but which until he severs them remain a part of the freehold, and, if he does not sever them, remain so for all time. Counsel for the defendant has tried to induce us to suppose that there is a third class of articles which I may call fittings having a law of their own in this sense, that they are not chattels simpliciter, but that they are for some purposes fixtures and for others not. That is to say, they are articles which pass by a conveyance of the freehold, or at any rate by a mortgage of the freehold or of a leasehold, but which for all other purposes remain simple chattels. I agree that it is possible in law to conceive that there are articles which may pass by a mortgage or conveyance of the freehold which are not actually part of the freehold. I believe, in West Indian mortgages in former times slaves always passed upon a mortgage of the freehold, although they were not part of it. But the courts have not dealt with the question of fixtures passing to the mortgagee from the point of view that they are additions to the freehold, and there is an express decision of the court in *Holland* v. *Hodgson* (3) that they so pass because they form part of the land. If they form part of the land, subject to the power of severance which is applicable to all matters which form

part of the land, they are part of the freehold. If they form part of the freehold they are not distrainable. It is strange, and I can see no principle in it, that a landlord, who can get articles at the end of a tenancy if they are left on the premises by the tenant, and who can get in this way articles which are chattels, is to be told that they are so much his already that he cannot distrain for them. That seems, however, to be the law of distress. It is partly archaic and partly very technical.

The authorities seem to say without question that fixtures are not distrainable, but there is this very remarkable distinction drawn in *Poole's Case* (4), where it was held that things set up by a lessee for years for the convenience of trade are removable during the term and seizable under a writ of fieri facias. LORD HOLT in his judgment said (1 Salk. at p. 368):

> "that the sheriff might take them [the articles in question] in execution, as well as the underlessee might remove them, so this was not like tenant for years without impeachment in waste; in that case he allowed the sheriff could not cut down and fell, though the tenant might. And the reason is because in that case the tenant has only a bare power without an interest, but here the underlessee hath an interest as well as a power, as tenant for years hath in standing corn, in which case the sheriff can cut down and fell."

That being so the only thing that remains to consider is whether the article in the present case is a fixture in either of the two senses which are the only two possible senses —namely, a fixture which is irremovable or a fixture which is severable by the tenant. If it belongs to either class it is not distrainable. I quite agree that the court which decided *Hellawell* v. *Eastwood* (1) would probably say that it was not a fixture. If the matter were res integra I should like to say that this was a mere chattel. I should like to go further and say that if this were a small article it would probably occur to nine people out of ten that it was a chattel. But we are bound by authority. This case is indistinguishable from *Hobson* v. *Gorringe* (2), and I do not think that practically there is any difference between the present case and that of *Reynolds* v. *Ashby & Son* (5). In *Hobson* v. *Gorringe* (2), which is enough for my purpose, there was an engine of a similar description to that in this case, and it was fastened in the same way, and the only suggestion of difference that can be made is that in the former case there were some metal plates holding the bolts embedded in the concrete which was just of sufficient size to hold the engine, and in the present case there was either a similar bed or there was already a concrete floor into which this engine was introduced. If anything, the present case seems stronger than *Hobson* v. *Gorringe* (2), because in the former case there was one area of concrete which might perhaps have been lifted up and taken away with the engine. In the present case that was not so. As I have said the distinctions between the cases are distinctions without differences, and it is enough for my purpose that *Hobson* v. *Gorringe* (2) is binding upon us. It is certainly extraordinary that the seller of this machine should be able to ride off on this extremely fine line which allows him to say, "This article is my chattel in the sense that now you have severed it I may recover it, but in no other sense is it a chattel, and therefore you cannot distrain upon it." It is a little artificial that he may be allowed to take this view, but *Hobson* v. *Gorringe* (2) says that it is a view which may be taken against him. That case decides that this is a chattel affixed to the freehold and became part of it subject always to a right of severance. If that is the case it must apply equally to all parties to the suit whether relief is claimed by the seller, the mortgagee, or the landlord, and if the tenant here brought his lease to an end by surrender and acceptance, or it expired by effluxion of time or was put an end to in consequence of the breach by him of the covenants contained in it, then these vendors would have found to their cost that this article was effectually affixed to the freehold.

Therefore, I am of opinion that this article was not distrainable, and that this appeal must be allowed. I think that the true position of the plaintiffs here was that of a person suing in trover, and that accordingly they are entitled to the true value of the goods claimed, which has been found by the learned judge to be £22.

WALTON, J.—I agree. The true effect of the argument of counsel for the defendant is that this engine at the time it was seized by the landlord was a chattel. If it was a chattel it was distrainable, and the judgment of the county court judge was right. If, on the other hand, the machine is a fixture it is not distrainable. That is well established, and if it is necessary to cite authority for the proposition I might refer to the cases cited in BULLEN ON DISTRESS (1st Edn.), p. 92. There the law is thus stated:

> "Whatever is annexed or affixed to the freehold, as kilns, furnace, cauldrons, windows, doors, and the like, cannot be distrained; and this exception seems to rest in every instance upon one or more of three reasons—namely, first, because they are not personal chattels, but form part of the thing demised; secondly, because they cannot be taken away without doing damage to the freehold, and are therefore privileged for the sake of the place; and, lastly, because the things themselves would be injured by the severance and removal, and consequently could not be restored in as good condition as when taken."

The only case to which I will refer in support of that proposition is *Darby* v. *Harris* (6). In giving judgment in that case WIGHTMAN, J., said (1 Q.B. at p. 899):

> "Whether the tenant might or might not remove the fixtures is one question; whether or not the goods could be restored in the same condition and were distrainable is another."

It was held there that, although articles might be tenant's fixtures removable by the tenant, they were nevertheless fixtures which formed part of the freehold and were not distrainable. Therefore, if the machine in the present case is a fixture, even although removable by the tenant, it was not distrainable.

The case relied on is that of *Hellawell* v. *Eastwood* (1). The question there arose as to certain machinery, and I will assume that for all material purposes the method of attachment in that case was the same as in the present. No doubt it was held there that the machinery was distrainable although so attached, and the effect of the decision was plainly this, that the machines there in question, to quote the words of PARKE, B. (1 Q.B. at p. 313):

> "were never part of the freehold any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking glasses, pictures, and other matters of an ornamental nature which have been slightly attached to the walls of the dwelling as furniture, and which is probably the reason why they and similar articles have been held in different cases to be removable. . . . They never ceased to have the character of movable chattels, and were therefore liable to the defendant's distress."

The machines there were distrainable because they were chattels; that is the effect of that decision. If the machines there in question were mere chattels it follows that such machinery would not pass to a mortgagee as part of the freehold mortgaged, because I cannot see that there would be any distinction in the case of a mortgage.

If the decision in that case is binding on us as the learned county court judge thought it was upon him, then the judgment appealed from must be affirmed. But we must look at the later cases. Over and over again, the principles of law stated by the court in *Hellawell* v. *Eastwood* (1) have been acknowledged and accepted as correctly stated, and over and over again doubt has been thrown on the correctness of the application of those principles to the facts in *Hellawell* v. *Eastwood* (1) and without referring to others we come to the case of *Hobson* v. *Gorringe* (2) which relates to a machine which, for all material purposes, was attached in the same method as the machine in the present case and also the machine in *Hellawell* v. *Eastwood* (1). In *Hobson* v. *Gorringe* (2) it was contended that a machine so attached was a chattel and did not pass as part of the freehold to the mortgagee, and it was further contended that there was no intention that it should be made part of the freehold. In that case, as in the present, the machine was subject to a hire-purchase agreement and there, as here, power was reserved to the vendor in certain events to take possession of it and remove it. Nevertheless, it was distinctly held in that case, notwithstanding the decision in *Hellawell* v. *Eastwood* (1)

and that the mode of attachment was the same, that the machine became affixed to and was part of the freehold and passed to the defendant as mortgagee. The Court of Appeal pointed out that it did not pass as a chattel and could not so pass, but that it passed as part of the land. It seems to me that the effect of that decision is practically this, that the law was not correctly applied in *Hellawell* v. *Eastwood* (1). We are bound to follow the decision of the Court of Appeal in *Hobson* v. *Gorringe* (2), and to hold that this machine did become affixed to the land as part of the freehold. Severable, possibly, as between landlord and tenant, but still part of the freehold. If it is part of the freehold, then it is not a distrainable chattel. For these reasons I think the judgment of the learned county court judge must be reversed. He thought himself absolutely bound by the decision in *Hellawell* v. *Eastwood* (1). We think that he was not absolutely bound by it and there must, therefore, be judgment for the plaintiffs.

Appeal allowed.

Solicitors: *H. E. Tudor* for *Leak & Prate*, Manchester; *R. Voss & Son.*

[*Reported by* PHILIP B. DURNFORD, ESQ., *Barrister-at-Law.*]

LUMSDEN *v.* SHIPCOTE LAND CO.

[COURT OF APPEAL (Vaughan Williams, Stirling and Fletcher Moulton, L.JJ.), May 18, 1906]

[Reported [1906] 2 K.B. 433; 75 L.J.K.B. 665; 95 L.T. 17; 54 W.R. 461; 22 T.L.R. 559; 50 Sol. Jo. 499]

Solicitor—Costs—Taxation—Liability for bill repudiated by client—Delivery of amended bill with additional items—Action to recover amount due on amended bill—Order directing reference to master to ascertain amount due for work and labour done—Jurisdiction of master to consider amended bill as well as first bill—First bill evidence against amended bill.

The plaintiff, a solicitor, delivered a bill of costs to his clients, the defendants, who repudiated liability for it. The plaintiff delivered an amended bill containing additional items which might have been included in the first bill, and then brought an action to recover the amount of the second bill. At the trial the jury found that the defendants were liable to pay for the work done by the plaintiff as solicitor, and the judge then made an order referring the first bill to the master for taxation. On appeal against the order,

Held: the order for taxation having been made after the verdict and there being no special circumstances, the judge was wrong in treating the taxation as being directed under the Solicitors Act, 1837 (see s. 37), and thus limiting the plaintiff to the charges in the first bill; the proper order was one, made under the court's general jurisdiction in an action to recover for work and labour done, directing a reference to the taxing master to ascertain the amount due to the plaintiff for his professional services, and, therefore, the master was entitled to consider both bills in determining that amount though (per FLETCHER MOULTON, L.J.) the first bill would be treated as strong evidence against allowing the increased charges in the amended bill.

Notes. The Solicitors Act, 1837, is repealed but proviso (i) to s. 69 (2) of the Solicitors Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 111), is similar to the proviso to s. 37 of the Act of 1837. The point of the present case, however, is that the taxation should not have been treated as a taxation under the Act but simply as a reference to a master to ascertain the proper fees due in an action for work done.

Referred to: *Light and Fulton* v. *McVittie* (1935), 79 Sol. Jo. 341.

As to the effect of delivery of a bill of costs, see 36 HALSBURY'S LAWS (3rd Edn.) 136, para. 185. As to taxation of costs, see ibid., 139 et seq. For cases on amended bills of costs, see 42 DIGEST 157; and for cases on taxation see ibid., 159 et seq.

Cases referred to:

(1) *Re Thompson* (1885), 30 Ch.D. 441; 55 L.J.Ch. 138; 53 L.T. 479; 34 W.R. 112, C.A.; 42 Digest 159, *1594*.

(2) *Re Park, Cole* v. *Park* (1888), 41 Ch.D. 326; 58 L.J.Ch. 128; 59 L.T. 925; affirmed (1889), 41 Ch.D. 326; 58 L.J.Ch. 547; 61 L.T. 173; 37 W.R. 742, C.A.; 42 Digest 166, *1710*.

(3) *Loveridge* v. *Botham* (1797), 1 Bos. & P. 49; 126 E.R. 772; 42 Digest 157, *1575*.

(4) *Anderson* v. *May* (1880), 2 Bos. & P. 237; 126 E.R. 1256; 22 Digest (Repl.) 241, *2372*.

Also referred to in argument:

Re Heather (1870), 5 Ch. App. 694; 39 L.J.Ch. 781; 18 W.R. 1079, L.J.; 42 Digest 158, *1588*.

Re Carven (1845), 8 Beav. 436; 14 L.J.Ch. 372; 50 E.R. 171; 42 Digest 157, *1576*.

Re Cartwright (1873), L.R. 16 Eq. 469; 42 L.J.Ch. 735; 28 L.T. 891; 21 W.R. 861, L.C.; 42 Digest 188, *2033*.

Re Chambers (1865), 34 Beav. 177; 5 New Rep. 298; 34 L.J.Ch. 292; 11 L.T. 726; 11 Jur.N.S. 230; 13 W.R. 375; 55 E.R. 602; 42 Digest 159, *1591*.

Re Holroyde and Smith (1881), 43 L.T. 722; 45 J.P. 437; 29 W.R. 599; 42 Digest 158, *1586*.

Re Walters (1845), 9 Beav. 299; 1 New Pract. Cas. 288; 5 L.T.O.S. 342; 50 E.R. 359; 42 Digest 158, *1587*.

Ex parte Woollett (1844), 12 M. & W. 504; 1 Dow. & L. 593; 13 L.J.Ex. 121; 2 L.T.O.S. 331; 8 J.P. 412; 8 Jur. 130, Ex. Ch.; 42 Digest 223, *2540*.

Re Wells (1845), 8 Beav. 416; 14 L.J.Ch. 215; 5 L.T.O.S. 19; 9 Jur. 820; 50 E.R. 163; 42 Digest 157, *1577*.

Re Grant, Bulcraig & Co., ante, p. 579; [1906] 1 Ch. 124; 75 L.J.Ch. 106; 93 L.T. 760; 54 W.R. 165; 22 T.L.R. 96; 50 Sol. Jo. 96; 42 Digest 155, *1545*.

Appeal by the plaintiff from a decision of RIDLEY, J., at the trial of the action with a jury.

The plaintiff, a solicitor, brought the action to recover the amount of his fees, charges, and disbursements in respect of work done by him as a solicitor for the defendants. The defendants were a number of persons who together with the plaintiff had formed themselves into a syndicate for the purpose of buying land and developing it as a building estate, and the plaintiff had done the solicitor's work which became necessary in the course of carrying out the operations of the syndicate. Upon his delivering to the other members of the syndicate a bill of his costs and charges in respect of this work, they denied any liability on the grounds that they had not retained him as their solicitor and that the plaintiff in doing the work for which he claimed payment had only acted as one of the co-adventurers. Thereupon the plaintiff delivered an amended bill which contained additional items that might have been included in the bill first delivered, so that the total amount claimed by him in the second bill was larger than the amount claimed in the first bill. The plaintiff then brought the present action claiming the amount of the amended bill. At the trial of the action the jury returned a verdict in favour of the plaintiff on the question of the defendants' liability. RIDLEY, J., thereupon gave judgment for the plaintiff, and ordered that the bill first delivered should be referred to the master for taxation. Against this order the plaintiff appealed.

Manisty, K.C., and *F. Newbolt* for the plaintiff.

Waugh, K.C., and *Adair Roche* for the defendants.

VAUGHAN WILLIAMS, L.J.—This case has been argued at length, but I do not say that it is not in its way an important one. I am far from saying that the defendants have not shown a certain amount of authority for the proposition that the rule in cases of taxation under the Solicitors Act, 1843, where the solicitor has delivered a second bill

of costs, that the solicitor must obtain leave to bring in the second bill for taxation, applies not only to cases where the second bill has reduced the charges made in the bill first delivered, but also where it has increased those charges. That seems to me to be the right view, though it is not necessary that I should give any decision upon the matter, as the point does not arise upon the present appeal.

The present case is one in which several gentlemen were engaged in a common adventure, one of those gentlemen being the plaintiff. He was a solicitor by profession, and he acted as solicitor for the co-adventurers. He was asked by his fellow adventurers to make this bill of costs as low as possible, and he accordingly delivered a bill which clearly was very moderate, as it did not include certain charges authorised by the scale. The defendants presently took up the position of total denial of liability. Either they denied the retainer or they denied that any work was done under a retainer on the ground that it was merely as one of the co-adventurers that the plaintiff did the work for which he claimed to be paid. But whatever may have been their ground, they denied any liability to pay. They might have got an order to tax the bill, but they did not do that as they were determined to deny any liability whatsoever. Thereupon the plaintiff delivered a new and amended bill, and on that bill he brought the present action. By their statement of defence the defendants denied liability under the circumstances which they set out. They also pleaded that the bill sued on was one which had been delivered after a different bill in respect of the same matter had been previously delivered. The defendants might have taken out a summons for taxation before the verdict in the present action and have then raised the question whether the first or the second bill ought to be taxed. I cannot say what the result of that would have been. It may be that it would have been held that the case was governed by the principle of *Re Thompson* (1). There the solicitor, after delivering a bill of costs, delivered an amended one containing lower charges, being in fear of the consequences of taxation, and it was held that he must abide by his original claim. I can conceive cases in which, though the second bill was for an increased amount, it ought not to be brought in for taxation because it might be important for the solicitor to increase the items and charges in order to avoid paying the cost of taxation. But the defendants did nothing and let the action go on to trial. The jury found a verdict against them on their plea of non-liability to pay anything.

What ought the learned judge to have done then? The proviso to s. 37 of the Solicitors Act, 1843, applies here. That runs thus:

> "Provided always, that no such reference as aforesaid [viz., reference of a bill for taxation] shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor . . . except under special circumstances. . . ."

In my judgment where an action is brought by a solicitor to recover the amount of his costs and charges and a verdict is given in his favour, but the quantum is left to be settled by the taxing master, that question left to the master is referred to him not under the Solicitors Act, 1843, but as to a referee to ascertain the proper amount due to the solicitor in respect of his work and labour. The question here is whether the order made by RIDLEY, J., was the right one? I think not. The matter should have been sent to the master, not under the statute, but as to a referee, to ascertain the amount to which the plaintiff was entitled. Instead of that the learned judge made an order for the taxation of the bill, as though there had been no action and verdict, but as though the taxation were under the statute. When the matter comes before the master, if it should appear to him that professional work for which the plaintiff claims to be paid was done by him not professionally, but as one of the co-adventurers and doing his best to assist in the venture, then I should say that the master would strike out such items and would not allow them to be charged for. Such claims might be struck out if the work has been done by the plaintiff as a volunteer. There is nothing to prevent full justice being done between the plaintiff and the defendants. I should like to point out that, in my judgment, some of the rights which a client has against his solicitor in an ordinary

taxation under the statute cannot be claimed when there is a reference of the amount of costs after verdict. I do not think that the rule as to the costs of taxation where one-sixth has been taxed off would apply. That at least is my opinion at present, though it is not necessary to give any decision on the point. Be that as it may, I think that the order of RIDLEY, J., must be set aside and a reference must be directed to the master to ascertain the amount due to the plaintiff.

STIRLING, L.J.—I am of the same opinion. With all respect to RIDLEY, J., I think that he should not have proceeded as if he were directing a taxation under the Solicitors Act, 1843. In the present case the proviso in s. 37 forbade any reference to taxation after verdict except under special circumstances. Here, as it seems to me, there are no special circumstances. But the court has, under its general jurisdiction, apart from statute, power to ascertain the amount of the proper fees due to the plaintiff for professional services by referring the question to the taxing master. There is in point of fact no difference in principle between this action and any ordinary action in which a plaintiff seeks to recover for work and labour done. In actions of that kind if the plaintiff makes out a bill with many items, the court may send the matter to an official referee. Here the court has power to refer the question to the taxing master. That power is often put in force in the Chancery Division, as for instance in *Re Park, Cole* v. *Park* (2). In that case, where a firm of solicitors had sent in their bill to a client more than twelve months before his death, and he had made no objection to it, but his executor alleged some of the charges to be unreasonable, the court referred the bill to the taxing master to inquire and state whether any and which of the particular items to which the executor objected were fair and proper to be allowed and to what amount respectively. That is merely an instance, but the grounds on which such an order could be made were gone into at considerable length both in the court of first instance and in the Court of Appeal. I think that upon this reference to the master he will have full power to deal with the bill before him so as to do full justice between the parties, without any specific directions from the court. But I may say that I think that the principles laid down in *Loveridge* v. *Botham* (3) and in *Anderson* v. *May* (4) may be useful to him.

FLETCHER MOULTON, L.J.—I am also of opinion that the appeal should be allowed. This case is one of a verdict upon a bill for work done, subject to a reference to the master to settle the quantum. The question was raised whether a solicitor is bound by a bill of costs that he has delivered so that he cannot afterwards vary it. A solicitor differs from other professional men in being subject to the provisions of the Solicitors Act and in being under the disciplinary power of the court, as an officer of the court. If there is any rule that he cannot claim against his client by an amended bill, it must exist by virtue of either one of those two things, because it cannot be doubted that other professional men can send in an amended bill for work done by them. It could not be a consequence of the Act, because, if that were so, the court would in no case have the power to relieve him from it and allow him to deliver an amended bill. Therefore, if the rule exists, it must exist under the disciplinary power of the court. But giving the best consideration that I can to the authorities that have been cited to us in argument, I can see no reason to think that the court has ever taken up the position of saying that in no case could a solicitor amend his bill. If taxation of a bill has been applied for, or perhaps if it has only been threatened, it may have been held that then the solicitor has no right to amend his claim because taxation is a right given to the client to prevent exorbitant charges. But where taxation has not been claimed or threatened, I can see no reason why a solicitor should not amend his claim. Why should not a solicitor, in those circumstances, be allowed to amend his claim just as any other professional man may do. No doubt the first bill would be strong evidence against him as to the matters in which by his amended bill he has made increased charges. I think the following passage in CHITTY'S ARCHBOLD'S PRACTICE (9th Edn.), p. 113, exactly describes the position of a client who has received a corrected bill:

> "The delivery of a bill is strong evidence against an increase of charge in a subsequent bill for any of the items contained in the first bill, and presumptive evidence against any additional items."

I think that this bill must go to the taxing master as to a referee, and that it is open to the defendants to use the first bill as evidence of what the charges ought to have been.

Appeal allowed.

Solicitors: *Stokes & Stokes*, for *J. G. Aitchison*, Newcastle-on-Tyne; *King, Wigg & Co.*, for *Keenlyside & Forster*, Newcastle-on-Tyne.

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

Re A SOLICITOR. Ex Parte HALES

[King's Bench Division (Darling and A. T. Lawrence, JJ.), May 29, 1907]

[Reported [1907] 2 K.B. 539; 76 L.J.K.B. 931; 97 L.T. 212; 23 T.L.R. 573; 51 Sol. Jo. 626]

Solicitor—Undertaking—Enforcement by court—Undertaking to non-client to pay money provided by client.

Where, in the course of proceedings, a solicitor undertakes to pay money to a person not a client out of sums received by him for that purpose from his client, and on the faith of that statement the person to whom it was made alters his position, the court will enforce the fulfilment of the undertaking by the exercise of its disciplinary jurisdiction over solicitors as officers of the court.

Notes. Considered: *United Mining and Finance, Ltd.* v. *Becher*, [1908–10] All E.R. Rep. 876.

As to liability upon undertakings given by a solicitor, see 36 Halsbury's Laws (3rd Edn.) 195, and for cases see 42 Digest 123 et seq.

Case referred to:

(1) *Re Grey*, [1892] 2 Q.B. 440; 61 L.J.Q.B. 795; 57 J.P. 246; 41 W.R. 3; 8 T.L.R. 694, C.A.; 42 Digest 359, *4097*.

Also referred to in argument:

Re Freston (1883), 11 Q.B.D. 545; 52 L.J.Q.B. 545; 49 L.T. 290; 31 W.R. 804, C.A.; 42 Digest 46, *356*.

Schmetten v. *Faulks*, [1893] W.N. 64; 37 Sol. Jo. 389; 42 Digest 348, *3943*.

Allaway v. *Duncan* (1867), 16 L.T. 264; 15 W.R. 711; 26 Digest (Repl.) 45, *302*.

Appeal from the decision of Bray, J., in chambers reversing a decision of the master directing the respondent to pay over to the appellant, a solicitor, the sum of £82 10s. 7d. received by him for payment to the appellant on account of a bill of costs.

The appellant had acted professionally for a client named Fournet, and had a bill of costs against him for a considerable amount. Fournet applied through the respondent, another solicitor, for a taxation of the costs due by him to the appellant. Upon the application being made, the appellant's clerk informed the master that Fournet was an undischarged bankrupt, and resisted the application for taxation as being vexatious. The respondent's clerk, who appeared before the master, denied that Fournet was an undischarged bankrupt, and the order for taxation was made. The respondent approached Fournet, who was in fact an undischarged bankrupt, and told him what had occurred, whereupon Fournet placed £150 in the respondent's hands to meet the amount of the taxed bill of costs. The respondent then wrote to the appellant on Dec. 11, 1905, as follows:

"Having regard to the statements made by your clerk to the master on our client's application to tax your bill of costs, Mr. Fournet has today placed in our

hands the full amount of your bills, so that on the completion of the taxation we shall be in a position to pay you the amount certified by the master due to you."

On the faith of the undertaking contained in the letter, the appellant did not take steps to enforce the order of taxation at once and did not take steps against Fournet, who died on the same day that the summons on which the present appeal was brought was issued. Upon the completion of the taxation a sum of £82 10s. 7d. was found to be due to the appellant. The respondent was applied to for payment of this amount, but declined to pay on the ground that money was owing to him by Fournet for work done as a solicitor.

A summons was taken out before the master asking for an order that the respondent be ordered to pay the sum due in accordance with the terms of his letter on the ground that the respondent as a solicitor and officer of the court had engaged by such letter to make the payment, and was under a professional duty to pay over to the appellant the sum due, it having been deposited for that purpose. The master made an order for payment by the respondent, which was set aside by BRAY, J.

Gore-Browne, K.C., and *J. H. Watts* for the appellant.
Montague Shearman, K.C., and *H. Douglas* for the respondent.

DARLING, J.—I think this appeal should be allowed. It appears that the appellant had a claim against Fournet for work done for Fournet as a solicitor. Fournet was an undischarged bankrupt. He desired to tax the appellant's bill of costs. To this the appellant objected on the ground that Fournet was an undischarged bankrupt, and had no intention of paying the costs. Upon that objection being made, Fournet said in effect: "True, I am an undischarged bankrupt, but I have money, and I will put it in the hands of my solicitors, in order that you may be safe." He did pay more than sufficient to pay the bill into the hands of the respondent, who then wrote the letter of Dec. 11 to the appellant. In that letter he said:

> "Having regard to the statements made by your clerk to the master on our client's application to tax your bill of costs, Mr. Fournet has today placed in our hands the full amount of your bills, so that"—and this is important—"on the completion of the taxation we shall be in a position to pay you the amount certified by the master due to you."

To my mind that is a definite statement by the respondent that on the completion of the taxation he would be in a position to pay the money. That means that the money will still remain in the respondent's hands allocated to the payment of the taxed costs. I think it is important to notice that the word used is "shall" and not "should." I understand the word "shall" to mean that "in consequence of what Fournet has done, I shall, on the completion of the taxation, be in a position to pay the money due to you." That is another way of saying, "In consequence of what Fournet has done, on the completion of the taxation the money will still remain in my hands for the purpose of being paid to you." In his affidavit the appellant said:

> "On the faith of the said undertaking, and knowing that the money to meet my claim when ascertained by taxation was earmarked, I did not take any steps to enforce a prompt and due carriage of the order for reference, nor for the same reasons did I institute proceedings against Mr. Fournet which I otherwise should have done."

Fournet died on the day that the summons with which we have to deal was issued. The respondent now declines to pay over the money necessary to discharge Fournet's debt to the appellant, and gives as a reason that he himself is making a claim against Fournet's estate for £77, and that he intends to hold this money in order to pay himself. Thereupon the appellant takes out this summons, and invokes the jurisdiction of this court over one of its own officers.

Counsel for the respondent admits that we might make the order we intend to make, in certain circumstances, but he says this letter is merely an undertaking given on behalf of his client by the respondent, and not a personal guarantee by him, and that the court will, therefore, not make the order asked for. I do not think it is a personal

guarantee in the sense that the respondent personally guarantees the payment of Fournet's debt out of his own money, so that he would be out of pocket by paying the appellant. But I think it is a personal guarantee in the sense that it is a statement that Fournet having put funds into the respondent's hands for the purpose of paying the appellant upon a certain event happening, that upon the happening of that event he will pay the money. His position is very much that of a stakeholder. I think a personal undertaking in that sense is quite sufficient to enable us to exercise the jurisdiction of the court. Let us see whether the case comes within the rules laid down as to the circumstances in which the jurisdiction will be exercised. I prefer to take the definition given by BOWEN, L.J., in *Re Grey* (1). The statement there is very accurate, and I think it is wide enough to cover this case. He says ([1892] 2 Q.B. at p. 447):

> "The solicitor in this case is in a situation which presents two aspects involving a double responsibility. He was a debtor who owed a legal debt. He also owed a duty to his profession, and the court of justice whose officer he was, to pay over the money which belonged to his client, and of which he had possession through the confidence placed in him in his professional capacity, and as an officer of the court. There are in such a case two wholly distinct rights, the right of the client at law to be paid his debt, and his right to apply to the court as a person whose confidence has been abused by a person who is an officer of the court, and whom he would not have trusted unless he had been such an officer."

It is perfectly plain to my mind that where there is no remedy by action for debt there may be this remedy because BOWEN, L.J., says there are two wholly distinct rights. What happened? The appellant would not have trusted Fournet if Fournet had written a letter and said: "I have got money enough to pay your bill." Nor would he have altered his position on the respondent's assurance that Fournet had money enough to pay the bill. Why he altered his position and thus brought himself within the rule was because his confidence had been abused by an officer of the court. He trusted the respondent where he would not have trusted Fournet. He trusted him because the latter said I have enough money to meet your bill, and it has been given to me so that on the completion of the taxation I shall be in a position to pay you the amount certified due to you by the master.

It seems to me that where a solicitor still has money in his possession confided to him by his client for a particular purpose to be paid over on the happening of circumstances which have since happened, it would be dishonourable for that officer to retain the money and doubtless do that which he desires to do—namely, pay himself the sum which he himself claims against his client. It was laid down by LORD ESHER, M.R., in *Re Grey* (1) (ibid. at p. 443) that this jurisdiction which is now invoked exists for the purpose of "enforcing honourable conduct on the part of the court's own officers." Although there may be no case in which it has been said that the court will use this power to prevent the commission of a breach of trust, my own opinion is that the court should and would make use of it if there is a declaration of trust. I think in this case the letter constitutes a declaration of trust whether it is a guarantee in another sense or not. I think this was a declaration of trust by the respondent, and one that made the appellant alter his position, and that being so, I think that the appellant, although not a client of the respondent, has the right to come to this court and ask it to prevent this dishonourable conduct on the part of a solicitor, that dishonourable conduct being the commission of a breach of trust against the appellant, who has altered his legal rights in consequence of the declaration of trust. For these reasons I think the appeal must be allowed.

A. T. LAWRENCE, J.—I am of the same opinion. I agree with the contention of counsel for the respondent that mere dishonourable conduct does not give the court jurisdiction to apply this summary remedy. The dishonourable conduct which gives the court jurisdiction in such cases is dishonourable conduct to the applicant in the course of legal proceedings, and if the applicant can show that there has been dishonourable conduct to him prejudicing his position it is then that he can come to the court and say: "I ask for the interposition of the court by way of this summary remedy." What

was the position in this case? The client was an undischarged bankrupt. He owed a bill of costs to his late solicitor, and he wanted to have that bill taxed, as he had a right to do. The solicitor, when the matter came before the master, said this was a mere vexatious proceeding by an undischarged bankrupt to put him to the costs of going through a long taxation, and when it is done he would get nothing. I can easily imagine, upon that being stated to the master, the clerk on the other side saying: "This is not a vexatious proceeding, and the client is not an undischarged bankrupt, and the bill will be duly paid." The master accordingly made the order for taxation. When the clerk goes back the respondent, on being informed of what had taken place, communicated with Fournet, who was really an undischarged bankrupt. That fact placed him in an awkward position, because he might be proceeding with a matter which might be extremely vexatious to the appellant. He communicated with his client and told him the position, and Fournet replied: "I have the money, and I will hand it over to you now," and he did. The respondent thereupon wrote the letter of Dec. 11. What does that letter mean? It means, "I am holding this sum of money to furnish the amount of your costs. I am not proceeding vexatiously, but bona fide to tax the bill of costs, and when the amount is due we" (i.e., the respondent) "shall be in a position to pay you the amount certified due to you by the master." How can litigation or legal proceedings be conducted justly or honourably if a statement of that sort is not to be taken as true? I think that the statement in the letter was not a personal undertaking in the sense that the respondent undertook to pay the money out of his own pocket, but was personal in the sense that he said: "We" (meaning the name of the firm under which he practised) "have this fund which we hold appropriated to this purpose, and from which we will pay you any amount to which you establish your right."

That was the position created by the letter between the parties. The taxation proceeds, and a sum of £82 10s. 7d. is found to be due to the appellant. In the meanwhile, a long time having been allowed to elapse by the appellant on the faith of that letter, the respondent says: "The position between myself and my client has altered. Costs are owing to me from him, and therefore, I propose to appropriate this sum to my own purposes." I think that is one of the cases in which the court should interpose and say: "No; if you write letters of this kind and make these statements, which are acted upon by other persons, you cannot afterwards turn round and appropriate the money merely because your position has changed." That would be, in the sense in which the court uses the term, dishonourable conduct. I do not say that the respondent does not think that he has the right to protect his own interests, but I am of opinion that he is not right in so thinking. I quite agree that *Re Grey* (1) was a case in which the court was dealing with a case arising between a solicitor and his client, and in that respect, no doubt, counsel for the respondent was right in drawing the distinction between that case and this, and is right perhaps in saying that this letter was not a personal guarantee. But it is a personal undertaking to apply that fund to a particular purpose, and I think therefore that the respondent is bound to pay over this money.

Appeal allowed.

Solicitors: *W. H. Hales*; *Richardson & Co.*

[*Reported by* P. B. Durnford, Esq., *Barrister-at-Law.*]

A

AKROKERRI (ATLANTIC) MINES, LTD. *v.* ECONOMIC BANK

[KING'S BENCH DIVISION (Bigham, J.), May 19, June 6, 1904]

[Reported [1904] 2 K.B. 465; 73 L.J.K.B. 742; 91 L.T. 175; 52 W.R. 670; 20 T.L.R. 564; 48 Sol. Jo. 545; 9 Com. Cas. 281]

B

Bank—Holder for value of cheque paid in by customer—Cheque credited to customer before clearance—Lien—Lien of bank as clearing agent—Cheque—Special crossing by "holder"—"Account payee"—Effect—Bills of Exchange Act, 1882 (45 & 46 *Vict., c.* 61), *ss.* 77 (3), 82.

An account was opened at the E. Bank by a customer, who had stolen from the plaintiffs some cheques crossed generally. From time to time he paid in such cheques. The bank's practice was not to discount bills and not to allow customers to draw on cheques paid in until they were cleared. The customer was aware of this practice. On the same day as the cheques were paid in, the amount was credited in the ledger to the customer's account. The bank specially crossed the cheques to their agents for clearance, impressed on the cheques beneath the crossing "account E. Bank," and forwarded them during the day to their agents. The bank had a current account which was in credit and a loan account which was in debit with their clearing agents. Those agents held securities specifically deposited by the bank exceeding in value the debit to the loan account. If notice of dishonour was not communicated by 9 a.m. on the following day, the bank credited the amount of the cheques paid in the day before in the pass-book, but under the date of paying in. There was no negligence and the bank acted in good faith.

C D E

Held: (i) the bank had not become holders for value of the cheques by crediting the amount of the cheques in their ledger since this gave the customer no right to demand payment and the bank, therefore, received payment for their customer within the Bills of Exchange Act, 1882, s. 82; (ii) the bank had not subjected the cheques to a lien by forwarding them to their clearing agent as they were not the property of the bank and were sent for collection only; (iii) that the bank, although not holders for value, as lawful possessors of the cheques, were entitled under s. 77 (3) of that Act to cross them specially; (iv) the addition of the words "account E. Bank" was not an addition to the crossing; (v) accordingly, the bank had only acted in the ordinary course of business and had done nothing to deprive themselves of the protection of s. 82 and were not liable in conversion.

F G

Notes. It is submitted that a banker does have a lien over cheques paid in for collection notwithstanding this case; see 2 HALSBURY'S LAWS (3rd Edn.) 179 note (o), and Cheques Act, 1957, s. 2. The Bills of Exchange Act, 1882, s. 82, has been replaced by the Cheques Act, 1957, s. 4, which extends the protection of collecting bankers.

Considered: *Bevan* v. *National Bank, Bevan* v. *Capital and Counties Bank* (1906), 23 T.L.R. 65; *Re Farrow's Bank, Ltd.*, [1922] All E.R.Rep. 679. Referred to: *Dey* v. *Mayo*, [1920] 2 K.B. 346; *Sutters* v. *Briggs*, [1922] 1 A.C. 1; *Importers Co., Ltd.* v. *Westminster Bank, Ltd.*, [1927] All E.R. Rep. 683; *British and North European Bank, Ltd.* v. *Zalzstein*, [1927] All E.R. Rep. 556.

H

As to collection of cheques, see generally 2 HALSBURY'S LAWS (3rd Edn.) 176 et seq.; as to rights of collecting bankers, see ibid. 179; as to "account payee," see ibid. 183; as to crossed cheques, see ibid. 200–201. For cases see 3 DIGEST (Repl.) 237–241, 261–266, 327. For the Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505 et seq. For the Cheques Act, 1957, s. 4, see 37 HALSBURY'S STATUTES (2nd Edn.) 54.

I

Case referred to:

(1) *Gordon* v. *London City and Midland Bank, Gordon* v. *Capital and Counties Bank*, [1902] 1 K.B. 242; 71 L.J.K.B. 215; 86 L.T. 98; 50 W.R. 276; 18 T.L.R. 157; 7 Com. Cas. 37, C.A.; affirmed sub nom. *Capital and Counties Bank, Ltd.* v. *Gordon, London City and Midland Bank, Ltd.* v. *Gordon*, [1903] A.C. 240; 72

L.J.K.B. 451; 88 L.T. 574; 51 W.R. 671; 19 T.L.R. 462; sub nom. *London City and Midland Bank, Ltd.* v. *Gordon, Capital and Counties Bank, Ltd.* v. *Gordon*, 8 Com. Cas. 221, H.L.; 3 Digest (Repl.) 264, *754*.

Also referred to in argument:

Bank of England v. *Vagliano Bros.*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; sub nom. *Vagliano Bros.* v. *Bank of England*, 39 W.R. 657; 7 T.L.R. 333; 55 J.P. 676, H.L.; 3 Digest (Repl.) 260, *739*.

Clutton v. *Attenborough & Son.*, [1897] A.C. 90; 66 L.J.Q.B. 221; 75 L.T. 556; 45 W.R. 276; 13 T.L.R. 114, H.L.; 3 Digest (Repl.) 262, *743*.

Colonial Bank v. *Exchange Bank of Yarmouth, Nova Scotia* (1885), 11 App. Cas. 84; 55 L.J.P.C. 14; 54 L.T. 256; 34 W.R. 417, P.C.; 3 Digest (Repl.) 191, *365*.

Action in the Commercial Court tried before BIGHAM, J., without a jury.

The plaintiff company had at their office in London a clerk named Nobbs, who acted as their secretary. From time to time Nobbs fraudulently procured the directors to sign cheques drawn on the company's bankers and made payable to the order of different persons with whom the company were in the habit of doing business. The cheques were crossed generally and then handed to Nobbs to be forwarded to the different payees. Nobbs, however, kept them for himself, forged the endorsement of the payees, and then handed them to the defendant bank, by whom they were forwarded to the plaintiffs' bankers for presentation and payment. They were duly paid, and Nobbs received the proceeds from the defendants. Nobbs was prosecuted to conviction for the frauds. To assist him in carrying out his frauds Nobbs had opened an account with the defendants, and the better to conceal his frauds he opened it in a false name—that of Evans.

The defendant bank carried on a business which may be described as that of a deposit or savings bank. By the memorandum of association its objects were described as being "to carry on the business of a bank, but so that the company shall not engage in any discount operations or make loans or permit any overdrafts"; and the investments which it was permitted to make were limited to certain selected statutory trustee securities. When Nobbs opened his account he read and signed an application form, which contained, among other things, a notice that no bills would be discounted, and that cheques would not be paid against until cleared. The course pursued when Nobbs brought the stolen cheques to the defendants was this: He filled up a paying-in slip and handed it, together with the cheque, to the defendants' counter clerk; this clerk entered the amount in a book kept for such purpose at his desk. The clerk then gave the cheque and the paying-in slip to another clerk, who entered the particulars in a book called the waste-book. The waste-book clerk then put the cheque into a box and handed the paying-in slip to the ledger clerk, who posted the amount there and then in the ledger to the credit of the Evans' (Nobbs') account. The box was used as a receptacle for all cheques brought to the bank by customers, and it was cleared several times in each day by a messenger, who took the cheques to the bank of Messrs. Williams Deacon & Co., to whom the defendants specially crossed the cheques. Beneath the special crossing the defendants by a rubber stamp impressed on the cheques the words "account Economic Bank." Thus when the cheques reached Williams Deacon & Co.'s hands they were specially crossed to those bankers, and bore in addition the words mentioned.

The defendants had two accounts open with Messrs. Williams Deacon & Co.—one a current account, which was always in credit, and the other a loan account, which was always in debit. Williams Deacon & Co. always held securities belonging to the defendants exceeding in value the debit to the loan account. These securities were deposited specifically to secure that account. There were occasions when the amount to the debit of the loan account exceeded the amount to the credit of the current account. On the evening of the day on which Williams Deacon & Co. received the cheques they attended with them at the clearing-house and cleared them. By half-past nine on the next morning the defendants were informed by Williams Deacon & Co. whether any, and, if any, which, of the cheques had been dishonoured, and if no such advice arrived the defendants assumed that the cheques had been duly honoured by the banks on which

they were drawn; and it was then, and not till then, that the defendants entered the amounts to the credit of the customers in the pass-books. The entries, however, though in fact made the day after the cheques were received, were dated as of the day of the receipt of the cheques. Thus Nobbs never got a credit entry in his pass-book until after the defendants had received the proceeds of the cheque which he had handed to them. The defendants acted throughout in good faith and without negligence. This action was brought for damages for conversion of the cheques.

Scrutton, K.C., and *Bateson* for the plaintiffs.
Hamilton, K.C., *G. Wallace* and *A. M. Talbot* for the defendants.

Cur. adv. vult.

BIGHAM, J., read the following judgment.—The action is brought to recover damages for the alleged conversion of a number of cheques, and the question which I have to determine is whether the defendants are entitled to the benefit of the statutory defence provided by s. 82 of the Bills of Exchange Act, which enacts that:

> "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

On the facts, it is quite clear that at common law the defendants by what they did rendered themselves liable to account to the plaintiffs for the proceeds of the cheques. They had no more right as against the plaintiffs to deal with the cheques than had the thief from whom they got them. Then arises the question whether they have a statutory defence, and that depends upon whether the facts bring them within the protection afforded by s. 82 of the Act. It is clear that the cheques were crossed cheques when they were received by the defendants. They were, therefore, of the kind to which the section applies. It is also clear that the defendants were bankers within the meaning of the section, and that they acted in good faith and without negligence.

So far, therefore, the defendants are within the terms of the section. What is it, then, that remains to be considered? Two things. The first, whether when the defendants received payment they did so for their customer; the second, whether there are any circumstances outside the receipt of the payment which render them liable for the conversion. The section says that, in order to afford a protection to the defendant banker, the payment must have been received by him for a customer; and the section then limits the protection to the liability incurred by reason of such receipt. Did the defendants receive the payment for their customer? The expression "for a customer" has been often discussed and its meaning has now been made fairly plain by judicial interpretation. Money is received for a customer in those cases only where the banker acts as a mere agent to collect. Thus it is that if the banker as between himself and his customer becomes the holder of the cheque for value before he collects it he does not receive the payment for his customer, he receives it for himself. The question, then, resolves itself into this: Did the defendants receive the payments as mere collecting agents for Nobbs? It is argued that they did not, because they gave Nobbs credit for the value of the cheques in their ledger before they sent them to Williams Deacon & Co. for collection, and so, it is said, made themselves holders of the cheques for value. But, in my opinion, the entries in the bank's ledgers did not make the bank holders for value. The entries neither conferred any right on Nobbs to draw the money out of the bank, nor did they fix the bank with any liability to pay the money to him. It might have been different if the entries had been made in the pass-book, for that book belongs to the customer and the entries made in it by the bank are statements on which the customer is entitled to act. Suppose, after the ledger entries were made, but before the cheques were sent to Williams Deacon & Co., Nobbs had asked the defendant bank to return him the cheque, could the bank have refused to comply with his request? Could they have said: No: the cheques are ours, for by entries in our ledger of which you know

nothing we have given you credit for the amounts and so have made ourselves holders for value? I think not. Nobbs, having regard to the terms on which the business was carried on, would have been entitled to say that he had never assented to any transfer of the cheques, and that, therefore, they were still his. In truth, notwithstanding the ledger entries, no credit was given to Nobbs; nor was it intended that he should have credit; and, if Nobbs had demanded the money, the defendants would have been entitled to refuse to pay it to him. I think, therefore, that the defendants, in forwarding the cheques to Williams Deacon & Co., and so obtaining the money, were acting as mere agents to collect and were receiving the payment for their customer within the meaning of the section of the Act.

The next question is: Have the defendants done anything more than receive payment so as to make themselves liable in trover? It is said that they have. It is argued that, in sending the cheques to Williams Deacon & Co.'s bank, they subjected them to a lien in the hands of that bank by reason of the existence of the loan account, the debit to which at times exceeded the credit to the current account, and that this constituted a conversion. This is, in my opinion, a fanciful point. Williams Deacon & Co. received the cheques for the purpose of collection merely, and, therefore, could not use them except to present them for payment. They could not have detained them; they were bound at once to present them for payment. Moreover, Williams Deacon & Co., as bankers, would know that the cheques paid in to them might be the property of the defendant bank's customers (as, in fact, these particular cheques were), and they could have no right to exercise a lien on securities which were not the property of the defendants.

Then it was said that the defendants had made an unauthorised alteration in a material part of the cheques by changing the general crossing into a special crossing. No doubt the Act of Parliament by s. 78 makes the crossing a material part of a cheque and forbids any addition to or alteration of it except as authorised by the Act. But s. 77 (3) expressly provides that where a cheque is crossed generally the holder may cross it specially. It was argued that this authority does not extend to mere agents for collection, and that "holder" must be read as meaning only holder for value. I see no reason, however, for limiting the operation of the section in such a way. Holder does not necessarily mean a holder for value. The expression includes every person who is in lawful possession of the instrument, and therefore includes an agent for collection.

Lastly, it was said that the defendants had made an unlawful addition to the crossing by stamping upon the cheque the words "account Economic Bank." But in my opinion these words are not in any sense an addition to the crossing. A crossing is a direction to the paying bank to pay the money generally to a bank or to a particular bank, as the case may be, and when this has been done the whole purpose of the crossing has been served. The paying bank has nothing to do with the application of the money after it has once been paid to the proper receiving banker. The words "account A. B." are a mere direction to the receiving bank as to how the money is to be dealt with after receipt.

The truth is that all that the defendants did from the moment they received the cheques down to the time when they received the payment was done in the ordinary course of business for the purpose of safely and properly obtaining payment; and as s. 82 protects the banker from the common law liability which the receipt of the payment would involve, it also of necessity protects him from any consequences which might otherwise flow from the steps properly taken to obtain the payment. This is made quite clear in the opinion of LORD MACNAGHTEN delivered in the House of Lords in *Capital and Counties Bank, Ltd.* v. *Gordon* (1). He said ([1903] A.C. at p. 244):

> "The only question, therefore, is, Did the banks receive payment of these cheques for their customer? If they did, it is obvious that they are relieved from any liability which, perhaps, might otherwise attach to some preliminary action on their part taken in view and anticipation of receiving payment. The section would be nugatory—it would be worse than nugatory—it would be a mere trap if the

immunity conferred in respect of receipt of payment, and in terms confined to such receipt, did not extend to cover every step taken in the ordinary course of business and intended to lead up to that result." A

Judgment for the defendants.

Solicitors: *Stibbard, Gibson & Co.*; *Pritchard & Sons.*

[*Reported by* TREVOR TURTON, ESQ., *Barrister-at-Law.*]

BIBL. LONDIN UNIV.